

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA 7/22

In the matter between:

CRESTWAVE 144 (PTY) LTD t/a TZANEEN SUPERSPAR Appellant

and

**COMMISSION FOR CONCILIATION,
MEDITATION AND ARBITRATION**

First Respondent

COMMISSIONER N. SONO

Second Respondent

SACCAWU obo L MUKHABELA

Third Respondent

Heard: 11 May 2023

Delivered: 26 April 2023

Coram: Waglay JP, Savage et Gqamana AJJA

JUDGMENT

GQAMANA AJA

Introduction

[1] This appeal is against the judgment of the Labour Court, which dismissed an application brought by the appellant, Crestwave 114 (Pty) Ltd t/a Tzaneen Superspar to review and set aside the arbitration award handed down by the second respondent (commissioner) under the auspices of the first respondent, the

Commission for Conciliation, Mediation and Arbitration (CCMA). The appeal is with the leave of this Court.

Background

[2] The appellant conducts a retail store business. Ms Makhubela and Ms Kubela (employees) were employed by the appellant as cash office assistants. Their duties included *inter alia*, the handling of cash in the cash office. On 28 September 2018, after a spot cash count was conducted by the appellant, a shortfall of R800 230.00 was found to exist. The employees were charged with misconduct relating to making false declarations and misappropriating funds. Ms Kubela pleaded guilty to the charges against her while Ms Makhubela pleaded not guilty. Both employees were found to have committed the misconduct alleged and were dismissed from their employment with the appellant.

[3] Aggrieved with their dismissals, the South African Commercial, Catering and Allied Workers Union (SACCAWU), acting on behalf of the employees, referred an unfair dismissal dispute to the CCMA. At arbitration, the commissioner found the dismissal of the employees to be substantively unfair and ordered their reinstatement.

[4] The appellant, dissatisfied with the outcome, launched an application to review the arbitration award on the grounds *inter alia* that the decision reached by the commissioner was unreasonable. The Labour Court dismissed the review application, finding no interference with the award was warranted since the commissioner had the advantage of assessing the demeanour of the witnesses and, faced with competing versions, had arrived at a decision based on the probabilities.

[5] On appeal, the appellant submitted that the Labour Court had erred in finding as it did, given the evidence placed before the commissioner at arbitration that it was the responsibility of the employees, from the 21st day of each month, to ensure that sufficient cash from daily takings was held in the safe to enable the payment of SASSA grants. The employees were required to count the money retained and

record such amount daily in the cash office book. After having counted the money, the employees placed the cash in the safe and were responsible for ensuring that the figures recorded in the cash office book balanced with the cash held in the safe.

[6] Ms Brett, the Admin and Financial Manager of the appellant testified that twice a month a reconciliation would be done between the amount of cash recorded and the actual cash held in the safe. On 28 September 2018, a physical cash check was conducted which discovered that there was a shortfall of R800 230.00, despite the recordal by the employees in the cash office book that an amount of R1 745 000.00 was available in the safe. The employees were unable to account for the shortfall and the money was never recovered.

[7] The appellant's General Manager, Mr Stiaan Coetzee, testified that the safe in the cash office was opened only in the presence of one of the employees and that no staff member, other than the employees and three managers, had access to the cash office. While one of the employees took lunch, the other would remain in the cash office and if only one employee was on duty, they would have lunch in the main office because they needed to be available to the cashier if the cashier needed cash. It was Mr Coetzee's evidence that once the safe was opened in the presence of the employees in the morning, the key would then be retained by one or both of the employees for the remainder of the day. He refuted the version of the employees that when they went on lunch the safe key would be hung in the main office.

[8] His further evidence was that the managers and supervisors did not access the safe in the cash office in the evening but dropped the start-up money into a drop safe, therefore not having access to any cash of the appellant. The keys to the safe would be retained in the main office, with only the supervisors and managers having access to them.

[9] In her evidence at arbitration, Ms Makhubela confirmed that only she, Ms Kubela and the appellant's managers knew about the money in the safe and that when daily takings were retained in preparation for payments of social grants at the end of the month, the employees were responsible for recording these amounts. The

money in the safe was required to balance with the figure recorded in the cash office book. Yet, according to Ms Makhubela, when the employees went on lunch, they would lock the cash office door, but leave the safe unlocked. She further stated that they were not allowed to have lunch in the main office for health and hygiene purposes and therefore, they always had their lunch outside, even if there was only one of the employees on duty.

[10] Ms Makhubela further testified that once the money was placed in the safe it was not physically recounted and the employees continued from one day to the next on the premise that the cash that had previously been recorded remained in the safe. A reconciliation between the cash book and the physical cash only occurred when a check was undertaken by Diane, or someone in her position.

[11] Ms Kubela testified that a voucher would be created to record the movement of the cash from the cashiers to the safe. This voucher would then be signed by the manager but the cash would not be physically counted by the manager. The employees would record the amount in the cash book and place the cash into the safe. Ms Kubela accepted that the shortfall existed but denied responsibility for it given that the employees were not the only people entrusted with the keys to the safe and were not expected to do a physical count of the money in the safe. She testified that she felt threatened by the General Manager and a person named Hettie when she pleaded guilty to charges that she did not understand. She maintained throughout that she and Ms Makhubela should not have been found guilty of the charges because they were not the only employees who had access to the cash safe.

Discussion

[12] The Labour Court on review is required to determine, as was set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*,¹ whether the decision reached by the commissioner was one that a reasonable

¹ [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

decision-maker could not reach.² The undisputed evidence before the commissioner was that it was the employees' responsibility to ensure that the amount of cash received was recorded in the cash book and that the same amount was then held in the safe. In order to perform this function to the standard and with the diligence required, the employees were required to count the cash retained to ensure that none of it went missing. On their own version, they failed to do so. The result was that when the reconciliation was undertaken, a large amount of cash was found to be missing.

[13] At arbitration, the commissioner found that the appellant had failed to prove that the employees were required to count the money daily and that they had therefore not been shown, on a balance of probabilities, to have committed the misconduct alleged. This finding was patently unreasonable and at odds with the totality of the evidence presented at arbitration, including that the employees had failed to count the cash held on a daily basis when it was their responsibility to ensure that it was safeguarded. This failure on the part of the employees amounted to a serious dereliction of their duties. The employees' suggestion that other people had access to the safe was not only denied by the appellant but was not found by the commissioner to have been proved. However, even if other employees had been found to have access to the safe, the employees did not provide any explanation why, given their role and responsibilities in relation to the safeguarding of the cash, they had not identified the loss immediately and reported it to the appellant without delay.

[14] In finding that the employees had not been shown to have committed misconduct of a nature which justified their dismissal, the commissioner reached a decision that a reasonable commissioner could not reach. Given the nature of the misconduct committed by employees in whom a high level of trust had been placed by the appellant, it ought reasonably to have been found that the dismissal of the employees was substantively fair. In finding differently, the Labour Court erred.

² Ibid at para 110.

[15] The appeal must accordingly succeed. Having regard to considerations of law and fairness, a costs order, both in respect of the review application and on appeal, is not appropriate.

[16] In the result, the following order is made:

Order

1. The appeal is upheld with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with the following order:
 - “1. The review application succeeds.
 2. The arbitration award of the second respondent issued under case no. LP8964-8 is reviewed and set aside and replaced with an order that the dismissal of the two employees, Ms Makhubela and Ms Kubela, was fair.
3. There is no order as to costs.”

N GQAMANA

Waglay JP and Savage AJA concur.

Appearances:

For the Appellant:

Mr Matthee of Kranko Karp Attorneys

For the Respondent:

Advocate R. Itzkin

Instructed by Yusuf Dockrat Attorneys