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National Union of Mineworkers and Others v Commission for Conciliation, Mediation and Arbitration and Others [2010] ZALC 17

Judgement: Molahlehi J

Introduction

This is an application to review and set aside the arbitration award issued under the auspices of the CCMA, in terms of which the commissioner found the dismissal of the two employees to have been both substantively and procedurally fair.

Background facts

The applicants are former employees of the employer who were dismissed for acts of dishonesty in that they had allegedly stolen drill steel belonging to the employer. Evidence to the facts was led at the arbitration hearing.

Manager's evidence

The first witness of the employer was its manager and owner who testified that during June 2008, he received information about the sale of a whole manifold and a quantity of

-----LABOUR NEWS-----

drill steels to a certain Mr Myburg and managing director of Ground Zero Blasting. He further testified that he was informed by Myburg that the process of selling to him the property of the employer its employees had been going on for quite some time. After receiving this information the employer sent one of his employees to Ground Zero to fetch the manifold but did not collect the drill steel as they looked the same. Thereafter the employer laid charges of theft against Myburg.

Myburg's evidence

Second witness of the employer was Myburg who testified that the employee delivered drill steel and manifold at his premises at Ground Zero. He testified that he was not present when the delivery took place but was informed by his employees that people who delivered the drills and the steels were employees of the employer. He also confirmed that after reporting the matter to the manager of the employer, the manifold was collected by one of the employees of the employer. He thereafter received a telephone call from one of the two employees informing him that they had been arrested for theft and that they required an amount of R1600, 00 for bail. During that telephone conversation, Myburg informed the employee about the conversation he had with their employer. He informed him that he had undertaken no longer to purchase stolen goods. Myburg also testified that the process of purchasing goods from the employees in question had been going on for a period of approximately one year. Myburg testified during cross examination that he came to know that the goods which had been purchased from the employees belonged to their employer after he was so informed by



-----LABOUR NEWS-----

his father- in- law. He was also informed by the one of the employees that the goods belonged to the their employer. The employee was paid cash for the goods in question and the other employee would be around whenever payment was effected.

Employee's case

The case of the employees during the arbitration hearing was to deny ever delivering the property in question at Ground Zero. They denied ever taking their employer's property to Ground Zero on any other occasion and claimed that Myburg in what he said regarding the purchase of the goods in question was "Just trying to surprise us." They also testified that he did not know Myburg and that he Myburg had falsely implicated them purely because he wanted to support their employer.

Evaluation

The test to apply in an application to review a decision of a commissioner has been set out in Sidumo v Rustenburg Platinum Mines Ltd and others 2007 28 ILJ 2405 (CC), as follows: **"Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair legal practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."**



-----LABOUR NEWS-----

Probabilities of evidence

In essence the complaint of the applicants regarding the decision of the commissioner is that their dismissal was unfair, because the manner in which the evidence was evaluated by the commissioner. It would appear that the main challenge to the commissioner's assessment of the evidence concerns the versions of the parties as supported by the probabilities.

It is trite that in dismissal case the employer bares the onus of showing that the dismissal was fair. Thus the starting point for a commissioner in assessing the versions presented by the parties during the arbitration hearing is to determine the extent to which the employer's version is more probable than not. In *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541(LAC) the court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that prove on a balance of probability was sufficient. In *Maruapula and other v Confteen (Pty) Ltd* (1999) 20 ILJ 1837 (LAC), the court in dealing with the approach to be adopted in dealing with the evaluation of evidence held that:

“The credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered piece meal. They



-----LABOUR NEWS-----

are part of the single investigation into the acceptability of otherwise of the employers version, an investigation where questions of demeanour and impression are measured against the content of the witnesses evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable and should be accepted, not that therefore the other version is false and may be rejected with safety”.

In Mbhele and another v Strange Cleaning Services CC 2001 32 ILJ 246 (CCMA) it was held that in dealing with the issue of assessment of probabilities that:

“The arbitrator needs to first look at the version of the employer and decide whether the version is probable. In other words, could such a thing really happen? If the arbitrator is satisfied that the version of the employer is probable, he must there after decide if the version of the employee is probable. If he similarly decides that the version of the employee could have happened, the arbitrator must thereafter decide which version is more probable, by comparing the opposing versions.”

Hearsay evidence

The answer to the complaint by the applicants regarding the acceptance of the hearsay evidence of Myburg about what he was told by his father- in- law, concerning the



-----LABOUR NEWS-----

delivery of the property of the respondent can be found in the judgment of Swiss South Africa (Pty)Ltd v Louw N O and others 2006 27 ILJ 1995 395, where the court held that:

“Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA.”

It is clear from the reading of the arbitration award that the commissioner applied his mind to the hearsay evidence that had been presented and in accepting such evidence relied on the provisions of section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 which reads as follows:

“(1) subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless:

(c) the court having regard to –

- (i) the nature of the proceedings**
- (ii) the nature of the evidence**
- (iii) the purpose for which the evidence is tendered**
- (iv) the probative value of the evidence**



-----LABOUR NEWS-----

(v) the reasons why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

(vi) any prejudice to the party which the admission of such evidence might entail

any other factor which should in the opinion of the court be taken into account.

Is of the opinion that such evidence should be admitted in the interest of justice.”

As stated earlier it is clear that the commissioner did apply his mind to the issue of the hearsay evidence which had been presented and in this regard he recognised that he was vested with the discretion in the interest of justice whether or not to accept such hearsay evidence. In this respect the commissioner reasoned as follows:

“Having regard to the factors numerated in section 3 (1) (c) of the LEAA, together with the objective facts regarding the presence of the employers it tan truck at the premises of Ground Zero and delivery of the manifold to the premises of Ground Zero , it is clear that the above mentioned hearsay evidence should be admitted “in the interest of justice”.



-----LABOUR NEWS-----

Conclusion

In the court's view the commissioner cannot be faulted for unreasonableness in the manner in which he assessed the evidence before him including how he came to the conclusion that the third respondent had discharged its onus of showing on the balance of probabilities that the applicants were guilty of theft of the third respondent's property.

For the above reasons the application stand to be dismissed.

