IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2524/13

In the matter between:

MZUKISI MBAWULI **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

THEMBEKILE NSIBANYONI N.O. **Second Respondent**

PICK 'N PAY RETAILERS (PTY) LTD **Third Respondent**

Heard: **15 February 2017**

Delivered: **08 June 2017**

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside and arbitration award under case number GAJB 5282-13 dated the 17th October 2013. The award by the second respondent (the Commissioner) found that the dismissal of the applicant for insubordination was substantively fair.

[2] The applicant was dismissed following a disciplinary hearing in relation to four charges. At the arbitration, the finding that the dismissal was substantively fair was only in relation to the following charge: *"Insubordination in that you did not respond to a lawful instruction at the time of the audit Menlyn Clothing Store"*.

[3] Prior to his dismissal, the applicant was employed by the third respondent (the company) as an internal auditor. The instruction referred to in the charge was from his manager, one Makgatho, who had sent him and his colleague, Ribisi, emails on the 7, 10, 11 and 12 December 2012.

[4] The applicant and Ribisi had conducted an internal audit of the company's Menlyn store and had submitted a report regarding this on the 28 November 2012. Prior to this Makgatho had sent an e-mail to the applicant, Ribisi and others instructing them to check compliance with Occupational Health and Safety (OHS) in the clothing audits.

[5] In regard to a query to the applicant and Ribisi, Makgatho sent the following emails:

5.1 On Friday 7 December 2012 at 12:07 pm an email containing extracts of the report stating: *"Kindly check this finding for Menlyn and report back to me with the correct info. The finding is also noted in Cresta, however there is nothing said about the below on the working paper for Menlyn.";*

5.2 On Friday 7 December 2012 at 14:09 pm a further email was sent to them with the following question: *"Was the initial report checked prior to sending?"*

At 02:11 another email stating *"Was OHS fully implemented in this store?"*

5.3 On Monday 10 December 2012 at 09:18 am Makgatho sent Ribisi and the applicant the following message: *"I am still awaiting your response"*

5.4 On Tuesday 11 December a further email stating *inter alia "I am still waiting your response."*

5.5 On Wednesday 12 December 2012 at 08:55 am a further email was sent to them stating: "*This is the 3rd e-mail I am sending, may I have the response by 13h00 today please*."

[6] The evidence before the Commissioner was that the applicant sent an email to Ms Ribisi, copied to Makgatho at 17:01 pm on Friday the 7th of December which stated "*Have a look I have made changes.*" Attached to the email was the Menlyn draft report which contained a comment from Makgatho contained in the report which she had sent attached to her earlier e-mails to the applicant, and Ms Ribisi.

[7] It was applicant's evidence before the Commissioner that on the 4th of December he had logged a problem with his laptop at the Company's help desk explaining he was experiencing the following problems:

"…the computer freezes and requires to be re-booted and when the computer is locked, it needs to be rebooted in order to reconnect. . . "

[8] The applicant told Makgatho that he was having problems with his laptop, which problems included receipt of emails:

"I even spoke to Kgadi about my computer to say you know what, even if you guys are sending mails to each other here in the office, I don't get my emails as you are sending them. I would get my emails the following day or uh, uh the following Monday and I don't know what causes that problem. And I will say maybe this computer is even old, you see. So that, that, that's when I reported my computer, because Madam Commissioner what I said was that not that I don't get e-mails, but if you sent emails now, you will send to both of us maybe to me and you, you would receive yours today and I wouldn't, I wouldn't receive mine now. Until maybe you phone (inaudible) I haven't received it yet. Maybe two, three days, or one day it. It, it was depending, it was not like something I could really track to say it happened after how many hours or how many day. . . "

[9] The Commissioner stated the following in her Award with regard to the insubordination charge:

"5.6 What is however disturbing is that Mokgatho attempted to bring the errors to the attention of the applicant on numerous occasion yet she did not get any response. The applicant, in his attempt to justify why he did not respond to the emails sent him pulled out an excuse that not only is surprising but improbable and absurd for the following reasons:

5.7 Anyone who can access emails knows that if the laptop freezes, one cannot receive emails, however when the laptop is fixed, all the emails are received by the user. The applicant stated he received some emails but he did not receive the emails of Makgatho. This is highly improbable, it is my finding that the applicant deliberately ignored the emails of Makgatho for reasons only known to himself.

> 5.8 The applicant, on the balance of probabilities, deliberately ignored responding to the emails of Makgatho and this boils down to failure to obey a reasonable instruction. This on its own goes to the core of the relationship between himself and his Manager and has rendered the continued relationship intolerable." (Emphasis added.)

[10] The statement that the laptop was 'fixed' is not supported by the record in this matter. The company's IT infrastructure manager, Vally, testified that a recordal that a problem had been fixed could mean of two things:

> "its either completed as in the issue has been fixed and the (inaudible) has been closed or after numerous attempts to contact the user and because we have certain service level agreements starting to the system, we cannot keep calls (inaudible) indefinitely. So if we made a reasonable attempt to contact the user and there is no contact made eventually the call would be closed."

[11] Vally further testified that he had not checked with his staff member Riaan Botha if the problem logged by applicant had been resolved. He also testified that the company did not have the capability to track when mail was opened and when it was read. He was asked to consider the records during cross-examination and he testified as follows:

> "Riaan, you can see he logged the update at the, at 4:50, called user, ring, no answer, he tried again contacting him on the 10th, called user, ring, no answer. Call ring, no answer again on the 11th, and that's when he took action (inaudible) close the call, made reasonable attempt to contact the user and called user on cell and phone line, no answer, the call goes straight to voicemail, the number (inaudible) call to be closed. So no physical action was taken to rectify the issue (inaudible)."

[12] Vally proceeded to confirm that no action was taken to fix the laptop. In my view, the Commissioner made a material error in surmising that that the computer was

fixed. She also failed to give weight to the following evidence elicited from Makgatho during cross-examination:

> "MS KGADI MAKGATO: Normally when, when, normally when I send the e-mails to them when Mzukusi phoned me telling me that Denayo phoned him, when they get the emails they will phone each other and communicate about the e-mails that was sent to them and then one of them will respond.
>
> APPLICANT REPRESENTATIVE: So on the 12th, the applicant found uh had found out that there's emails where you want certain information. He then picks up the phone and says listen I believe there's emails, I've got computer problems. He, he told you that at least, we agree on that part.
>
> MS KGADI MAKATO: Yes, he said he has computer problems.
>
> APPLICANT REPRESENTATIVE: Okay, and what else did you discuss with him then in the conversation, in that conversation after he told you he has computer problems?
>
> MS KGADI MAKGATO: I said to him okay it's fine."

[13] Makgatho also conceded that she did not know if his problem with his laptop had been fixed but only that the call to the help desk was closed.

[14] On Friday 14 December 2012, two days after Makgatho told the applicant that "*it was okay*" regarding his computer problems, the applicant received his notice of suspension and notice of the charges against him.

[15] This Court must consider whether the award should be set aside, given the stringent tests for review under the LRA. The oft quoted dictum in *Herholdt v Nedbank Ltd* (*COSATU as Amicus Curiae)*[1] is apposite:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to

[1] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

> amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[16] The company was at pains to show that the applicant did receive at least some emails during the period and sent one on 7 December 2012 to Ribisi, copied to Makgatho. However, this is consistent with applicant's testimony that that he was receiving some emails and not others. The Commissioner's finding was premised on her notion that his laptop problem was fixed. This was not born out by the company's own evidence at arbitration. In my view the effect of this factual error, and the Commissioner's consequential finding that the applicant deliberately ignored the emails from his manager, render the outcome of the award unreasonable.

[17] In the premises, the award stands to be reviewed and set aside. The record before me is extensive and I see no reason to remit the dispute for re-hearing.

Order

[19] In all the circumstances, and taking into account the applicant seeks the primary remedy of reinstatement, I make the following order:

1. The Award under GAJB 5282-13 is reviewed and set aside and substituted as follows:

   "1.1. The dismissal of Mzukisi Mbawula was substantively unfair;

   1.2 Pick 'n Pay Retailers (Pty) Ltd is ordered to retrospectively reinstate Mzukisi Mbawula into his position as of the date of his dismissal."

3. The third respondent is to pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv. P. Somi

Instructed by: Du Randt Du Toit Pelsner Attorneys

For the First Respondent: R.M Carr of Bowman Gilffillan Inc.