



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA26/2019

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD

Appellant

And

JAMAFO OBO YOLISWA MALULEKE

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

KHOMOTJO DANIEL MATJI N.O.

Third respondent

Heard: 19 May 2020

Delivered: 07 September 2020

Summary: Dismissal for misconduct – the employee flouting company procedures relating to refunds, returns, exchange, and gifts - CCMA finding - dismissal substantively and procedurally fair.

The Labour Court – finding - dismissal unfair due to the employee's long period of service.

On Appeal – the LAC- restating the test applicable to the review of the CCMA awards- finding that award fell within the bounds of reasonableness - accordingly -the appeal is upheld.

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

JUDGMENT

PHATSHOANE ADJP

- [1] This is an appeal by Pick ‘n Pay Retailers (Pty)Ltd, with leave of this Court, against the whole of the judgment and order of the Labour Court (*per* Gush J), handed down on 07 December 2017, reviewing and setting aside the arbitration award issued on 12 July 2014 by the Commission for Conciliation Mediation and Arbitration (“CCMA”), the second respondent, under Case No: GATW1640-14 and remitting the matter to the CCMA for a hearing afresh before a commissioner other than Mr KD Matji, the third respondent (“the commissioner”).
- [2] The Notice of appeal was filed 42 days outside the time limit specified in the Rules of this Court due to what the appellant says was “the misinterpretation of the Rules and the process to follow”. Even though the procedural oversight is inexcusable, upon discovery of its error, the appellant promptly filed the Notice of appeal. Good prospects of success are extant and this should compensate for the delay. I can conceive of no prejudice in granting condonation and it is so ordered.
- [3] Ms Yoliswa Euphemia Maluleke commenced employment with Pick ‘n Pay on 02 June 1992. She was promoted to the position of an E-service manager at Pick ‘n Pay Gezina Store on 01 November 2010. This position required Ms Maluleke to operate a till and to train other cashiers on the company policies and procedures including those relating to refunds, returns, exchange, and gifts.
- [4] On 07 January 2014, Ms Alleta Magrieta Erasmus, an elderly longstanding customer of Pick ‘n Pay, did some grocery shopping at Gezina Store in the

course of which she purchased and presented three boxes of milk chocolates valued at R103.98 as gifts to Ms Maluleke and Mr Saul Maphanga (“Mr Maphanga”), also an employee of Pick ‘n Pay who held the position of general merchandise supervisor. According to Mr Lesiba Elias Masipa (“Mr Masipa”), the store manager at Pick ‘n Pay Gezina, goods purchased by customers for employees in this fashion ought to be declared. It did not happen.

- [5] Following Ms Erasmus’s departure Ms Maluleke processed a refund of the boxes of chocolates by completing the return/refund book¹ in which she identified Mr Maphanga as the customer. She also processed the refund on her till without authorisation by the store manager. Mr Masipa says in terms of Pick ‘n Pay Policy Ms Maluleke was supposed to have called him, prior to processing the refund, to attach his signature because the items were worth more than R50.00. The converse occurred. She called Mr Masipa *ex post facto*, around 16h50, through the intercom requesting him to authorise the already processed refund. Mr Masipa enquired where the customer was, when Ms Maluleke pointed at Mr Maphanga, Mr Masipa refused to authorise the transaction because the refund was done contrary to the policy. In addition, he was not informed of any items that needed to be returned on that day. Furthermore, the items were not purchased by the two employees but by a Pick ‘n Pay customer which precluded them from returning the articles.
- [6] Faced with this dilemma, Ms Maluleke cancelled the refund slip and thereafter rang back the chocolates thereby reversing the transaction. Mr Abram Sehlola, the floor manager at Pick ‘n Pay Gezina, testified that the reversal transaction was illicit because Ms Maluleke attempted to cover up her misdeeds. To do this, she used the password of another cashier, Ms Frieda Manyala, which act is also prohibited in terms of Pick ‘n Pay policies. Following this event, Mr Maphanga took the three boxes of chocolates, the refunds book, and three slips to Masipa

¹ A book in respect of which all the goods returned by customers are recorded. Thereafter the customers are refunded for items returned.

and requested him to sign the slips. Masipa ordered him to leave everything with him for further investigation.

[7] On 08 January 2014, Ms Maluleke was issued with a charge sheet which captured four counts of misconduct as follows:

7.1 she contravened the company rules by accepting three boxes of milk chocolates from a customer without declaring the gifts;

7.2 she attempted to defraud the company in that she tried to return the gift she received from the customer;

7.3 she contravened the company procedure by performing a return on her till without authorisation from senior management; and lastly

7.4 she breached till procedures in that she performed fraudulent transactions on her till.

[8] It was contended for Pick 'n Pay that these transgressions by Ms Maluleke were highly irregular and led to the irretrievable breakdown in the relationship of trust between the employer and the employee.

[9] In her defence Ms Maluleke testified that her intention was not to siphon money from Pick 'n Pay's coffers but merely planned to exchange the boxes of chocolates for tissue papers whereas Mr Maphanga wanted to swap his gift for a sack of Maize Meal. Ms Maluleke disputed having breached or contravened till procedures. She used another supervisor's password to reverse the transaction and intimated that employees including supervisors and store managers exchange passwords albeit this is not a general practice at Pick 'n Pay national but a common practice at Pick 'n Pay Gezina. She says she requested Mr Maphanga to ask Ms Frieda Manyala for her password which she voluntarily shared.

[10] On 04 February 2014, pursuant to a disciplinary hearing, Mr Brian Knopf, the chairperson of the enquiry, acquitted Ms Maluleke on Count 1 (receipt of gifts

from a customer without declaring them) but found her guilty on the other three charges and dismissed her from the services of Pick 'n Pay. Ms Maluleke filed an unfair dismissal dispute with the CCMA which went through the process of conciliation on 20 February 2014 and ultimately the arbitration before the commissioner.

- [11] In his arbitration award, the commissioner summarised the evidence led by parties and the applicable legal principles, *inter alia*: that the onus reposed on the employer to prove that the dismissal was fair both substantively and procedurally. The commissioner found that Ms Maluleke did not deny the allegations that were made against her but advanced a defence that it had been the practice within the store to do things as she described.
- [12] The commissioner rejected the entire evidence adduced on behalf of Ms Maluleke as highly improbable and unreliable. In his view, Ms Maluleke committed fraudulent activities at her till. He held that she was knowledgeable with the company policies and procedures but chose to ignore them and relied on general practices. He further reasoned that Ms Maluleke trained cashiers and had to ensure that they implemented what they had learned. Ms Maluleke should therefore never have been a party to any practice that was inconsistent with the policies and procedure of the company. The commissioner concluded that she contravened the workplace rules which she was aware of or could reasonably be expected to have been aware of. The rules in issue were valid and reasonable. As a trainer she was supposed to have been exemplary but she flouted the policies. In the commissioner's view, the conclusion was inescapable that Pick 'n Pay discharged the onus that the dismissal of Ms Maluleke was for a fair reason related to her conduct. He was of the view that the gravity of the offences merited the termination of her services and found that her dismissal was both procedurally and substantively fair.
- [13] The dismissal of Ms Maluleke's claim by the CCMA led to the launching of an application to review and set aside the CCMA's award in the Labour Court on 12

September 2014 by Joint Affirmative Management Forum Trade Union (JAMAFO) on her behalf.

- [14] The Labour Court found it common cause that Ms Maluleke did not comply with Pick 'n Pay rules on the handling of gifts. However, the Court was of the view, that sight had been lost that Ms Maluleke had been in the employ of Pick 'n Pay for some 24 years with a clean disciplinary record. The Court found that no attempt had been made during the disciplinary hearing and the arbitration to consider Ms Maluleke's personal circumstances, her length of service, and untarnished record. For the most part, the focus had been on Pick 'n Pay's attitude towards its own rules on refunds/returns, reversing transactions, and the use of passwords. The Court held that the misconduct with which Ms Maluleke had been charged did not imply that she was dishonest. The Court found it remarkable that, while the commissioner said that Maluleke had acknowledged her wrongdoing, he went ahead and made certain credibility findings against her.
- [15] The Court found it difficult to assess what the appropriate sanction would be in the event it set aside the dismissal because "*The misconduct is clearly serious*". The Court could not impose a sanction such as a demotion absent evidence on the hierarchy or the ranking of various employees within Pick 'n Pay. The Court held, on the basis of the overall circumstances including the nature of the misconduct, that it might well have been appropriate for the sanction to have included, *inter alia*, some form of training or a demotion be it on a permanent basis or for a determinate period of time. In the end, the Court reviewed and set aside the arbitration award and remitted the matter to the CCMA for arbitration hearing *de novo*.
- [16] Stripped to its bare essential, the issue central to this appeal is whether the Labour Court properly applied the review test as set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* ² and maintained the distinction

² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).

between appeals and reviews in the context of labour disputes. It is further contended for Pick 'n Pay that the Labour Court erred in the following respects:

- 16.1 in concluding that Ms Maluleke was not guilty of attempted fraud; that her conduct was not dishonest and merely amounted to breach of Pick 'n Pay policies;
- 16.2 by failing to appreciate that the commissioner was faced with two mutually destructive versions and had to make the necessary credibility findings and the determine probabilities; lastly
- 16.3 by accentuating that the length of service negated the sanction of a dismissal. In so holding, it was contended, the Court conflated the review and the appeal process.

JAMAFO on behalf of Ms Maluleke is not opposing the appeal and abides the decision of this Court.

[17] During the arbitration process much was made on the issue whether Ms Maluleke rendered herself guilty of attempted fraud. In my view, that is inconsequential because where a disciplinary rule has been contravened and the employee knew that such conduct could be subjected to discipline and had not been significantly prejudiced by the incorrect characterisation of the offence, discipline commensurate to the offence found to have been committed may be imposed.³

[18] Fraud is constituted by the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.⁴ In my view, there were various elements of deceit on the manner in which the return/refund transaction was carried out by Ms Maluleke which points to her nefarious conduct. To demonstrate this:

³ See P A K le Roux & André van Niekerk: *The SA Law of Unfair Dismissal* (Juta & Co 1994) at 102.

⁴ See *S v Gardener* 2011 (1) SACR 570 (SCA) par 29; *S v Prinsloo and others* 2016 (2) SACR 25 (SCA) at 65 para 174.

- 18.1 She recorded the name of Mr Maphanga, her subordinate, as a customer on the refund slip when she knew that Mr Maphanga was not the customer but a recipient of a gift just like herself. When asked why she failed to put both her and Maphanga's names on the refund slip she gave less than frank response.
- 18.2 A cashier is prohibited from serving herself by performing any transaction of her own on her own till. She did exactly what is proscribed.
- 18.3 The store manager intimated that under no circumstances can gifts be exchanged for the monetary value they were purchased for. Mr Masipa explained that the customer brought money to the store by paying for the items whereas the employee attempted to purloin it for her own pocket.
- 18.4 Ms Maluleke was untruthful when she alleged that she intended to exchange the items but not to be refunded. This is so because she failed to disclose her intention to Mr Masipa. The most cogent inference arising from her conduct is that she ran a refund so as to take cash in the place of the gifts as testified by Mr Masipa.
- 18.5 She did not dispute that she misrepresented to Mr Masipa that Mr Maphanga was the customer. When Mr Masipa shook his head she then revealed that the customer (Ms Erasmus) purchased the items.
- 18.6 When Mr Masipa refused to authorise the refund due to its suspicious nature, Ms Maluleke reversed the transaction on her till. The evidence is to the effect that for a proper reversal, she needed a supervisor or manager to authorise the transaction. Instead, contrary to Pick 'n Pay policies, she used another supervisor's password to achieve this.
- 18.7 Ms Maluleke's contention that no money was taken or a voucher issued by Pick 'n Pay does not advance her case because the refusal by the store manager to authorise the transaction stopped her in her tracks.

- [19] The Court *a quo* questioned that the commissioner made credibility findings against Ms Maluleke when the commissioner had already mentioned that she admitted the misconduct. This criticism was unjustified because there were certain aspects of the evidence which had not been admitted and required factual resolution. To undertake this form of exercise, the commissioner was bound to assess the probabilities and make credibility findings. Failure to do this by the commissioner would have constituted a misdirection.
- [20] Ms Maluleke was less than frank in her account of the events of 07 January 2014. Her evidence to the effect that she was permitted to breach company rules was never put to any of Pick 'n Pay's witnesses. Her mendacity became patently obvious when she intimated that everyone in the store, which would include the two senior managers who testified in this case, were also engaged in common practices, an aspect she also never put to them. Mr Maphanga, her only witness, also fared badly. He claimed that in the course of the dubious transaction, Ms Maluleke transferred her goods to him. In the overall his version smacked of a rehearsal of Ms Maluleke's.
- [21] It was also unacceptable for Ms Maluleke to rely on general practices which were contrary to the policies and procedures of the store. One such advanced practice was the exchange of passwords among the employees. Ms Maluleke alleged that the reason for this exchange was to dispense with authorisations when the store was busy. This claim does not hold water because during the afternoon of 07 January 2014 the store was not busy. All witnesses called by Pick 'n Pay, whom I must add corroborated each other in material respects, disputed the existence of such practices.
- [22] A half-hearted attempt was also made at the CCMA and in the Court *a quo* to argue that Pick 'n Pay was inconsistent in the application of discipline. It was submitted that the evidence demonstrated that both Ms Maluleke and Mr Maphanga intended to exchanged their gifts; that Mr Maphanga agreed to his name being used as a customer when the refund transaction was executed; that

he was at all relevant times at the scene; he also actively participated in the transaction. It was further contended that insofar as the commissioner confirmed the dismissal of Ms Maluleke and the final written warning imposed on Mr Maphanga he acted irrationally.

- [23] The question of inconsistency in the application of discipline can be resolved with relative ease. Ms Maluleke was an E-service manager and well versed in till procedures. She trained other employees and occupied a position of trust which differed materially from that of Mr Maphanga, her subordinate. Mr Maphanga was not integrally aware of policies and procedures pertaining to refunds. He did not operate a till let alone play a role in processing the refund in question. The two employees' cases are markedly incomparable. Therefore, there was a rational basis for the differentiation.
- [24] As demonstrated, Ms Maluleke's conduct was deceitful. The Labour Court erred in holding that she was not dishonest. In any event, the union in its opening address during the arbitration placed it on record that it did not dispute *"that this purported offence has been committed"*. It merely challenged that it amounted to fraud and took issue with the appropriateness of the sanction of dismissal imposed on Ms Maluleke to which I now turn.
- [25] The Labour Court primarily focused its attention on Ms Maluleke's 24 years of service and her unblemished record to show that her dismissal was unfair. This notwithstanding it found her misconduct to have been sufficiently serious not to warrant a mere warning but some corrective action. Ms Maluleke was no ordinary employee. She admitted that she was entrusted with the responsibility to train other cashiers on the very policies and procedures which she not only acted in flagrant disregard of but flouted.
- [26] Ms Maluleke's 24 years of service with Pick 'n Pay, albeit a weighty factor, must be assed with other factors. The Court should strike a balance between the period of service; the gravity of the misconduct and its impact on the employment relationship. The acts of misconduct committed in this case were of a serious

nature. The dishonest acts, as testified to by Mr Masipa, destroyed the relationship of trust. What makes Ms Maluleke's transgressions even more unpardonable is her failure to show some contrition. Her persistence that she acted in terms of common practices did to redound in her favour. The Labour Court did not have regard to these pertinent factors which militated against Ms Maluleke's continued employment with Pick 'n Pay. I am satisfied that the sanction of dismissal was not grossly disproportionate to the nature and gravity of the misconduct. In any event, the length of service, would not in all cases come to the aid of an employee. This Court held in *Toyota SA Motors (Pty) Ltd v Radebe & others*:

'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.'

- [27] The test for the review of CCMA arbitration awards is whether 'the decision reached by the commissioner is one that a reasonable decision-maker could not reach'.⁵ In the end, the question which the Labour Court had to grapple with was whether the material before the commissioner justified his conclusion that the dismissal was substantively and procedurally fair. The Labour Court did not make any finding on whether the decision by the commissioner was not one that a reasonable decision-maker could have come to. The Court also perfunctorily dealt with the reasoning by the commissioner on the substantive fairness of the dismissal.

⁵ The test has been authoritatively stated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at 2439 para 110 and restated in several decisions of this Court, *inter alia*, *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) at paras 14-16 and *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC) and the Supreme Court of Appeal *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA).

[28] Based on the analysis above, it can hardly be argued that the award made by the commissioner fell outside the bounds of reasonableness. Consequently, nothing merited the Labour Court's interference with the arbitration award. It follows that the appeal should be upheld. There is no basis for making any order as to costs.

In the result, I make the following order.

Order

1. The appeal is upheld with no order as to costs;
2. The order of the Labour Court is set aside and in its stead is substituted the following:

"1. The review application is dismissed.

2. No order is made as to costs."

MV Phatshoane ADJP

Davis JA and Murphy AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:

Adv ZM Navsa

Instructed by Bowman Gilfillan Inc