REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 535/2010

In the matter between:

RAMBAR CONSTRUCTION (PTY) LTD t/a RIXI TAXI	**Applicant**
and	
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER ELSABE MAREE	**Second Respondent**
GALI LEONARD SKHOSANA	**Third Respondent**

Heard on: 03 November 2011

Delivered on: 20 January 2012

JUDGMENT

BOQWANA AJ

Introduction

[1] This is a review application in terms of section 145 read with section 158(g) of the Labour Relations Act[1] ('the LRA') to review and set aside the arbitration award made by the second respondent ('the commissioner') on 07 November 2009 under case number GATW5129-09. The commissioner found that the dismissal of the applicant was substantively and procedurally unfair and ordered the applicant to pay the third respondent compensation in the amount of R81 900 representing the third respondent's remuneration for the period of 9 months.

[2] The applicant received the arbitration award on 23 November 2009 and brought a rescission application in terms of section 144 of the LRA under the auspices of the first respondent ('the CCMA') on 07 December 2009.

[3] On 26 January 2010 the applicant was advised by the CCMA that its application for rescission was defective as both parties were represented during the arbitration and thus not in compliance with section 144. The applicant was accordingly advised by the CCMA that the correct procedure would be to refer the matter on review before this court.

[4] The review application was preceded with the condonation application. The condonation application is unopposed. I will deal with both condonation and the review applications in this judgement.

Background facts

[5] The third respondent was employed by the applicant since 1978 until his dismissal on 21 April 2009.

[6] The applicant provided transport services to the public via a metered taxi service in and around Pretoria. The third respondent was responsible for management of the vehicles, personnel and looked after administration systems.

[1] Act No 66 of 1995

[7] The applicant had 20 drivers working with each vehicle equipped with a tracker system to monitor the movements of the vehicle and to ensure that the drivers recorded kilometres that corresponded with monies collected.

[8] It was allegedly the third respondent's duty to ensure that this was done and to bank the monies. This was a very important management tool to ensure that drivers do not pocket the money.

[9] On 26 February 2009 the applicant was called into a meeting with the manager and the owner of the applicant where his performance was discussed. On 20 March 2009 it was determined that his performance had not improved and a disciplinary hearing was then called. A disciplinary hearing was then held and a final written warning was issued.

[10] On 8 April 2009 an email was sent to the third respondent informing him what was expected of him.

[11] A month later another disciplinary hearing was scheduled, where a CCMA commissioner was asked to preside over and the third respondent was dismissed for misconduct.

[12] The third respondent referred his dismissal to the CCMA.

Arbitration award

[13] The commissioner found, inter alia, that:

'38. Despite this rather long-winded explanation the evidence as to how the applicant failed to meet a performance standard was vague to the extreme'

39. An arbitration is a hearing *de novo* where onus of proof rests with the respondent to prove, on a preponderance of probabilities that the applicant failed to meet a performance standard.

40. It is simply not good enough to merely refer to "all the documents" that were given to the chairperson at the disciplinary hearing.

41. It is also not good enough to refer in vague terms to “bad service”. The details of the “bad service” needs to be spelled out and needs to be supported by proper service.

42. In view of this I cannot find that the applicant failed to meet a performance standard.’

[14] In essence the commissioner found proper evidence was not led to support the claim of poor work performance. In view of her findings in that regard, the commissioner did not see a need to determine whether the guidelines set out in schedule 8 of the Code of Good Practise of the LRA were followed as that exercise would be superfluous. The commissioner ordered compensation to the tune of R81 900 equivalent to R9100 (third respondent’s salary) x 9.

Grounds for review

[15] In summary, the applicant alleges that the commissioner 'misconducted' herself in the hearing of the arbitration and committed gross irregularity in that:

- Her arbitration award does not correlate with her findings of fact and is not justifiable in relation to the evidence that was before her;
- She did not apply her mind to the evidence before her;
- She exceeded her powers in making such an order and reaching such a conclusion;
- Her finding was unreasonable in relation to the evidence that were before her and issues presented to her; and
- The decision reached by the commissioner is one that a reasonable decision maker would not have reached.

[16] The applicant further elaborated on its grounds for review by stating that the commissioner disregarded evidence before her which clearly showed that there was a clear performance standard, which the third respondent failed to adhere to.

[17] The applicant alleged that emails exchanged between the third respondent and one James Chapman (‘Chapman’) clearly substantiated this.

[18] The applicant further submitted that the commissioner had been referred to a bundle during the arbitration proceedings which contained summaries of reports but 'clearly' failed to take this 'evidence' into account. An allegation is made against the commissioner that she failed to take into account variances and also gave no cognisance to the fact that the third respondent during the period of 1 March 2009 up to 07 April 2009, a period of 38 days only checked and verified 13 days worth of reports, approximately 34% of the work.

[19] The applicant dealt with SYTRAX Reports since 2005 and therefore knew what was expected of him. During May 2008 and February 2009 SKYTRAX reports were administered by another employee of the applicant but the third respondent specifically wanted it moved back to him. The applicant was given a month to re-acquaint himself with SKYTRAX system. When investigations were done it was found that checks were not done by the third respondent.

Condonation application

[20] Section 145(1)(a) of the Labour Relations Act 66 of 1995 ('the LRA') requires a party wishing to review arbitration proceedings in which it alleges there is a defect, to file such application within six weeks of the date upon which the arbitration award was served on that party. Section 145(1A) however allows for the condonation of the late filing of the application.

[21] The test for good cause is well established:

'The approach is that the court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are

immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused…'[2]

[22] In respect of condonation for the late filing of a review application the applicant is required to provide a 'compelling' explanation and show that he has 'strong' prospects of success.

[23] The applicant's grounds for condonation for failing to institute these proceedings within six weeks are set out in his founding affidavit.

Extent of the delay

[24] The applicant does not set out the degree of the delay in its founding affidavit however, it has stated that it received the arbitration award on 23 November 2009. The review application should accordingly have been lodged by 04 January 2010. The review application was referred to this court on 10 March 2010, which means the review application was lodged approximately 9 weeks late.

Explanation for the delay

[25] On 07 December 2009 the applicant lodged a rescission application with the CCMA alleging that it was and still is of the belief that the arbitration award was erroneously sought and made.

[26] On 26 January 2010 the applicant was informed by the CCMA that its rescission application was defective and that the correct procedure would be to lodge a review application in this court.

[27] That is the only explanation given as a reason why the review application was brought outside the six weeks period. Other than that the applicant alleges that in keeping with previous judgements of this court, (which judgements were not submitted by the applicant) the calculation of the six weeks period should start from the day the CCMA notified the applicant that the rescission application was defective. I must mention that it is not the CCMA that referred a dispute to this court

[2] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at –para 10. See also *Foster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC) at 369C - E; and *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 B - F.

but it simply informed the parties *via* a letter that the correct procedure was to bring a review application in terms of section 145 of the LRA.

[28] Apart for the explanation regarding those two dates mentioned above, no other explanation is offered by the applicant as to why it took so long to lodge a review application. I find this explanation quite thin as it does not deal with the period after the applicant was notified by the CCMA that the rescission application was defective and that the correct procedure was bringing the matter on review.

[29] The review application was not brought until 10 March 2010, which was a further delay of approximately 6 weeks after being nofitied of the defect by the CCMA. During the rescission application to the CCMA, the applicant was allegedly represented by an Employer's Organisation. It is quite telling that an Employer's Organisation that ought to be *au fair* with the prescripts of the LRA would advise their member to lodge a rescission application when there was absolutely no basis to do so. In any event that process did not proceed after the CCMA letter.

[30] Even if the court were to accept the applicant's submission that the court should start counting the days from the date of the CCMA letter the applicant still failed to bring the review application at least immediately after 26 January 2010 and failed to offer any kind of explanation for that delay.

[31] When the court engaged Ms Duvenage, who appeared for the applicant on this issue, she attempted to give evidence from the bar stating that her offices were approached by the Employer's Organisation to assist with the matter and establish if there were grounds for review. She stated that her office was asked to peruse the bundle which was quite extensive. I obviously cannot allow counsel to give evidence in the manner that Ms Duvenage sought to do. Her 'explanation' from the bar in any event still lacked any sufficient detail that could be accepted by the court. Ms Duvenage failed to state when her office was approached and what steps she took to bring this application as soon as she could after instructions were given to her. The court still does not know what happened between 26 January 2010 and 10 March 2010.

[32] In my view condonation application is capable of being dismissed simply on this basis alone. I nevertheless will also deal with the merits of this case in order to ascertain whether any prospects of success do exist in this case coupled with the grounds for review that have been brought before me.

Merits of the case

[33] The difficulty that the applicant is faced with in its case is that it acknowledged that it made an error in leaving out material evidence in its rescission application to the CCMA. The rescission application was filed with the record from the CCMA. Mr Mphepya who represented the third respondent referred to the concessions made in the rescission application. Although it is not the CCMA's rescission application that is to be determined by this court, the averments in those papers are quite instructive.

[34] The witness at the arbitration hearing was Kevin Cromhout ('Cromhout'). Cromhout acknowledged in his supporting affidavit to the rescission application that he caused the error by not submitting all the evidence of this matter to the commissioner during the arbitration process as a result of his ignorance and inexperience regarding arbitration process. Cromhout averred therein as follows:

'2.1 I only had copies of what I thought would be sufficient to proof (sic) my case without going into too much detail.

2.2 I did not have ALL the above documents nor any other witness, because I am not familiar with the Arbitration process and I did not know exactly what was required from me. I thought that I was properly prepared, but in terms of the law of evidence, as I understand it from the commissioner's award, it is clear that I totally misunderstood the process and I did not submit ALL the evidence that I was supposed to.

2.3 I now see that my failure to submit all the elaborate and direct evidence caused the employer to suffer unnecessary and unjust prejudice in this matter and I wish to rectify it since I have learned from the Arbitration process and I wish to submit all the evidence so that the honourable commissioner can make a ruling which is based on ALL the facts. Due to my error the honourable commissioner did not have all the facts to make a fair ruling. I

want to rectify this by submitting all the facts, because I believe that she would come to a different conclusion if she has all the necessary evidence and facts at her disposal.'

[35] Cromhout goes on further to say in his supporting affidavit to the rescission application:

'We were of the opinion that because he was from the CCMA (i.e. the chairperson of the disciplinary inquiry), the mere fact that he did the disciplinary enquiry and outcome, would be sufficient for us and CCMA to agree with him, irrespective of what the outcome was. In this way we felt that we would have eliminated all risk for a possible unfair dismissal'. (my own insertion)

[36] The applicant went on to introduce 'new evidence' that it erroneously omitted whilst Cromhout was presenting his evidence.

[37] From this it is clear that the commissioner was not presented with the evidence that would support the applicant's case at the arbitration. Having looked at Cromhout's concessions above, it really baffles my mind how the commissioner can be criticised for failing to take into account any of the material evidence when that was not presented before her by Cromhout as he himself acknowledged. The applicant sought to introduce new evidence *via* a rescission application. By doing so it is clear to me that the applicant sought to have 'a second bite at the cherry' by referring the matter for rescission on the basis of 'an obvious error in the facts that is reflected from the proceedings.' Be that as it may the rescission application did not proceed as the CCMA correctly advised the applicant that the application was defective. Section 144 of the LRA provides no grounds for a rehearing of the matter on the basis of a party's 'error' or omission to present material evidence before the commissioner.

[38] Coming back to the application before me, although concessions similar to those in the rescission application have not been made in the review application the applicant also seeks to introduce new evidence in its founding affidavit by making averments and attaching documents which were never presented to the commissioner as evidence in an attempt to convince this court that the commissioner committed gross irregularity by omitting such evidence.

[39] I have read the CCMA transcribed record of the proceedings and I found very little evidence focusing on the reason for the dismissal of the third respondent. The third respondent was charged with not completing the SKYTRAX admin and when inspected it was found that it was seven days behind. Due to not checking the SKYTRAX, management took the SKYTRAX function away from the third respondent, which showed five other staff members to be falsifying records within two days. This allegedly resulted in continuous performance below standard despite previous disciplinary hearing was held on 26 March 2009, failing to carry out instructions of management, dishonesty concerning work done and poor work performance which cost the applicant financially as a result.

[40] Cromhout's evidence focused mainly on the final written warning culminating from the disciplinary hearing previously held. The commissioner correctly cautioned that the arbitration hearing was about the dismissal dispute and not a rehearing of the case where the final written warning was issued against the third respondent. Although the fact that the third respondent had been given a final warning before is an important consideration, it does not substitute the need for the applicant to provide proper evidence as to why the third respondent was dismissed. The commissioner did not disregard the fact that there was a final written warning she simply said that, that was not the dispute before her. Surely the commissioner could not simply confirm the fairness of the dismissal based on a previous a final written warning without sufficient evidence led on the reasons for the actual dismissal.

[41] Ms Duvenage who appeared on behalf of the applicant was at pains in trying to convince the court that the employer was entitled to expect satisfactory conduct and went into some detail explaining that there were facts to show that the third respondent had performed poorly. It may be so, but that is the evidence that should have been led at the arbitration.

[42] The fact that the applicant spent time elaborating on evidence in its founding affidavit that was not placed before the commissioner does not help its case at all. It is well and good to make allegations and good submissions on applicable principles relating to poor work performance, that however should have been placed on evidence before the commissioner. Parties cannot come before court with fresh

evidence no matter how good it is and hope that the court would find in their favour when that evidence ought to have been brought and tested at the arbitration level by the commissioner. Ms Duvenage referred me to some snippets of the evidence where Cromhout made reference to SKYTRAX but that did very little to demonstrate reason for dismissal.

[43] It is also not enough for parties to place a bundle of documents before the commissioner and hope that the commissioner will in his or her wisdom be able sift through the bundle of documents to try and ascertain what the case is all about without properly being referred by a party relying on a document in the said bundle. Reference to an 'email attached to the bundle' without specifically mentioning which email and where it is found in the bundle is not helpful either as there could be a few emails in the bundle. Specific evidence must be led to afford the other party a chance to comment on specific allegations.

[44] If the commissioner simply took into account a bundle of document without any specific evidence being led, the commissioner would in my view be acting irregularly as he or she would be taking into account documents that the other party to the dispute had no opportunity to comment on. Further there might a danger where a commissioner may incorrectly place the content of documents out of context.

[45] It does also appear that at the disciplinary hearing the third respondent was dismissed for misconduct but the case brought against him at the arbitration seemed to be that of poor work performance. The applicant failed to lead evidence on charges of misconduct other than on the sub charge of poor work performance. One of the sub charges was that the third respondent was dishonest in carrying out the work done. That is a very serious allegation which ought to be supported by evidence. That however did not happen.

[46] It appears that evidence in the disciplinary hearing was led by a different witness Chapman whilst Cromhout who took no part at the disciplinary hearing gave evidence at the arbitration. This gives more of a reason why the evidence would need to be comprehensively led and documents handed in explained to the commissioner.

[47] Further, the applicant cannot expect the commissioner to simply accept the finding of the chairperson of the disciplinary hearing just because the chairperson of the inquiry was a CCMA commissioner asked by the employer to chair the disciplinary hearing. In *Sidumo* the court held as follows:

'It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing "discretions". Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.'[3]

[48] It is trite that regardless of what transpired at the disciplinary enquiry an arbitration hearing is a hearing *de novo.* This means that the employer has the onus to prove at the arbitration, on a balance of probabilities that the employee's dismissal was substantively and procedurally fair in terms of section 192(2) of the LRA.

[49] In order succeed in a review application the applicant must show that the commissioner's decision is that which a reasonable commissioner could not reach. In my view the applicant has not been able to do that. In that regard, there are no prospects that the review application would succeed.[4]

[50] The task I have is to ensure that the decision taken by the commissioner falls within the bounds of reasonableness.[5]

[51] The commissioner's award has not been shown to be so unreasonable that no decision-maker could have reached it as illustrated above. The merits of the application for review are therefore not good.

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC) at para 75.

[4] *Sidumo* above (2007) 28 *ILJ* 2405 (CC) at para 109; and *Fidelity Cash Management Service v CCMA and Others* (2008) 29 *ILJ* 964 (LAC) at para 103.

[5] *Sidumo (supra)* at para 118 - 119.

[52] On the issue of costs I see no reason why costs should not follow the cause.

[53] In the circumstances I make the following order:

1. The condonation and the review applications are dismissed.

2. The applicant is ordered to pay the third respondent's costs.

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BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

For the applicant: Ms Duvenage, Duvenage Attorneys, Pretoria

For the third respondent: Mr K F Mphepya, Legal Aid South Africa, Johannesburg