REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 92/15

In the matter between:

SUPERCARE SERVICES GROUP (PTY LTD	Applicant
and	
DU PLESSIS N.O.	First Respondent
CCMA	Second Respondent
NEHAWU obo	Third Respondent
SIMPHIWE SOSHWESHE	

Heard: 16 March 2016

Delivered: 31 March 2016

Summary: Review – misconduct – employee stealing toilet paper – arbitrator finding that misconduct not proven -- award so unreasonable as to be reviewable on *Sidumo* test – award reviewed and set aside – dismissal fair.

JUDGMENT

STEENKAMP J

Introduction

[1] This is a case about toilet paper.

[2] The employee, Mr Simphiwe Soshweshe[1], was dismissed after he was allegedly seen in possession of a bag full of toilet paper belong to the Cape Peninsula University of Technology (CPUT). He referred an unfair dismissal dispute to the CCMA.[2] Conciliation failed. The arbitrator[3] found that the dismissal was unfair. He ordered the employer, Supercare[4], to reinstate the employee. Supercare wants to have the award reviewed and set aside.

Background facts

[3] The applicant, Supercare, operates a contract cleaning service. Its employee, Mr Soshweshe, worked as a cleaner at the Bellville campus of CPUT.

[4] An employee of CPUT, Mr Mark Jenkins, is an animal lover. He was feeding a stray cat on the periphery of the campus on 28 May 2014. He saw a person – described in his evidence at arbitration as "a black man" – wearing blue jeans and a blue jacket and carrying a black bag coming to the security fence adjacent to the railway line from the direction of the Freedom Square hostel on the campus. The man was later identified as the employee, Mr Soshweshe. The employee threw the black bag over the fence. Jenkins asked him what was in the bag. He answered, "toilet paper". Jenkins went to look for a security guard. The guards were tardy. When Jenkins returned, he saw the man outside the security fence. The man picked up the bag and walked away.

[5] CPUT reported the incident to Supercare. It held a disciplinary hearing. It was held in absentia after the employee refused to undergo a polygraph

[1] The third respondent (represented by his trade union, NEHAWU).

[2] The Commission for Conciliation, Mediation and Arbitration (the second respondent).

[3] Commissioner Daniel du Plessis (the first respondent).

[4] The applicant.

test. The chairperson found that the employee had stolen the toilet paper from CPUT. He was dismissed.

The arbitration

[6] Jenkins testified at the arbitration. He did not know the man who threw the bag over the fence. After he had called the security guards and after he had seen the man taking the bag and running away, he was approached by an employee of Supercare whom he knew as “Jane”. She was later identified as Ms Jane Adams. She told him that the man who had taken the bag was the employee, Mr Simphiwe Soshweshe. The incident happened at about 15:30 – the time it was entered into the security guards’ occurrence book.

[7] Ms Adams testified that she was a co-employee of Mr Soshweshe. She saw him jumping over the security fence after throwing the black bag over the fence. The bag split open and she saw toilet paper inside. She saw him picking up the bag and running away across the railway line. She saw Jenkins and the security guards. She told him who the employee was and asked him not to divulge that he got the information from her. It happened between 15:00 and 16:00. On the following Monday, she saw the employee at the train station and told him what she had seen. He told that it was fine, as long as he was not caught.

[8] Ms Martine Carstens, Supercare’s area manager, attended the disciplinary hearing as the company’s representative. She testified that the employee described himself as a shop steward, but NEHAWU had never formally notified the company of that status.

[9] The employee, Mr Soshweshe, denied that he had stolen any toilet paper. He said that he only clocked out at 16:00.

The award

[10] The arbitrator considered two procedural attacks. The employee claimed that he was a shop steward and that his union had not been consulted about his disciplinary hearing. The arbitrator found that his right to a fair procedure was not prejudiced. There is no cross review.

[11] There was a delay in informing the employee of the result of the disciplinary hearing. The arbitrator found that was unfair. However, he did not award any compensation for procedural unfairness.

[12] The substance of the award turns on substantive unfairness. The arbitrator found that the employer did not prove that the employee committed the misconduct complained of.

[13] The arbitrator found the evidence of Jenkins to be "clear and to the point with no inherent contradictions". Despite this, he did not accept Jenkins's version of events. The reason is that it differed from Ms Adams's version. The arbitrator found that the fact that the employee, Soshweshe, did not question her evidence as to the conversation the two of them had on the Monday morning, "does not take the matter anywhere as I find that I am unable to rely at all on Ms Adams's version."

Review grounds

[14] Mr *Snyman* argued that the arbitrator failed to decide the factual dispute between the parties properly. He argued that the arbitrator decided and determined the issues of credibility and probabilities in a manner that was not only grossly irregular, but led to an unreasonable outcome.

Evaluation / Analysis

[15] The nub of the review is that the arbitrator did not consider the inherent probabilities, but fixated on the minor contradictions between the evidence of Ms Adams and that of Mr Jenkins.

[16] The arbitrator was faced with two mutually destructive versions – that of the employer, that the employee had stolen its toilet paper; and that of the employee, which was a bare denial.

[17] As the court held in *Sasol Mining*[5], one of the Commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.

[5] *Sasol Mining (Pty) Ltd v Ngqeleni NO* (2011) 32 *ILJ* 723 (LC) para 9.

[18] The manner in which arbitrators should resolve such disputes has often been outlined in terms of the technique set out by the SCA in *SFW*:[6]

> "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities."

[19] The arbitrator did not weigh up the credibility and reliability of the employer's witnesses as against that of the employee; neither did he consider the probabilities.

[20] Instead, the arbitrator focused on the contradictions between the versions of Adams and Jenkins. He did not, in his award, explain how those versions were contradictory. It is left for the Court *ex post facto* to gather that from the transcript. In fairness to the arbitrator, some contradictions are indeed apparent:

20.1 Jenkins says that the employee threw the bag over the fence; then he crossed the fence by some other means and Jenkins saw him again on the other side, where he picked up the bag. Adams says that she saw the employee jumping over the fence with the bag, he fell, and the bag split open.

20.2 Jenkins says that Adams approached him and told him the employee's name; Adams says that Jenkins asked her what the employee's name was.

[21] What the arbitrator does not do, is to consider the credibility of the employee; or the inherent improbability of his bald denial. Both Jenkins and Adams testified that they saw the employee with the black bag and that the bag contained toilet paper. There was no reason for Jenkins to make up such a story. He did not even know the employee. He only learned his name when Adams, the co-employee, told him. There was also no reason for Adams to make up the story. In fact, she did not want her identity to be disclosed. She had no bone to pick with the employee.

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[6] *SFW Group Ltd v Martell et cie* 2003 (1) SA 11 (SCA) para 5.

[22] The arbitrator found that the employee's version that he clocked out normally at 16:00 "was also not challenged". The difficulty with that finding is that, although it was put to Mr Jenkins, Jenkins was not an employee of Supercare. The version that the employee only clocked out at 16:00 was not put to either of Supercare's employees, i.e. Adams or Carstens. They were not placed in a position to contradict it by, for example, submitting the relevant clock cards or timesheets.

[23] Having found that there were contradictions between the versions of Adams and Jenkins – without specifying what they were – the arbitrator simply finds that "I am unable to rely *at all* on Ms Adams's version." On that basis, he dismisses her version of her discussion with the employee on the Monday morning entirely, despite the fact that the employee did not dispute it at arbitration.

[24] As Mr Snyman pointed out in his argument, in rejecting Ms Adams's testimony *in toto*, the arbitrator committed a logical fallacy by applying the approach of *falsus in uno falsus in omnibus*. Such an approach has been rightly rejected as unreliable and illogical.[7]

[25] In summary, the arbitrator did not consider the probabilities against the background of the credibility and reliability of the witnesses. On the probabilities, the only inescapable inference is that the employee did indeed steal the toilet paper. That is, in my view, the only reasonable conclusion that an arbitrator could have come to on the evidence before him or her.

Conclusion

[26] This is one of those rare cases where the applicant has crossed the hurdle of showing that the conclusion reached by the arbitrator is so unreasonable that no reasonable arbitrator could have come to the same conclusion on the evidence before him. The award must be reviewed and set aside.

[7] Cf *R v Gumede* 1949 (3) SA 749 (A) 756; *Kok v CCMA* [2015] JOL 32888 (LC), [2015] ZALCJHB 45 para 32.

[27] It would serve little purpose to remit the dispute for a fresh arbitration. The Court has had the benefit of a full transcript of the proceedings. It would only lead to further unnecessary delay and costs to remit the dispute.

[28] With regard to the costs of this application, I take into account that the employee had an arbitration award in his favour; and that there is an ongoing relationship between his trade union, NEHAWU, and the employer. Taking into account the requirements of the law and fairness, I do not consider a costs award to be appropriate.

Order

[29] I therefore make the following order:

29.1 The arbitration award of the first respondent, Commissioner Daniel du Plessis, under case number WECT 14902-14 is reviewed and set aside.

29.2 It is replaced with an award that the dismissal of the employee, Mr Simphiwe Soshweshe, was for a fair reason.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: S Snyman (Attorney)

THIRD RESPONDENT: M Phoko (trade union official).