

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

Case No: P101/07

In the matter between:

GENERAL MOTORS OF SOUTH AFRICA APPLICANT

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

FIRST RESPONDENT

COMMISSIONER Z LALLIE

SECOND RESPONDET

MFUSI ABEL TALE & OTHERS

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the Commissioner) under case number ECPE3115-06 dated 13 February 2007. In terms of the arbitration award the Commissioner found the dismissal of the third respondent (referred to herein as the “employee”) to be unfair and ordered his

reinstatement retrospectively.

Background Facts

[2] On 16th August 2006, after finishing early at the training workshop the employee returned to his work place and obtained permission to use one of the applicant's vehicles, to attend at another company. The issue in dispute in as far as the substantive fairness of the dismissal is concerned relates to the purpose of attending at this company.

[3] Arising from the arrangement to use the van on the 16th August 2006, the applicant charged the employee for misconduct in terms of which he was accused of:

- “Acquired permission to use the company vehicle under the semblance of company business, knowing that you had no intention of doing company business,
- Submitted and claimed overtime payment for the time you spent doing private business, knowing that you were not entitled to do so”

[4] The employee testified that on the day in question he approached Mr Nkonyeni and sought permission from him to use a vehicle to go and attend at one of the supplies of the applicant, Eagle Work Wear. He left the applicant's premises at about 12h21 and returned at 13h34. He further testified that after obtaining permission to utilize the van he met with Mr Ngcunga one of the applicant's employees and agreed to assist him with overalls that needed to be exchanged at Eagle Work Weak.

[5] After receiving assistance at Eagle Work Wear he proceeded to Industrial Safety Products. Because of the time constraints, he phoned Mr Lombard who informed him that the problem they had faced had been resolved and therefore it was not necessary to attend at Industrial Safety Products. The employee claimed that on arrival at the work place he sent an email to Mr Mannering informing him that the query at Industrial Safety Product had been resolved.

[6] The case of the applicant at the arbitration hearing was that the employee deliberately and dishonestly acquired permission to use the vehicle under the pretence of attending to the applicant's business whilst knowing that he would be attending to his private business. It

was also the case of the applicant that the employee claimed over time payment for the time he had spent attending his private business.

- [7] Mr Walters testified that the applicant required permission from Mr Nkonyeni to utilise the vehicle but require permission from him (Walters) as his superior in order to leave the workplace. Mr Walters testified that he came to the conclusion that the employee used the van for his private business because of the distance that the vehicle had travelled on the day in question.

The Award

- [8] The Commissioner accepted the version of the employee that he properly secured the use of the van to conduct applicant's business, and that he was asked by Mr Ngcunga to go Eagle Works Wears for him on that day.
- [9] The Commissioner rejected the version of the applicant that the entry in the log book was indicative that the employee used the van for private business. To this extent the Commissioner's view is that the variance in the log book entry was caused by human error, and specifically an error made by the security officer.

[10] It was for these reasons that the commissioner ordered the reinstatement of the employee retrospectively for a period of 5(five) months and compensation in the amount of R30 000.00.

Grounds for review

[11] The first ground of review relates to the complaint that the Commissioner refused to grant the applicant a postponement. The circumstances surrounding the request for postponement are as follows:

11.1 At the hearing in October 2006, the employee initiated an application for legal representation, which was opposed by the applicant. The Commissioner reserved her ruling in the matter. The parties were thereafter, before the issuance of the ruling by the Commissioner, informed, during November 2006, that the hearing was scheduled for 24 January 2007. From the time it received the notice of set sown and, for a period of two months the applicant continuously enquired about the ruling on legal issue representation from the Commissioner to no avail.

11.2 The Commissioner issued the legal representation ruling the afternoon preceding the day of the arbitration hearing.

11.3 The applicant contended that consequent to the delay in issuing the ruling, it was not fully prepared to proceed with its case on the 24 July 2007. It was for this reason that it requested a postponement which is alleged to have been declined by the Commissioner.

11.4 The applicant further contended that after its application for postponement was declined, the Commissioner agreed to adjourned the proceedings for a period of three hours to afford it the opportunity to prepare itself with the assistance of its attorney of record, who was in attendance at the proceedings.

[12] It was the case of the applicant that it had requested a few hour adjournment but the Commissioner was willing to grant only three hours adjournment. Two hours of the three hours granted for an adjournment was according to the applicant utilised to arrange for witnesses to be present at the hearing and the rest of the remain hour used to hurriedly prepare for the presentation of the case.

[13] It is however not disputed that the applicant's representative upon his return after the three hour adjournment, thank the Commissioner for the

adjournment but did not at that time indicate that the applicant was not ready to proceed. It is also common cause that the applicant's representative did not place on record its application for postponement and its refusal by the Commissioner.

[14] In essence the applicant's contention that the delay by the Commissioner in issuing her ruling regarding the application for legal representation compromised its preparation for the hearing. The problem arising from the delay in issuing the ruling was compounded by the fact that according to the applicant the ruling was issued a day before the arbitration hearing.

[15] The state of unpreparedness was according to the applicant highlighted by the fact that it had to be given three hours to collect its witnesses and bring them to the hearing on that day.

Evaluation

[16] The contention of the applicant is that it went to the arbitration hearing without its witnesses and unprepared is unconvincing. The notice of set down dated 24th January 2007, states very clearly what parties should do if they wish to have the matter postponed. The initial notice of set

down sent to the parties amongst others stated the parties as follows:

“Please note that postponements are not easily granted and must be in compliance with the CCMA rules.”

[17] It is common cause that the applicant did not formally apply for a postponement. The applicant avers that it informally requested for a postponement outside the hearing which was refused by the Commissioner.

[18] The informal request for the postponement and the refusal to grant the same by the Commissioner was never put on the record nor was it ever brought to the attention of the employee or his attorney. The record of the proceedings is silent on the issue of the postponement. Thus the issue would have to be determined on the basis of the probabilities deduced from the evidence on the papers before this Court.

[19] At the beginning of the hearing the Commissioner enquired from the representative of the applicant, Mr Fredericks, if there was something he wished to say before making his opening statement. Mr Fredericks thanked the commissioner and proceeded with the applicant’s case. In his own words he said:

“No Madam Commissioner. I just want to thank you for the short

adjournment”.

[20] There can be no doubt that if the version of the applicant was to be accepted, then the applicant would have to provide a reasonable explanation as to why it did not take advantage of placing on record the issue of postponement and the alleged limited period it had to prepare its case, when the commissioner enquired if there was something the applicant’s representative wished to say before making his opening statement. This was more importantly the opportunity to indicate to the Commissioner that the applicant was not ready to proceed because of the late receipt of the ruling on legal representation. The version of Mr Fredericks, the applicant’s representative that he needed and requested a postponement is not supported by the record in this regard.

[21] After thanking the Commissioner Mr. Fredericks proceeded to make a statement that goes totally against the very basis why he says he required the postponement. In this regard the record reveals the following:

“Mr Fredericks: I think I have had enough time to prepare myself.”

[22] Thereafter the Commissioner briefed the parties about the procedure that she would follow in conducting the proceedings. This was again an

opportunity for Mr Fredericks to raise the issue of the postponement or indicate to the Commissioner the challenge he faced in conducting the hearing due to lack of preparation. The opportunity to place on record the request for the postponement and its refusal presented itself also when the Commissioner indicated to the parties that she would be recording the proceedings on the electronic system.

[23] When invited by the commissioner to call his first witness, Mr Fredericks stated the following before calling his witness:

“Yes, we are going to call a witness. We have also agreed that if it is possible that we can deliver heads in writing to you.”

This statement by Mr Fredericks flies in the face of his averment in his founding affidavit that he was not prepared to conduct the case of the applicant because the late issuance of the ruling on legal representative by the Commissioner.

[24] The other opportunity that availed itself for the applicant to have raised the issue of postponement was in the heads of argument at end of the hearing.

[25] Assuming that the version of the applicant that it requested a

postponement and was refused, the question that would then arise is whether it (the applicant) was denied a fair hearing as a result. In my view there is nothing that points toward a suggestion that had the applicant applied for a postponement and same denied, the applicant would in the circumstances of this case have been denied a fair hearing. The applicant had the opportunity to lead its witnesses, re-examine them after cross-examination by the respondent. The applicant also had the opportunity to cross-examine the respondent's witnesses including the submission of well thought through heads of argument.

[26] In **Cementation (Africa Contracts) (PTY) Ltd v CCMA & Others (2000) BLLR 573 (LC)**, the court held that the commissioner is not expected to mero mutu grant to a postponement of a hearing to enable a party to call its witnesses in the absence of a request from the concerned party.

[27] The present case as stated earlier, the matter was adjourned and on the applicant's own version used the time to collect its witnesses. Having collected its witness and having had only one hour to prepare, the witnesses, the applicant never indicated to the Commissioner that the adjournment was too short and as a result was not ready to proceed.

[28] It is not the case of the applicant that the circumstances of its case were such that the Commissioner ought to have realized that the representative of the applicant was having difficulty in conducting the case such that there was a need to enquire whether it was necessary to postpone, the case to afford the applicant an opportunity for preparation.

[29] As concerning the issuing of the ruling, on legal representation it has to be noted that it was the applicant who objected to legal representation on the basis that the matter was not complex. There is no evidence in the record pointing towards prejudice that the applicant may have suffered as a result of the delay in the issuance of the ruling. It is therefore my view that the delay in the issuing of the ruling does not constitute an irregularity.

[30] I now proceed to deal with the merits of the review application. The applicant contended that the commissioner adopted an overly simplistic approach to the facts and as a result failed to apply her mind to all the evidence which was before her. In this regard the Commissioner is criticized for failing to assess the inherent probabilities of the case. The facts which the applicant criticizes the Commissioner for failing to

consider are summarized in the heads of argument of the applicant as follows:

- “6.1 *She unfairly declined to afford the applicant a postponement, with the result that she perpetrated a gross irregularity in the conduct of the arbitration proceedings.*
- 6.2 *She failed to discharge her fundamental obligation to assess the probabilities with reference to all the evidence, she in effect focusing only that evidence which supported the factual construction advanced by Tala.*
- 6.3 *She completely disregarded relevant and material evidence which she was obliged to reflect upon. It will be submitted that this not only represented a gross irregularity in the conduct of the arbitration proceedings, it resulted in the commissioner rendering an award which was not justifiable within the contemplation of the authorities,”*

[31] The test for determining whether or not to review arbitration is that of a reasonable decision-maker as set out in **Sidumo & Another v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)**.

[32] In determining whether the Commissioner committed a gross

irregularity I am required to examine the reasons given for the award. It is not for this court seating as a review court to determine the correctness of the decision of the Commissioner. **See the Minority judgment of Ncobo J in Sidumo at page 112 paragraph 265G**

[33] In my view the commissioner applied her mind to all the relevant facts which were before her and arrived at a reasonable conclusion that the applicant failed to discharge its onus of proving that the dismissal was fair. It can therefore not be said that the Commissioner committed a gross to irregularity in her assessment of the evidence nor can it be said that her award failed the threshold of reasonable decision maker test as set out in Sidumo, *supra*.

[34] It would seem to me that even if the Commissioner had accepted that the logbook had been reliable and its contents indicated that the employee traveled further than the company he claimed to have attended at, this would still have not been sufficient evidence to tilt the probabilities toward proving that he was conducting private business.

[35] There is also no merit in the contention of the applicants that an

inference should have been drawn that the employee was engaged in private business from the use of the word “town” in the logbook. I also agree with the submission of the employee’s, attorney that this was not a material issue needed to be considered in depth by the Commissioner. It seems to me what ever the extent of reflection and consideration the Commissioner may have had to the entry of the word “town” in the log book, there would have been no basis to draw any inference that the employee was engaged in private business. It is also my view that failure by the employee to obtain permission to exit the workplace could not constitutes the only reasonable inference upon which it can be concluded that the employee left the premises for the purpose of engaging in and was involved in private business.

- [36] The contention of the applicant that failure by the Commissioner to record all the evidence in the award constitutes gross regularity has no merit. What the Commissioner was required to do, which she did, was to apply her mind to all the material evidence which was presented before her. And even in this regard the commissioner need not mention every specific aspect of the material evidence that was presented. **See Aitken v Khoza & Others (2000) 9 BLLR 1011(LC).**

[37] It is evidently clear that the case of the applicant was based mainly on the entry in the logbook. It was on the basis of the entry in the log book that the applicant argued that the Commissioner ought to have drawn an inference that the employee was engaged in private business. The reading of the award reveals that the Commissioner considered and applied her mind to this issue. She in this regard concluded that the applicant failed to provide a satisfactory explanation as to why it appeared that the logbook had been interfered with. It is also common cause that the entry in the logbook was made by the security officer and not the employee. In my view even if it was to be accepted that the entry in the log book was correct, it would not have assisted the case of the applicant because such evidence would not have constitute a basis upon which it could reasonable inferred that the employee was engaged in private business.

[38] In my view the applicant has failed to make a case justifying the arbitration interference with the arbitration award issued by the second respondent. I see no reasons why the costs should not follow the results.

In the circumstances the review application is dismissed with costs.

Molahlehi J

Date of Judgement: 18 April 2008

Date of Hearing: 14 November 2007

APPEARANCES

For the Applicant: Ms Gael Barrable

Instructed by: CHRIS BAKER ASSOCIATES

For the Respondent: Mr Donnell Naidoo

Instructed by: PORT ELIZABETH JUSTICE CENTRE