IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not Reportable

CASE NO: JR 1372/08

In the matter between:

METROTOY (PTY) LTD t/a

JOHN CRAIG	Applicant
AND	
COMMISSIONER (K S NTSUMELA) **THE COMMISSIONER FOR CONCILIATION,**	1ST RESPONDENT
MEDIATION AND ARBITRATION	2ND RESPONDENT
EDDIE MANZINI	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the first respondent (the commissioner) under case number LP 2515 dated 11 June 2008. In terms of that arbitration award the commissioner found the dismissal of the third respondent (the employee) to have been substantively unfair but procedurally fair.

Background facts

[2] The applicant is involved in the clothing retail business. The employee was

at the time of his dismissal employed as regional manager, mainly responsible for turnover and ensuring compliance with the applicant's policies and procedures. The applicant proffered several charges of misconduct against the employee which were triggered by information which one of the applicant's managers received from someone. The applicant conducted an audit prior to charging the employee and it would appear that whilst the applicant conducts its audits twice a year, that one was conducted as result of the information received about the activities which the employee was alleged to have been involved in. The employee was charged with eight counts of misconduct. The following charges were presented against the employee:

Gross breach of company policy and procedure regarding the store keys

Gross of breach of company policy and procedure. Dishonest behavior and fraud by manipulating stock

Gross breach of company policy and procedure regarding cash- neglect of duty.

Gross breach of company policy and procedure keep asides –neglect of duty.

Gross breach of company policy and procedure on lay byes- neglect of duty.

Gross breach of company policy and procedure –manual invoice book-

neglect of duty.

Falsifying of company documents and wrongful self enrichment alternatively theft.

Falsifying of company documents and gross breach of company policy and procedure on banking- neglect of duty.

[3] The offence in terms of the first charge is that the applicant allowed one of the managers to carry a full set of store emergency keys with him. He was found guilty of this charge. The employee was not found guilty on almost all the charges except for the second. The third charge concerned the allegation that the employee failed to check one of the employees' cash drawer. The charge also entailed the allegation that the employee failed to keep proper petty cash slips some of which were found without supporting documents. The other allegation under charge three was that the employee failed to ensure the reconciliation of and the proper keeping of the petty cash supporting documentation. In this respect the applicant was accused of authorizing petty cash in the amount of R10.00 whilst on the other hand the supporting voucher indicated the amount as being R9.95.00. The fourth charge concerned the allegation that the employee failed to ensure that the goods which were kept aside for a customer had a "kept aside slip" which was against company policy. The alleged failure to comply with policy under charge five arises from the allegation that the employee failed to ensure that overdue lay byes in Polokwane store are returned to stock. The sixth charge concerns the allegation that a loss in the amount of R30.00 airtime was

incurred due to under ringing of two stock items, including an amount of R1679.00 being an amount not accounted for. In the main the seventh charge concerned the use of an outside tailor and authorization of petty cash without verification. The last charge entails the allegation that the employee failed to detect the absence of over and under baking in the Polokwane bank deposits and thus failing to comply with audit trail. .

The grounds for review

[4] The applicant contends that the commissioner's arbitration award should be reviewed and set aside on several grounds. The applicant contends in the first ground of review that the commissioner committed a gross misconduct in that he misconstrued the evidence which was presented, resulting in him arriving at an incorrect conclusion about the testimony of Mr Fiford.

> In the second ground of review the applicant accuses the commissioner of gross irregularity, again on the basis that the commissioner misconceived the evidence which was placed before him. In terms of this ground the applicant attacks the arbitration award based on the finding of the commissioner regarding the use and payment of the external tailor and the production of invoice.

[5] The third ground of review concerns the complaint about bias on the part of the commissioner. The complaint is that the commissioner failed to appreciate that the same bundle before him was the same bundle used at the internal disciplinary hearing. The ground is also based on the criticism that the conclusion reached by the commissioner was irrational and unjustifiable in that the commissioner failed to appreciate that had the employee not walked out of the disciplinary hearing he would have been able to defend himself and

for that reason the commissioner was not entitled to interfere with the decision to dismiss him.

[6] Further grounds of review are raised in the applicant's supplementary affidavit. The first ground raised in the supplementary affidavit concerns the complaint by the applicant that certain parts of the transcript show that in certain areas the tapes of recordings of the arbitration proceedings are inaudible. The applicant says that should the reviewing court find that those inaudible parts are critical and constitutes material part of the evidence which was presented then the court should sent the matter back for a fresh arbitration hearing.

[7] The motivation for the contention that the commissioner failed to apply his mind to evidence before him can according to the applicant be found on what the commissioner recorded in his hand written notes and what he states in his arbitration award. The applicant contends in his heads of argument that prove that the commissioner did not apply his mind can be found in the fact that in his hand written notes it is recorded that the loss was R28 301.00 whereas in the arbitration award he recorded the amount as R28 000.00.

[8] In the heads of argument the applicant argues that the employee had committed misconducts that pierced into the heart of the trust of the employment relationship. In this regard the applicant argued that because of the nature of the misconduct committed by the employee it (the applicant) had no duty to give evidence to prove that the employer-employee relationship

had broken down. It was also argued on behalf of the applicant that the commissioner disregarded the fact that the employee did not challenge its version at the disciplinary hearing.

[9] The allegation about bias is explained in the applicant's heads of argument as arising from the finding of the commissioner the walking out of the disciplinary hearing by the employee was irresponsible but then held that there was no good reason to dismiss him. In other words the complaint about bias is based on the contradiction that arises from the finding that the dismissal was procedurally fair and then finding that it was substantively unfair.

[10] At the arbitration hearing, Mr Nkosi representing the applicant, in his opening remark stated, that the applicant's case focused mainly on poor performance, audits which concerned the breach of comparing policies and procedures. The breach of policies and procedures according to Mr Nkosi resulted in stock loss and gross loss of trust relationship. The financial loss is said to be in the amount of R 13 745.40.

[11] The applicant led two witnesses in support of its case. The first witness was Mr Fiford, who testified firstly that all policies and procedures were well documented suggesting in that regard that there was no reason for the employee not to comply with them. He further testified about several instances where he received telephone calls or sms from certain people

complaining about the employee. He raised those complains with the employee and after receiving an explanation from the employee he accepted the explanation and felt that there was no basis to pursue the complaints further.

[12] The other complaints which Fiford received were from the managing director who informed him that she had "received numerous calls from customers, the alleged customer questioning our area manager's (the employee) integrity."

[13] The employee was accused of selling battery charges outside working hours. As indicated earlier, Fiford was satisfied with the explanation tendered by the employee and decided not to take the matter further.

[14] The other complaint came from a former employee of the applicant who alleged that the employee took a leather jacket from one of the stores of the applicant's where there had been a robbery. It is not clear from the testimony of Mr Fiford whether the employee took the jacket in the process of the robbery or what circumstance is he alleged to have taken the jscket. Mr Foford, without giving much details says that he accepted the explanation given by the employee, more particularly because the employee is a trust worthy person. It does appear from his testimony that he was suspicious of the nature of the person who made the allegation because he had recently been dismissed.

[15] A week after the complaint from the ex-employee Mr Fiford received about 4 sms from anonymous people. It would appear, following receipt of

the sms, Mr Firford received a call from guest house owner alleged that the employee had been at the guest house and accused him the employee of a "whole lot of allegations."

[16] After that complaint from the guest house lodge, Mr Fiford visited other stores and spoke to other managers seemingly about the problem of the employees. At that stage the employee was conducting stork taking at Mabopane.

[17] According to Mr Fiford none of the managers he visited were prepared to speaking about the details of what was happening in their areas but all of them said that there was a problem. After speaking to most of the managers Mr Fiford went and spoke to the employee. It was after this meeting that Mr Fiford decided to institute an audit, starting with Polokwane, which is the store the employee was based at. After the Polokwane audit the applicant proceeded to audit the others stores.

[18] During cross examination, Mr Fiford conceded that the investigation was triggered by the seriousness of the allegations received through the sms, the explicit details of the allegations.

[19] Mr Fiford does not in his testimony as set out in the transcript say who the people are who were smsing him neither does he give the details of the allegations contained therein. He does not however dispute that prior to this audit the employee had indicated to him that he was planning on conducting the audit but he (Fiford) stopped him from doing that.

[20] It is clear from the transcript that Mr Fiford evaded the question why he

had stopped the employee from proceeding to conduct the audit. In answering the question why he stopped the employee from conduction the audit Mr Fiford says:

> *"Mr Manzini the only time the instruction was given to you as a regional manager to stop and just concentrate that the turnover was done to June 2007 for the very reason we were on warranties. If you recall the whole system of checks was changed to a fuller visit, a (inaudible) and a half day visit, no instruction was ever given thereafter June 2007 for regional managers to stop audits."*

[21] And when the commissioner clarified to him that the question asked by the employee was why did he stop the audit, he say:

> "I am just saying there has never been a time; I have known Mr. Manzini now for the past fourteen years; there has never ever been a time where i was concerned that he did not have the ability to perform the functions as a regional manager."

[22] The second witness and whose testimony the applicant relied upon in support of its case is Mr Hanegan, the regional manager. When asked during evidence in chief as to whether there was anything found to be improper and said that there were many he stated that:

> "*Yes there were many one which stands out in particular is the expenses the store suffered; and as well as petty cash expenses used by petty cash has been advanced for example*

and the slips are R80 and the amount is R100.00, so there is R 20 different and that was basically the petty cash transactions and casuals were being paid without document and they casuals would be made to work late hours and from the documentation available in the store we don't really understand this."

[23] The employee was the only witness who testified on his own behalf. He denied the allegations levelled against him. He complained that the allegations which were levelled against him were derogatory.

[24] It would appear that the employee does not deny that he went to Tzaneen, on the occasion when it is alleged that there was an incident allegedly involving him. In relation to that complaint the employee testified that he had done the bookings at the guest house for Mr Nkosi. At the end the first day after Mr Nkosi, finished whatever he was doing, the employee visited him at the guest house to have drinks with him. He says whatever the problem that had arisen at the guest house, the owner assumed that it was him because he had done the bookings. He says he received information that one of his colleagues was assaulted.

[25] The version of the employee as concerning what happens to petty cash and how an amount of R 99.90 in a store may be rounded up to R100.00, was not challenged by the applicant. Similarly, the version that the applicant does not fetch the "money at all" was not challenged. The employee was not charged with an offence concerning walking out of the disciplinary hearing.

The commissioner therefore at the arbitration hearing investigated the walking out of the disciplinary hearing and therefore the comment about the walking out of the disciplinary hearing which he clearly made in obiter cannot make him bias.

[26] In need to point out that I do not agree with what the applicant is saying that this finding is not in conflict with the conclusion that the dismissal was unfair. The applicant seems to suggest in its contention that this finding ought to have led to the conclusion that the dismissal was fair.

The arbitration award

[27] As indicated earlier the commissioner found that the dismissal of the employee was procedurally fair. He reasoned that the employee failed to attend the disciplinary hearing despite having been given the opportunity to so. The commissioner says the employee acted irresponsibly by walking out of the disciplinary hearing.

[28] In relation to substantive fairness the commissioner found that the applicant had failed to show that the dismissal to have been fair. In arriving at the conclusion that the dismissal was substantively fair the commissioner firstly rejected the version of the applicant. As concerning the charges relating to poor financial management the commissioner was again not satisfied with the quality of the applicant's version. In this respect the commissioner found that the applicant's version not to have been substantiated with supporting evidence such as invoices and was further not corroborated. The commissioner went further to say:

[15] Regarding the unauthorized expenses and abuse of petty cash the Respondent's witness failed to provide the total cash amount and the particulars of the transactions. I accept the Respondent's view that the Applicant was aware of his duties. But given the inconclusive evidence adduced by the Respondent's witnesses, I am inclined to say, there was no evidence that linked the Applicant to all charges. The second witness to be called was Mr, Shawn Henegan. He based his testimony entirely on the Audit Report. He said that the Applicant failed to account to exorbitant expenses incurred in connection with tailoring and abused petty cash. In this case he indicated that there was no documentation to prove the expenses. The said allegation was also not supported with sufficient proof or at least the supporting vouchers. Otherwise, most of the allegations contained in the audit report were not raised at the hearing. Although one would be forgiven to suggest that the Applicant's conduct is not entirely unblemished, I am not in a position to make such a decision without convincing reasons from the Respondent."

Evaluation

[29] The determinant issue in the first instance in this matter is whether the finding that the dismissal was procedurally fair ought automatically to have led to the conclusion that the dismissal was also substantively fair. It is trite that in conducting the inquiry into whether the dismissal was fair or otherwise the commissioner has to enquire into whether the dismissal was both

procedurally and substantively fair. These enquiries are conducted independent of each other. The one enquiry does not necessarily have an influence on the outcome of the other neither does the conclusion on the one automatically lead to the same conclusion on the other. The distinction between the two enquiries can be seen clearly from Item 2 of Schedule 8 of the Code of Good Practice, which provides as follows:

> "**2 *Fair* reasons for dismissal**
>
> (1) A *dismissal* is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a *dismissal* is for a fair reason is determined by the facts of the case, and the appropriateness of *dismissal as a* penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.
>
> (2) *This Act* recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the e*mployee,* the capacity of the *employee,* and the *operational requirements* of the employer's business."

[30] Item 4(1) read with item 7 of the Code demonstrates further that the enquiry into the procedural fairness of the dismissal is separate and different from that of substantive fairness. Item 4 reads as follows:

"*(I) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time* ***to*** *prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish fie employee with written notification of that decision."*

Item 7 provides that a person determining the nfairness of the dismissal should consider the following:

(a) whether or not the *employee contravened a standard regulating conduct in, or of relevant workplace; and*

(b) *if a rule or standard was contravened, whether*

(c) *the rule was a valid or reasonable rule or standard;*

the employee was aware, or could reasonably expected to have been aware, of the standard;

the rule or standard has been consistently by the employer; and

dismissal was an appropriate sanction contravention of the rule or standard."

1] It is thus clear from the above discussion that the commissioner cannot be faulted for having conducted two separate inquiries into the fairness of the dismissal – the one relating to procedure and the other to the substance of the dismissal. It also goes without saying that the conclusion reached on the one does not mean that the conclusion on the other should be the same.

The second issue is whether the commissioner committed gross irregularity in his reasoning and in arriving at the conclusion that the dismissal was substantively unfair. The court would indeed interfere with the arbitration award if it was to be found that the reasoning and the award of the commissioner to be grossly irregular. The essence of the test for determining whether or not the commissioner has committed a gross irregularity is whether the complaining party has been denied a fair hearing on the issues which were placed before the commissioner. Failure to afford a party to the arbitration hearing a fair hearing could be as a result of the commissioner failing to apply his or her mind to the facts or the issues presented before him or her. It could also be due to misconception of the issues or the facts presented during the arbitration hearing.

A mistake of fact or law could also constitute an irregularity. It is however not every mistake that would lead to the conclusion that the complaining party has been denied a fair hearing and accordingly justifying interference by the court. For a mistake of fact or law to constitute gross irregularity, it has to be shown that the mistake is so material as to amount to the denial of a fair hearing or failure to deal

with the issues raised by the dispute. It is thus my view, that assuming the commissioner made a mistake regarding the figures of R28 000.00 and R28 301.00, it cannot be said that such a mistake was so material as to render the decision grossly irregular.

As concerning the substantive fairness of the dismissal the commissioner evaluated the two versions which the parties had presented to him and as indicated earlier he rejected the version of the applicant. In this respect the commissioner weighed the evidence of the applicant and correctly in my view, came to the conclusion that the evidience did not carry sufficient weight to discharge the burden placed on the applicant of showing that the dismissal was for a fair reason.

The complaint by the applicant that the record has inaudible and should for that reason be reviewed and be remitted back to the CCMA bears no merit. The delay to ensure that a proper record is placed before the court in a review application rest with the applicant. In a case of defects in the record, the applicant bears a further duty of ensuring that the record is reconstructed. There is no evidence that the applicant performed any of its duties as far as the inaudible in the record are concerned.

The complaint that the commissioner could not have come to the conclusion as he did because the employer did not attend the disciplinary hearing also bears no merit. It is trite that the arbitration hearing is a proceeding *de nove*. The disciplinary hearing is relevant to the extent only of the commissioner having to determine the reason for the dismissal and whether the procedure followed was fair.

In the light of the above discussion, I am of the view that the commissioner's arbitration award satisfy the test of ***Sidumo v Rustenburg Platinum Mines Ltd & Others, 2007 (12) BLLR 1097 (CC).*** The applicant has thus failed to make out a case justifying interference with the arbitration award by this court.

The applicant's claim thus stand to fail. In the circumstances of this case I see no reason why the costs should not in law and fairness follow the results.

Accordingly the following order is made:

1. The application to review and set aside the arbitration award issued under case number LP 2515 dated the 11th June 2008 is dismissed.

2. The applicant is to pay the costs of the third respondent.

Molahlehi J

Date of Hearing : 03 June 2010
Date of Judgment : 17 November 2010

Appearances

For the Applicant: Adv R Ralikhuvhana

Instructed by : Graham Attorneys

For the Respondent: Mr S Mabaso of Mabaso Attorneys