THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JR 515/2019

In the matter between:

PRODUCE HUB (PTY) LTD	**Applicant**
and	
MATHEBULA, NORMAN	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
KARSTEN, GREGORY	**Third Respondent**

Heard: **02 September 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 07 September 2021.**

LABOUR COURT

Summary: Review application – award reviewable – remitted for a fresh hearing

Application to introduce a further supplementary affidavit with a new ground of review – application withdrawn – costs

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JUDGMENT

COETZEE AJ

[1] The applicant seeks to review and set aside an arbitration award dated 26 February 2019 in which the first respondent ("the Commissioner") awarded the third respondent compensation equal to six months' salary.

[2] The applicant is unhappy with the award.

The introduction of an additional supplementary affidavit

[3] The applicant applied for the introduction of a further ground of review in the form of a second supplementary affidavit. The second supplementary affidavit was delivered after the close of pleadings and the applicant applied for leave to do so.

[4] The third respondent opposed the introduction of the second supplementary affidavit on various grounds based upon the Rules and the common law.

[5] The applicant at the commencement of the hearing withdrew the application.

The review

[6] The applicant conducts the business of staging a fresh produce service with a strategically central produce handling and value facility.

[7] Fresh produce arrives daily handled amongst others by the use of pallets. Pallets move in and out of the facility.

[8] A loss of pallets became evident to the applicant after Zelda Hobbs ("Hobbs") one of applicant's witnesses, drove by the applicant's premises during a

LABOUR COURT

weekend and noted that one of its senior managers, Mr Naidoo, unlawfully was removing pallets.

[9] Naidoo, the thief manager, stole the pallets apparently at the rate of between sixty and one hundred pallets at a time every third weekend when he was on duty. On those occasions he was in charge of the premises and had access with his own key.

[10] Naidoo sent an email to the third respondent confirming that he had removed and stolen the pallets and also said that in his view the third respondent would have been unable to pick up a loss of that number of pallets after a weekend had he been walking through the premises to check on the pallets.

[11] The applicant investigated and detected a substantial loss of pallets in the form of more than six thousand pallets over slightly more than a year.

[12] The applicant suspected the third respondent of being part of the unlawful removal of pallets and subjected him to a polygraph test which resulted in an outcome that says there was no deception on the part of the third respondent.

[13] The Board of directors of the applicant was dissatisfied with the situation and in a Board meeting instructed the managing director to deal with the third respondent on the least damaging way for both the applicant and the third respondent.

[14] The applicant's managing director ("Jaco") then called upon the third respondent and put him before an election. The third respondent could either accept a voluntary severance package that would remain open for a specified period of time or face a disciplinary enquiry.

[15] When the third respondent, after reflection, indicated to Jaco that he would not accept the voluntary severance package, Jaco indicated to him that he would "go for his throat". In evidence Jaco explained that all that he meant by that was that he would proceed with the disciplinary enquiry.

[16] The third respondent lodged a grievance with regard to this threat and the grievance was resolved with a finding that Jaco acted improperly.

LABOUR COURT

[17] Within a day or two after the outcome of the grievance procedure, the applicant suspended the third respondent, put him through a polygraph test and called him into a disciplinary enquiry.

[18] The third respondent then asked whether the voluntary severance package was still open and was informed that it had expired.

[19] The allegation of misconduct reads as follows:

> "Breach of fiduciary duty and/or gross negligence – in that you failed, without proper cause to perform your duties with the proper care required in that as Chief Operations Officer, you have failed to responsibly manage assets the company has entrusted to you with, in that company property (including but not limited to: pallets, crates etc) has gone unaccounted for while under your care and responsibility".

[20] He was found guilty in the disciplinary enquiry under the auspices of an external chairperson and was dismissed.

[21] In the arbitration the applicant's witnesses testified that the third respondent was the responsible person for the assets that included the pallets. He was in particular responsible for the pallets and the customer stock. As a result of the disappearance of more than six thousand pallets and some customer stock, the applicant submitted that he was grossly negligent.

[22] The evidence about the loss of pallets was only challenged in respect of the number of pallets but not the fact that pallets were lost in one way or another amongst which was that it was stolen by one of the applicant's managers.

[23] The third respondent did not indicate his quantification of the number of lost pallets.

[24] It is common cause that the third respondent had to implement controls and measures to control the incoming and outgoing pallets and stock.

[25] One way in which the third respondent had to control the pallets was with a daily walk about to see whether he could observe any discrepancy in the

LABOUR COURT

number of pallets at the premises. The pallets were stacked over 4000 m² of which 2000 m² was under a roof.

[26] The third respondent testified that he did not do a daily walk about but did so infrequently. Part of the reason was that he had a knee injury and had to undergo surgery on more than one occasion.

[27] The third respondent admitted to not doing daily stocktaking.

[28] The third respondent admitted that he put in place some measures to control stock losses but that he had not done so in respect of the pallets. In respect of the pallets, he installed a personal camera at some point in time. The stock loss, however, was discovered when Hobbs saw Naidoo stealing the pallets.

[29] The Board warned the third respondent to carefully watch Naidoo, as Naidoo had previously stolen steel from the applicant. It is common cause that the third respondent did not put any controls in place to check on Naidoo. He allowed Naidoo free access to the facility every third weekend to manage the facility.

[30] The third respondent on occasion received from Naidoo cash. According to Naidoo he had sold some pallets and the cash was the proceeds. He did not produce a receipt from the purchasers or any documentation regarding the sale. The applicant had no way to check on whether the sale price was market related and whether Naidoo had paid in all the proceeds. The applicant testified that the correct procedure was to document all transactions.

<u>The grounds for review and analysis</u>

[31] The third respondent in oral argument submitted that where the conduct of the third respondent could be criticised, it would constitute a performance issue and not misconduct in the form of negligence or gross negligence.

[32] This submission is without merit as the third respondent never testified that he could not do what was required of him. He defended his position on the basis that he was not negligent and did what was required of him.

LABOUR COURT

[33] The third respondent, as the applicant's Chief Operating Officer, was responsible for the pallets and stock. He was charged with gross negligence in failing to ensure proper controls over the pallets and other stock in the form of produce that the applicant stored on behalf of some of its customers.

[34] The third respondent admitted to not doing daily stocktaking as he was supposed to do. He also did not do the daily walk about through the premises to see if there were obvious shortages of pallets. In respect of the pallets, he neglected his duty to develop and install control measures to protect the pallets.

[35] The third respondent failed to take measures to protect the applicant against possible losses where Naidoo was concerned, notwithstanding having been forewarned.

[36] This case primarily turns upon whether the conduct of the third respondent constituted gross negligence or negligence.

[37] The Commissioner did not analyse the evidence to establish whether the third respondent was negligent. He merely concluded that the applicant did not show in evidence that the third respondent was negligent or grossly negligent. The Commissioner out of hand rejected the evidence of the three witnesses that testified on behalf of the applicant.

[38] A ground for review is that the Commissioner criticised the evidence of the three witnesses that testified for the applicant as being biased. The Commissioner did so solely because one witness was the managing director (Jaco), and another also a director.

[39] The Commissioner gave no reasons why the third witness was biased.

[40] The Commissioner never analysed their evidence to show how they were biased.

[41] The finding of the Commissioner that the two witnesses as directors of the board of the applicant were biased merely because they were directors is unfounded. He had to judge the evidence on its merits. The same applies to his finding that the disciplinary enquiry was a sham because the applicant

LABOUR COURT

merely wanted to revenge the grievance outcome and decided to dismiss the third respondent anyway with a concocted disciplinary enquiry.

[42] There is also nothing wrong for an employer to give an employee an election to take a voluntary severance package or to face a disciplinary enquiry provided there are grounds for a disciplinary enquiry. This is exactly what happened here. The applicant's conduct does not constitute a sham. When the Commissioner took this view, he closed his eyes for the evidence tendered on behalf of the applicant. The Commissioner concluded that the applicant put the third respondent before a choice to accept the package or *to be fired*. That was not the evidence.

[43] The Commissioner's finding that the third respondent was not the only responsible person is not based upon a conspectus of evidence. This finding is not based upon the evidence.

[44] The third respondent contended that on occasion when he and Jaco together walked through the premises, Jaco also did not pick up that pallets had been removed. Therefore, he, the third respondent, could not be blamed for not noticing it on the occasions he did a walk about. This evidence must be seen against the background that Jaco only occasionally visited the premises. Also, third respondent did not allege that Jaco was present after a weekend when Naidoo was in charge and had removed pallets.

[45] The Commissioner failed to have regard to the evidence and simply concluded that the applicant's witnesses were biased and not credible. This constitutes reviewable conduct.

[46] A further ground is that a witness for the applicant (Mr Musset) was interrupted by the Commissioner when he wished to testify about the loss of customer stock. The Commissioner was of the view that the case primarily turned upon the theft of the pallets and not on any stock losses. The applicant in the supplementary affidavit raised this issue that was not dealt with by the third respondent in the answering affidavit. The evidence that was tendered was that the stock in the cold rooms did not correlate with the stock on the inventory. Before he could elaborate, the Commissioner *mero moto* stopped

LABOUR COURT

him as according to the Commissioner the allegation of misconduct did not cover this aspect.

[47] The allegation of misconduct clearly relates to all stock and assets including customer stock. The evidence as to the loss of customer stock is very relevant to at least the degree of negligence. The Commissioner's excluding of this evidence and the fact that he excluded in his finding any reference to the loss of customer stock constitutes valid grounds to review the award.

[48] A curious aspect not raised by the parties was that the third respondent at the commencement of the arbitration proceedings stated that he wanted compensation equivalent to five month's remuneration if the Commissioner were to find that his dismissal was unfair.

[49] The Commissioner awarded him not five but six month's remuneration without the asking. This has not been explained. It is not for the Court to consider this aspect.

[50] The award is reviewable and should be set aside.

[51] The applicant submitted that the Court is in a position to substitute its own finding for the award.

[52] It is clear that the Commissioner should have found the third respondent guilty of misconduct in respect of the lack of control over the pallets. An important aspect to determine whether the misconduct justified a dismissal, lies with the evidence on discrepancies with regard to the customer stock and the third respondent's part therein.

[53] This Court is not in a position to substitute its own finding in the absence of evidence in respect of the evidence that Musset was prevented from giving as it may be material to whether the third respondent acted grossly negligent and whether his dismissal was fair..

Costs

[54] The third respondent submits that the applicant should pay the costs of the withdrawn application to introduce a second supplementary affidavit. The

LABOUR COURT

more so because the applicant realised that the application had no merit and then withdrew the application.

[55] The applicant asks for a cost order in the review application because opposing the review had no prospect of success. The conduct of the third respondent also warrants a cost order. Mr Orton submitted that the third respondent stated that if he were aware that stock went missing, he would have pleaded guilty. In the arbitration he admitted to knowing that stock went missing. That warrants a cost order according to Mr Orton. In oral argument Mr Goldberg submitted that the third respondent had a right to defend an award in his favour, irrespective of the merits. Having regard to the relevant factors each party should pay their own costs, apart from the costs of the application to admit a second supplementary affidavit.

Order

[56] I make the following order:

1. The applicant's second supplementary affidavit is struck out with costs as it was withdrawn.

2. The arbitration award dated 26 February 2019 with case reference GAJB 26522018 is reviewed and set aside.

3. The matter is remitted back to the second respondent to be determined by a Commissioner other than the first respondent.

F. Coetzee

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the applicant:	RJC Orton of Snyman Attorneys
For the First Respondent:	A Goldberg of Goldberg Attorneys

LABOUR COURT