REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Of interest to other Judges

Case no: D 994/09

In the matter between:

TOYOTA SOUTH AFRICA MOTORS LTD **Applicant**

and

DAVID KEITH LEWIS **First Respondent**

HILDA GROBLER N.O. **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **23 September 2011**

Delivered: **27 January 2012**

Summary: Review of award of compensation: Commissioner's finding that applicant unable to establish that respondent guilty of the misconduct with which charged not reviewable. Application Dismissed,

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JUDGMENT

GUSH J

[1] The applicant applies for the second respondent's arbitration award under case number KNDB11986/07 that the first respondent's dismissal was unfair be reviewed and set aside and that the the award be substituted with an award confirming that the dismissal of David Keith Lewis (first respondent) was procedurally and substantively fair.

[2] The arbitration award made by the second respondent followed an arbitration which took place on 9 and 10 July 2008, 8 and 9 December 2008, 6 and 7 April 2009, 26 October 2009 and 26 November 2009. (Whilst the final award is dated 21 April 2009, it would appear that on 21 April 2009 the second respondent concluded that the first respondent's dismissal was unfair and directed that the matter be set down for argument to determine the appropriate relief which took place on 26 November 2009).

[3] On 26 November 2009, the parties having argued what would constitute appropriate relief the second respondent granted the applicant the following relief: 'The respondent is directed to pay the applicant compensation in the amount of R186, 942'.

[4] The first respondent had been employed by the applicant during February 1996 and at the time of his dismissal on 18 September 2007 was employed as a financial manager in the applicant's the tool and die division (TDM).

[5] The applicant's dismissal followed a disciplinary enquiry at which which enquiry the applicant was charged with the following misconduct and:

'CHARGE: dishonesty including but not limited to misrepresentation with the intention of deceiving the company in that:

- during 2001 and 5 January 2004 you entered into contracts and agreements with DN Couriers in violation of company policy and procedures and which resulted in the financial prejudice to TSAM the financial prejudice refers to: –

- fuel cards issued to DN couriers although not part of the 2004 contract was unlimited fuel usage.

- The sale of two vehicles to DN couriers to a flawed process.

- You utilised TSAM diners and credit cards one authorised purposes: –

- payment of study she is for Brandon van der Bank instead of following the policy in terms of Study Assistance Program.

- Car hire whilst on vacation in the UK

- personal items - resulting in an interest-free loan.

- Goods for TDM without adhering to the procurement process.

- On 15 April 2005 you entered into a transaction with Avalon Travel whereby you "sold" your voyage miles to cover the cost of N Singh's airfare and trained a refund from TSAM via a cheque requisition (check number 119493) for personal gain.'

[6] At the conclusion of the disciplinary enquiry the applicant found the first respondent 'guilty of dishonesty as charged by the company' and the applicant dismissed the first respondent. The first respondent unsuccessfully appealed against his dismissal, and thereafter referred the matter to the third respondent.

[7] After conciliation, the matter was referred to arbitration before the second respondent. At the arbitration, both the applicant and the first respondent were legally represented and agreed with the consent of the second respondent that the arbitration be conducted in two stages. The first stage was to determine whether the first respondent's dismissal was fair. If the dismissal was found to have been unfair, the second stage of the arbitration would proceed to determine the appropriate relief.

[8] From the record of the arbitration and the second respondent's award, it is clear that the primary issue in dispute at the arbitration was not simply whether the first respondent was guilty of misconduct but specifically whether the respondent was guilty of dishonesty as opposed to misconduct involving a breach of the applicant's policies and procedures. The second respondent in her award recorded the issue to be determined as '[i]n essence the applicant was charged with dishonesty while his defence is that he should have been charged with not following the company policies and procedures.'[1]

[1] Arbitration Award: Indexed pleadings page 28 para 10

[9] The second respondent's summary of the main contentions of the parties as set out in the opening statements of the respective parties at the arbitration (with which neither party has taken issue) records:

9.1 Re: Applicants opening statement:

9.1.1 The dismissal was fair in that the first respondent was and was found guilty as charged (viz. dishonesty including misrepresentation with the intention to deceive);

9.1.2 He had the intention to deceive the applicant;

9.2 Re: The first respondent's opening statement:

9.2.1 The incidents recorded in the charge sheet were common cause but the circumstances under which the infractions were committed were in dispute (viz. that first respondent was not dishonest nor was the first respondent guilty of misrepresentation with the intention to deceive);

9.2.2 The practices of which he was accused were common practice amongst his colleagues and that fellow employees who had followed these practices had not been disciplined;

9.2.3 In any event unless the applicant could prove dishonesty (that the first respondent was dishonest in his failure to comply with the policies and procedures) the appropriate sanction according to the applicant's code was a written warning.

[10] Both the applicant and the first respondent led extensive evidence at the arbitration; the applicant called three witnesses and the respondent gave evidence himself and called four witnesses.

[11] None of the of the applicant's witnesses gave direct evidence of dishonesty on the part of the first respondent and the main issue addressed both in the evidence and in chief and cross examination of the applicant's as well as the first respondent's witnesses was directed at whether or not the actions of the first respondent amounted to breaching the applicant's rules and

proceedures. During his evidence, the first respondent conceded that he had not complied with certain of the applicant's policies and procedures but steadfastly maintained that his failure to so comply was not dishonest nor did it amount to a misrepresentation with the intention of deceiving the company. It is not necessary to summarise the evidence of the witnesses and the first respondent. In her award the second respondent has done so in great detail, with reference to extracts from the record before thoroughly analysing the evidence and argument of both parties.

[12] Referring to the charge sheet the second respondent, in her award, divides the charges and the sub categories under each charge into "three legs"[2] which she numbered and indentified as follows:

12.1 Firstly charge 1.1: 'The DN Couriers contract';

12.2 Secondly charge 1.2: 'The Diners credit card';

12.3 Thirdly charge 1.3: 'Voyager miles'.

[13] In the second respondent's award, in respect of each of the charges, bearing in mind the issue in question, the second respondent has carefully and thoroughly analysed the evidence and concluded as follows in respect of each charge:

Re Charge 1.1: "The DN Couriers contract"

[14] The second respondent found that the applicant had failed to discharge the onus of proving that the first respondent was dishonest in respect of this charge. Taking into account the applicant's case before the arbitrator was that the first respondent was guilty of 'dishonesty including but not limited to misrepresentation with the intention of deceiving the company' the conclusion reached by the second respondent is entirely justified based on the evidence placed before her.

[15] In its founding affidavit, the applicant submits that the conclusion reached by the respondent is reviewable in that 'a proper examination of this evidence

[2] Arbitration Award: Indexed pleadings page 53 para 28

would have alerted the second respondent to the fact that the first respondent was guilty of a number of acts of misconduct placed the applicant at risk'.[3] This is a far cry from the essence of the misconduct for which the first respondent was dismissed viz. dishonesty.

Re Charge 1.2: "the Diners credit card"

[16] The second respondent concluded her analysis of the evidence by stating that '... there was not a shred of evidence that pointed to any dishonesty, or any attempt to deceive the [applicant]'.[4] Based on her conclusion the second respondent found '...that [applicant] has failed to discharge the onus to show that the [first respondent] was guilty of dishonesty or misrepresentation with the intention of deceiving the company in respect of the manner in or the purpose for which he use his company credit'.[5]

[17] Seemingly ignoring that, based on its own case the applicant bore the onus to establish that the first respondent acted dishonestly the applicant in its founding affidavit merely describes the first respondents conduct as "questionable".

[18] The main issue or act of misconduct that the applicant relies on is the hiring of a motor vehicle on the credit card for the purpose of visiting a client. It transpired that the respondent having hired the vehicle, due to a major traffic disruption was unable to get to the clients premises and duly returned the car. The applicant's evidence regarding this issue was that he had booked the car for the specific purpose of undertaking the trip to the client which had been approved by his manager. When the trip to the client could not take place, he had returned the car and had paid for the petrol and ancillary costs himself. The first respondent had only hired the car because of the approved intended business trip when the trip did not materialise he had himself paid for the petrol and ancillary charges and the applicant had paid for the hire charge.[6]

[19] When the first respondent was cross examined it was never put to him that his explanation was unacceptable or that his actions regarding the hire of

[3] Indexed pleadings at page 15, para 37
[4] Arbitration Award: Indexed pleadings page at 57, para 30.15
[5] Arbitration Award: Indexed pleadings at page 57, para 30.16
[6] Transcribed record at pages 23 - 25

the car amounted to dishonesty or a misrepresentation with the intention of deceiving the company.[7]

Charge 1.3: "Voyager miles"

[20] The second respondent in analysing the evidence adduced by the applicant in respect of the charge relating to the sale of the voyager miles pointed out that the applicant's witness, Ward, was 'not in a position to answer questions that are of material importance ...' In fact it was put to the first respondent in cross examination that Ward's evidence was to the effect that there was no rule in place specifically preventing the sale of voyager miles to the applicant, it was simply against the spirit of the scheme.

[21] The second respondent found that the applicant had 'failed to discharge the onus to prove that the applicant was guilty of dishonesty or misrepresentation with the intention of deceiving the company in this regard.'

[22] Based on the above findings and her conclusion that evidence that suggested that the applicant's 'policies and procedures were not followed to the letter and that when employees deviated from these policies and procedures for what was ostensibly a good reason, the deviation was at least tacitly approved or condoned' and the concession by the applicants witness, Ward, that the first respondent 'was guilty of no more than a failure to follow company policies and procedures',[8] the second respondent found that the first respondent's dismissal was unfair.

[23] It appears from the record that at the commencement of the arbitration, first respondent sought a reinstatement order so as to benefit from an enhancement paid to employees of the applicant who changed from the pension fund to a provident fund shortly after the first respondent's dismissal. Subsequent to the finding that the first respondent's dismissal was unfair and prior to the award of compensation, the parties submitted written representations to the second respondent. At this stage however the first respondent, having been retrenched from the position he had moved to shortly after his dismissal, now sought reinstatement in the normal course. The

[7] Transcribed record at pages 118 - 119
[8] Arbitration Award: Indexed pleadings page 5 para 34 - 37

applicant's heads of argument concentrated on submissions that reinstatement was inappropriate in the circumstances inter alia that the division in which the first respondent had been employed had been closed. In the absence of any record of what transpired during the argument on the appropriate relief and in the absence of a cross review by the first respondent, it must be assumed that the first respondent is content with the award of compensationAs regards the award of compensation (an amount equivalent to six months remuneration) it is clear from the applicant's application that its review was confined to the relief it specifically sought in its notice of motion viz. to set aside the award in so far as the dismissal was found to be unfair and for it to be substituted with an order that the first respondent's dismissal be declared procedurally and substantively fair. In fact the only reference in the applicant's papers to the compensation awarded by the second respondent appears in the founding affidavit when the applicant states: '[t]o award compensation in excess of two months is on this evidence alone unjustifiable'.[9] Other than this bald averment the applicant has not addressed the award of compensation and in particular, has not dealt with the quantum of compensation awarded the first respondent.

[24] The issue therefore is simply whether or not the second respondent's ruling that the dismissal was unfair is reviewable.

[25] In its heads of argument the applicant correctly submitted that the second respondent's task was to decide on the evidence whether there was a fair reason for the dismissal of the first respondent. The applicant submitted further that while employers often fall short in drafting charge sheets in an attempt to categorise the misconduct, as long as the employee knows what the essence of the misconduct is this should not detract from the enquiry as to whether there was a fair reason for the dismissal based on the facts placed before the Commissioner. The applicant avers that the second respondent's award did not take these issues into account.

[26] What the applicant failed to appreciate is that at the outset of the arbitration the crisp issue was specifically defined. The issue to be determined

[9] Indexed pleadings at page 23, para 62.

was whether the respondent was guilty of dishonesty as opposed to a breach of the applicant's policies and procedures. The applicant made it abundantly clear that it had dismissed the first respondent for dishonesty including misrepresentation with the intention of deceiving the applicant, and that accordingly it bore the onus to prove exactly that. The second respondent justifiably and reasonably came to the conclusion that it had not discharged that onus based on the material placed before her..

[27] The gist of the applicant's argument and averments made in its affidavits is that the second respondent was wrong in regard to her findings based on the evidence presented. Had this been an appeal such an approach may have been appropriate. However the this is a review brought in terms of the Labour Relations Act and the test to be applied in determining whether an award is reviewable is not the same test which is applied had this been an appeal against the award of the second respondent. The test on review was succinctly set out in *Edcon Ltd v Pillemer NO and Others*,[10] where the court held:

'Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.'[11]

[28] Applying this test to the second respondent's award, it is clear that the award is one that a reasonable decision maker could arrive at considering the material placed before her. I am not satisfied that the applicant has established that the second respondent's award, that the dismissal of the first applicant was unfair, is reviewable, neither has the applicant succeeded in establishing that the compensation awarded the first respondent is neither just nor equitable.

[29] Regarding costs, there is no reason why the costs should not follow the result.

[30] I, accordingly, make the following order:

1. The applicant's application is dismissed with costs.

[10] (2009) 30 ILJ 2642 (SCA)
[11] Id at para 15.

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D H Gush

JUDGE OF THE LABOUR COURT

APPEARANCES

APPLICANT:	Adv D Crampton
	Instructed by: De Jager Clemens and Associates
FIRST RESPONDENT:	Mr M Maeso: Shepstone and Wylie