



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C877/2015

Not Reportable

In the matter between:

THE NATIONAL UNION OF MINeworkERS

obo SD KAMA

Applicant

and

ESKOM HOLDINGS (SOC) LTD

1st Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

2nd Respondent

L. MARTIN N.O.

3rd Respondent

Heard: May 5 2016

Delivered: 27 October 2016

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review an arbitration award. The third respondent (the Commissioner) found the dismissal of the applicant employee (Khama) to have been procedurally and substantively fair.
- [2] Khama had worked for the first respondent (the company) since 1 May 2008 and at the time of her dismissal was a customer relations officer. She was dismissed on 14 October 2014 having been found guilty of "Failure to comply with Eskom's Conditions of Service, agreements with trade unions, operating regulations, security and/or safety measures, procedures, directives and applicable statutory requirements; and making any false statement or representation that relates to, or ensues from his duties."
- [3] It was the company's case at arbitration that Kama deliberately entered incorrect information in her car trip sheets so that she could derive financial benefits in that private trips were treated as business kilometres. In addition, it was its case that Kama made a false statement in respect of sick leave because she failed to capture the sick leave taken on Zenzele, the electronic leave administration system. She it was alleged, stood to benefit from not having sick leave captured on the system. Finally there was one instance of annual leave Kama had not captured on the system.
- [4] It was not in dispute at arbitration that Kama had failed to capture 17 days sick leave on Zenele as well as one days' annual leave. The issue was whether these omissions were deliberate and intentional. The company sought to prove that they were and that Kama acted with the intention to defraud the organisation.

- [5] Kama's case was that the 'errors' on the trip sheets were genuine mistakes caused by lack of training on the system and that she was struggling with it. She also testified that her understanding of the procedures for sick leave were that she would capture sick leave taken manually and that an administrative officer would then capture it electronically. In respect of the one day annual leave, she claimed it was simply an oversight on her part.
- [6] In his analysis of the evidence and argument the Commission concluded that the evidence showed that there had been numerous discrepancies in the recording of leave and vehicle records pertaining to kilometres travelled by Kama. In coming to his conclusion that the dismissal of Kama was substantively fair and the relationship of trust had broken down, the Commissioner took into account inter alia that:
- 6.1 Kama's reasons for incorrectly recording the kilometres travelled, in that she did not know how to record them were not acceptable given her status as junior management;
 - 6.2 Her supervisor Mr Bethanie gave unchallenged evidence that he had conducted an investigation of all in the department and it was found that no one had transgressed in the manner that Kama had.
 - 6.3 Kama had received training in filling in the records and she was assisted in correctly filling in the trip sheets;
 - 6.4 She had benefitted from the errors;
 - 6.5 The nature of her functions was that she worked on her own without supervision. She was therefore expected to execute such functions such as the filing in of the forms correctly with the greatest degree of trust.
- [7] The basis for the review is that the Commissioner's findings on the evidence before him were "irrational and not supported by the evidence and therefore unreasonable". In essence however the review focusses on findings of fact by the

Commissioner which the applicant challenges. It is also submitted on her behalf than “any reasonable commissioner would have found that Kama was charged because Bethanie has an axe to grind against Kama and this explained the charges laid against her”. This latter submission is quite unsubstantiated.

- [8] The amount of money that Kama claimed on her trip sheets that she was not entitled to was R3000.00. The days claimed in excess for sick leave were 17 in total. Kama subpoenaed an administrative clerk, a Ms Douglas, to give evidence at the arbitration regarding the motor vehicle scheme. Her evidence supported the company’s version that Kama had been taught how to fill in the trip sheets. The Commissioner also recorded the following:

- “60. She telephoned Stannic to inform them that Kama had been dismissed that day and that the fuel card should be cancelled immediately.
- 61. Douglas cannot give permission for the card to be used after the holder had been dismissed.
- 62. After Kama had been dismissed Douglas requested a report from Standard Bank regarding whether Kama had used the card after the dismissal. She notified Kama’s line manager that the card had been used and that it was Fraud.
- 63. Douglas had still not received a trip sheet for October 2014 from Kama which was supposed to have been handed in the day she was dismissed.
- 64. Douglas’s manager therefore informed her that the closing odometer reading for September and add to that the last odometer reading Kama refueled the car as the closing kilometres. That total together with the last amount paid at the last refueling was deducted from Kama’s salary. The Stannic report was used to validate the trip sheet.”

- [9] Having considered the Award and the record before the Commissioner, including the above evidence by Douglas, I find that the Commissioner’s finding on substantive fairness is well within the bounds of reasonableness. The review

grounds amount to what the applicant believes the Commissioner ought to have found. Using labels such as ‘unreasonable’ and ‘irrational’ in describing the findings by the Commissioner on the evidence before him, are of no assistance to the applicant. The submission on behalf of the applicant that the penalty of dismissal was too harsh in the circumstances is not persuasive given the nature of the charges and the evidence given at the arbitration as regards the breach of trust in the employment relationship.

[10] As to procedural fairness, it was submitted on behalf of the applicant at the arbitration that the company had not endeavoured hard enough to hold the disciplinary hearing within the three month period, which the disciplinary code provided should be aimed for. In addition, it is submitted before me that the chairperson of the disciplinary hearing decided to call for further evidence from the employer. However, the record shows that the applicant and her union were provided with the opportunity to cross-examine the testimony given by a company witness at the further hearing. In my view the Commissioner's finding that the dismissal was procedurally fair is reasonable. As he records in the award: “.....the evidence is clear that she had been afforded an opportunity to prepare for her hearing; she had been represented by her trade union; she had cross-examined witnesses and she had been afforded an opportunity to state her case notwithstanding her electing not to place her version through testimony before the disciplinary hearing.”

[11] In all the circumstances, the applicant has failed to make a case for this court to review the award. Numerous decisions of the labour courts support this finding. I will rely on the **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**¹ dictum in which the LAC stated that for a reviewing court:

“The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process B that the arbitrator

¹ (2014) 35 ILJ 943 (LAC) at para 20

employ give the parties a full opportunity to have their say in respect of the dispute?
(ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.)
(iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"

[11] In this matter all of the above questions stand to be answered in the affirmative. Both parties asked for costs and I see no reason why costs should not follow the result. I order as follows:

Order

1. The review application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Cheadle Thompson & Haysom Inc

First Respondent: R. Nyman instructed by Moosa, Waglay & Petersen Inc