THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no: JR 2963/19

In the matter between:

UNIVERSITY OF WITWATERSRAND **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER FAIZEL MOOI **Second Respondent**

NUMSA OBO MAKGWANYAPE RAHAB MOEMI **Third Respondent**

Heard: 07 November 2024

Delivered: 15 November 2024

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant, the University of the Witwatersrand (the university), seeks to review and have aside an arbitration award wherein the dismissal of the third respondent's member (the employee), was found to be substantively unfair whereafter, the employee was awarded retrospective reinstatement.

Background facts

[2] The employee commenced her employ with the university in 1989 and at the time of her dismissal, on 19 June 2019, she occupied the position of a cleaning supervisor earning R15 000-00 per month.

[3] The employee was dismissed for the alleged theft of a cellular phone alternatively unauthorised possession of the phone.

[4] At proceedings before the second respondent, arbitrator, the following facts were common cause;

4.1 the employee retrieved a cellular phone she found in the female toilets,
4.2 she did not hand the phone into security either at the time she found the phone or when leaving the employer's premises at the end of her shift,
4.3 the following day, before and during the course of the employee's shift, the employee did not inform anyone that she was in possession of the phone,
4.4 it was only at the end of the employee's shift that the university became aware of the fact that the phone was with the employee and was at her residence,
4.5 another cleaning supervisor, on the instruction of the university, accompanied the employee to her place of residence to retrieve the phone,
4.6 on return of the phone, it was discovered that the phone's sim card and memory card were removed and all pictures stored on the phone were

deleted. The sim card and memory card were nevertheless simultaneously but separately returned with the phone,

4.7 the phone was returned to the rightful owner who was a visiting student from another province.

[5] In explaining her conduct, the employee testified that she found the phone in the bathroom situated in the science block. She immediately took it to the science block security room, however there were no security officers in the room and therefore she kept the phone with her. During the course of the day, she received a call informing her that her niece had been involved in a car accident. The employee said she was traumatised by the news and as a result forgot to hand the phone to security when leaving the employer's premises at the end of her shift. The following day she used a different handbag to work and forgot to transfer the phone from the handbag she used the previous day. The phone the employee took possession of, was similar to the phone she had, and it was possible that her son found the phone in her handbag and when playing with phone, removed both the sim and memory card and deleted all the photos from the phone. In the minutes to the employee's disciplinary enquiry, it is recoded that the employee's son in question was in fact 21 years old. This fact was not disputed in argument before the court.

[6] At arbitration there was a dispute about whether the employee approached the security office the following day and informed them about the phone or whether, as was the university's version, the employee was approached first and when questioned about the missing phone, the employee 'confessed' to the misconduct.

[7] In his findings, the arbitrator accepted the common cause facts, however found that the university only established a suspicion that the employee stole the phone or was in unlawful possession of same. This according to the arbitrator did not, on a balance of probabilities, establish that the employee was guilty of either of the two offences.

[8] The arbitrator's finding on this score in underpinned by the following; firstly, it was not in dispute that at the time the university's witness confronted the employee the following day, the employee was not a suspect. Therefore, according to the arbitrator, there was no reason why the employee would have confessed to the alleged misconduct. Rather the arbitrator accepted the employee's version that she voluntarily and on her own volition, advised the applicant's witness that she retrieved the phone and kept it for safeguarding.

[9] Secondly, the arbitrator found that the university did not challenge the version that the employee, upon retrieving the phone, attempted to hand the phone with security but no security personal was at the office at the time. According to the arbitrator, on the undisputed version, it was probable that the employee acted in accordance with her version.

[10] Thirdly, the employee's version that she was traumatized by the news she received and hence forgot to hand the phone in when leaving the premises, was likewise not challenged and therefore it was a reasonably explanation for not handing in the phone on the same day she took possession of it.

[11] Fourthly, the arbitrator found that the removal of the sim card and memory card did not support the version that the employee had any intention to steal the phone. Instead, following the finding that the employee on her own accord, informed the university that she was in possession of the phone, the act of removing the sim and memory card, could not, from the arbitrator's point of view, be seen as evidence in support of theft.

[12] Lastly, the arbitrator found that the reason offered by the employee as to why she did not bring the phone with her the following day, was not challenged and hence was also a reasonable reason as to why she forgot the phone at home the following day.

[13] Based on the above, the arbitrator found the university had failed to prove the employee stole the phone or was in unlawful possession of same.

Ground on review

[14] Mr Bouchier, acting on behalf of the university, confirmed that the first ground on review was that the arbitrator erred in that on the accepted facts, the university put up a *prima facie* case of misconduct whereafter the evidentiary burden shifted to the employee to offer a reasonable alternate explanation, which she failed to do.

[15] Mr Mnyandu, acting on behalf of the employee, submitted that the arbitrator's reasons for accepting the employee's version are reasonable and hence the award is not susceptible to being set aside on review.

[16] On the common cause facts before the arbitrator, I accept that the university put up a *prima facie* case of misconduct against the employee. The employee took possession of the phone on a particular day, failed to hand it in on two occasions on the day in question, failed to bring the phone to work the following day, failed to advice security the following day when she arrived at work or even throughout her shift about the incident of the phone and only, when ending her shift, informed the university about the phone. It was further common *casu* that when she retrieved the phone from her residence, both the sim card and memory card had been removed, while pictures on the phone had been deleted.

[17] The arbitrator failed to appreciate that on the common cause facts, a *prima facie* case of misconduct had been made against the employee, resulting in the evidentiary burden shifting to the employee to provide a reasonable alternate explanation.[1]

[1] See: *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2011) 32 ILJ 2455 (LAC) at para 34, *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and others* (2006) 27 ILJ 2567 (LC) at para 21, 23 and 25 and *National Union of Mineworkers and another v Commission for Conciliation, Mediation and Arbitration and others* (2013) 34 ILJ 945 (LC) at para 41.

[18] However, what the arbitrator did was to assess each explanation in a piece meal fashion and once the university failed to challenge the veracity of the applicant's explanations; the arbitrator automatically accepted the employee's explanations as being reasonable, cogent and possibly true.

[19] That was the incorrect approach in law. The arbitrator was duty bound to assess whether the employee's explanations on the whole (and not in a piece meal fashion), satisfied the requirement that being a reasonably alternate explanation. The mere fact that each explanation was not disputed, does not transcend the employee's explanation into the realm of what can be considered a reasonable alternate explanation to the *prima facie* case of gross misconduct made against the employee.

[20] The arbitrator accepted the employee, on her own volition, informed the university of the fact that she took possession of the phone the previous day. However, the arbitrator relies on this version to find that the removal of the sim and memory card, did not establish any intention to steal. This likewise is an incorrect approach. The question the arbitrator ought to have asked himself, was whether the employee provided a reasonable explanation for the sim and memory card being removed.

[21] The university's second ground on review, was that the arbitrator erred in stepping into the arena and taking over the responsibility of the employee's representative by questioning the employee during examination in chief. This so, to the extent that the employee's representative failed to put a single question to the employee while testifying.

[22] The record reflects, that prior to the employee commencing her evidence in chief, the arbitrator enquired from her representative whether he wanted to lead the employee in evidence or whether he wanted the arbitrator to do so. Once the representative opted for the latter, the arbitrator posed all questions to the employee with the representative remaining silent throughout.

[23] Mr Mnyandu submitted that the arbitrator had a right to conduct the proceedings in a manner he deemed appropriate and secondly, the employee's representative at arbitration was a shop steward who did not have the necessary experience to question the employee.

[24] In *Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration and others*[2] the Labour Appeal Court held the following:

> "The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.'

[25] I accept that if it became apparent to the arbitrator that while questioning the employee in chief, her representative's line of questions did not ventilate the necessary issues needed for the arbitrator to make a finding; then under such circumstances it would have been open for the arbitrator to ask inquisitorial questions to the employee during or once her representative concluded his line of questions to the employee. However, there does not appear to be any reason for the arbitrator to afford the employee's representative a choice, at the onset, of either asking the employee all questions himself or passing on that responsibility to the arbitrator.

[26] The fact that the representative was a shop steward with little experience, does not afford the arbitrator the right to assume the role and duties of a representative. Moreso, in light of the fact that there was nothing before the arbitrator to take the view that the representative would not conduct the examination in chief in a meaningful manner. The record does not reflect the representative was incapable of cross examining all the university's witnesses. To this end the arbitrator stepped in to the proverbial arena and

[2] (2019) 40 *ILJ* 819 (LAC) at para 18.

moved away from the neutral and objective position he ought to have remained in until otherwise established.

[27] For reasons advanced above, I am of the view that the university has made out a case which warrants this court's intervention. The award under review ought to be set aside. Submissions were made that this court should substitute the findings of the arbitrator with a finding that the employee's dismissal was substantively fair.

[28] Recently in *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others*[3] the LAC reiterated that the test a reviewing court must consider when deciding whether to remit a matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council, or substitute the findings of the award, is to ascertain (among other factors), whether the court is in as good a position as an arbitrator to make a decision and substitute the findings, whether the outcome is a forgone conclusion and whether further delays will unjustifiably cause prejudice to the parties.

[29] While this court has found that the arbitrator adopted the incorrect approach in dealing with the employee's explanation, adopting the correct approach would require this court to make a value judgment on whether the employee's explanations is tantamount to a reasonable alternate explanation. Although this court has reservations in this regard, it would nevertheless be an issue which serves before an arbitrator to determine and not a reviewing court.

[30] In the premise the following order is made:

Order

1. The applicant's review application is upheld.

[3] (JA60/23) [2024] ZALAC 44

2. The arbitration award under case number GAJB15879-19 is set aside and remitted to the CCMA for a *de novo* hearing before an arbitrator other than the second respondent.
3. There is no order as to costs.

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M. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Mr. D Bouchier of Eversheds Attorney
For the Third Respondent	:	Mr Mnyandu (Union official)