IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA31/2019

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED — **Appellant**

and

HEIDEN LESLIE — **First Respondent**

COMMISSIONER DESMOND LYNCH N.O. — **Second Respondent**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — **Third Respondent**

Heard: 9 December 2020

Delivered: 18 December 2020

Coram: Waglay JP, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

[1] This appeal is against the judgment and order of the Labour Court (Mahosi J) delivered on 6 February 2019 in which the review application brought by the appellant, Standard Bank of South Africa Limited, against the arbitration award of the second respondent, a commissioner of the third respondent, the

Commission for Conciliation Mediation and Arbitration (CCMA) was dismissed with no order of costs. This followed the commissioner's finding that the dismissal of the first respondent, Mr Heiden Leslie (the employee), was substantively unfair, with the employee retrospectively reinstated into his employment with the appellant.

[2] The employee commenced employment with the appellant on 1 July 2005, initially as a Machine Room Operator. At the date of his dismissal on 14 May 2015, he had been deployed to the appellant's treasury department as a Custodian. In that capacity, he was responsible for counting and handling cash on behalf of the appellant in accordance with the appellant's Group Reference Guide Policy, which regulates bulk deposits and cash handling in its treasury department. The security procedures, which were to be followed at all times given the volume of cash handled, included the dual control of cash by two employees at a time, with employees not permitted to have cash in their possession while at work.

[3] On 17 March 2015, the employee was paired to work with Ms Dorcas Motsapi, who had at the time been a custodian in the treasury department for approximately three weeks. The employee was searched at the end of his shift by security, as was standard practice, but no money was found on him. After the end of her shift, Ms Motsapi reported to her team leader, Mr Shane Scaife, that she had noticed that Mr Leslie had a calculator in his hand under which he held a R100 note and that she saw him placing the cash in his back pocket. The FD40 box containing R100 notes was counted and found to be short by R200. The next day on 18 March 2015, the employee was suspended from work. He received notice to attend a disciplinary hearing on 20 April 2015 to face the allegation of:

> 'Alleged dishonesty on your part in that you abused your position of trust in the bank when you:
>
>> Removed an amount of R200 from the Johannesburg Cash Centre Treasury on the 17th of March 2015, without the necessary authorisation and/or business reason.'

[4] On 14 May 2015, following the disciplinary hearing, the employee was dismissed. At the date of his dismissal, he earned R14 271,67 per month. The employee referred an unfair dismissal dispute to the CCMA which, after conciliation had been unsuccessful, was referred to arbitration.

[5] Three witnesses testified for the appellant at arbitration. The investigator, Mr Otto Arends, viewed the CCTV camera footage of the area in which the employee had worked on the day. Contrary to operating procedures, the employee was seen at the FD40 box on his own and without a co-employee on two occasions. The evidence of Mr Scaife was that he had counted the FD40 box which contained R100 notes and found R200 missing. Ms Motsapi testified that she saw something under the employee's calculator which appeared to be a R100 note; and that he moved his left hand into his left pocket "*and when he took his hand out of there, there was no cash in that hand anymore*." The evidence of the employee was that he had been stressed on the day as the cash had not balanced, although that issue was ultimately resolved. He said he had checked the money in the FD40 box, first alone and then with his colleague, Leroy, as there had been a cash shortage, which he was anxious to reconcile. He said he could have put his hand in his pocket to take out a packet of chewing gum.

[6] In his arbitration award, the commissioner found that the appellant had not proved dishonesty on the part of the employee. This was so since the video evidence was indistinct; no cash was found on the employee when he was searched; and during questioning, he had produced a blue packet of menthol gum which he had put in his back pocket. The commissioner found that the packet of chewing gum is what could have been seen by Ms Motsapi. The dismissal of the employee was therefore found to be substantively unfair and he was retrospectively reinstated into his employment with the appellant.

[7] Dissatisfied with the arbitration award, the appellant sought its review by the Labour Court. Although requested to do so, the Labour Court refused to watch the video evidence which had formed part of the record before the commissioner. The Court found no reason to interfere with the findings of the commissioner and concluded that the arbitration award did not fall to be set

aside on review. The review application was consequently dismissed with no order as to costs.

[8] On appeal it was contended for the appellant that the Labour Court erred in overlooking the fact that the commissioner had committed a reviewable irregularity in ignoring the evidence of Ms Motsapi and the corroborative nature of the video footage. It was submitted that there was no basis to find that Ms Motsapi may have confused the R100 with blue packet of chewing gum when this was not put to her in cross-examination; and that on a conspectus of the evidence before the commissioner the appellant had proved that the employee had conducted himself dishonestly. Consequently, the appellant sought that the appeal be upheld with the dismissal of the employee found to be substantively fair.

[9] In opposing the appeal, it was contended for the employee that the appellant's case had been based on suspicion, without corroboration. Since an employee cannot be dismissed on suspicion of misconduct, the commissioner's award was not one that a reasonable commissioner could not reach and the Labour Court correctly dismissed the review application. The appeal, for these reasons, it was submitted should fail, with costs to follow the result.

<u>Discussion</u>

[10] A commissioner is required to arrive at a decision having appropriate regard to the conspectus of material placed before him, with the test on review now well established.[1] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,* [2] the Court stressed that the distinction between appeals and reviews continues to be significant.[3] A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution, cautioning against "*judicial overzealousness in setting*

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 107.
[2] *Supra.*
[3] At para 108.

aside administrative decisions that do not coincide with the judge's own opinions."[4]

[11] The video evidence clearly showed the employee at the FD40 box on two occasions without a co-employee and placing his hand in his back pocket shortly after having been present at the box. His explanation for being there was that he was counting money. He did not explain why he was there alone when the appellant's rule required the contrary or how he could have reconciled the money in the seconds he was present at the box.

[12] On the evidence before the commissioner, the employee's conduct aroused strong suspicion. His explanation that he was at the box to reconcile the money in the box in a matter of seconds was highly improbable. His behaviour in shortly thereafter placing his hand in his back pocket was, at best for him, most unusual. His failure to explain why he breached procedure by proceeding to the box alone was glaring. Yet, despite this, on a conspectus of the evidence before the commissioner, the finding that the appellant had not proved that the employee had conducted himself dishonestly was not one that a reasonable commissioner could not reach.

[13] The evidence put up by the appellant at arbitration was simply, in spite of the strong suspicion which the employee's conduct aroused, insufficient to prove misconduct on the terms contended by the appellant. Had Ms Motsapi reported the incident immediately during her shift, this may have led to the employee being searched immediately, which could have resolved the matter decisively one way or the other. Had the appellant led evidence that the FD40 box had not been short of R200 when it was delivered for counting, this may have allowed a finding that R200 was removed during the employee's shift. But this was not the case and without clear and reliable evidence of dishonesty on the part of the employee the commissioner's finding of unfairness was not unreasonable.

[4] At para 109.

[14] Section 193(1) of the Labour Relations Act 66 of 1995 ("the LRA") provides that:

> '(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
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> *(a)* order the employer to re-instate the employee from any date not earlier than the date of dismissal;
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> *(b)* order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
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> *(c)* order the employer to pay compensation to the employee.'

[15] Section 193(2) states that:

> '(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless—
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> (a) the employee does not wish to be re-instated or re-employed;
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> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[16] This Court in *Glencore Holdings* (*Pty*) *Ltd and another v Sibeko and others*[5] found that an employee's behaviour, whether before or after dismissal, can be taken into account in determining whether, in terms of s 193(2)*(b),* the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. In *Afgen (Pty) Ltd v Ziqubu*[6] it

[5] [2018] 1 BLLR 1 (LAC).
[6] [2019] 10 BLLR 977 (LAC)**.**

was made clear that there must be an extraordinary reason to deviate from reinstatement as the primary remedy.[7] In *Maepe v CCMA and another*[8] this Court refused reinstatement on the basis that it was impracticable given that the employee was employed as a commissioner of the CCMA but had given false evidence under oath.

[17] In the current matter, the appellant is entitled to expect honesty, integrity and rely on a high degree of trust with its employees who are responsible for counting large sums of money in its treasury department. In applying his mind to the appropriate remedy, section 193(2) required that the commissioner not simply to adopt a mechanical approach to the award of reinstatement as the primary remedy, but to consider the circumstances surrounding the dismissal to determine whether these were of such a nature that a continued employment relationship between the parties would either be intolerable or not reasonably practicable.

[18] Properly construed the evidence before the commissioner showed that the employee had failed to comply with the appellant's operating procedures and that his behaviour as viewed on the recordings had been noticeably unusual and suspicious. Had the commissioner carefully applied his mind to the employee's unlikely explanation for his conduct, coupled with the evidence of Ms Motsapi and Mr Scaife, he ought reasonably to have found support for the appellant's view that the trust relationship with the employee had broken down. Given the employee's behaviour and his explanation for it, considered against the appellant's evidence that he could no longer be trusted, it was apparent that significant trust issues had arisen. These issues were of such a nature that they made reinstatement intolerable. It could not reasonably have been expected of the appellant in such circumstances to reinstate the employee into a position in which a high degree of trust and integrity was required when from the evidence he had failed to display precisely such behaviour.

[19] Since the employee had nine years' service with the appellant, and having regard to the circumstances of the matter, an award of compensation was the

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[7] *Afgen (Pty) Ltd v Ziqubu* (*supra*) at para 18.
[8] [2008] 8 BLLR 723 (LAC).

appropriate remedy in this matter. There was no reason shown why such compensation should be limited. The employee should therefore, given his unfair dismissal, be granted the maximum compensation of twelve (12) months permissible in terms of section 194.

[20] Having regard to considerations of law or fairness it is appropriate that no order of costs be made.

Order

[21] For these reasons, the following order is made:

1. The appeal succeeds in part.

2. The order of the Labour Court is set aside and replaced as follows:

‘*The review application succeeds only to the extent that the order of reinstatement is set aside and substituted with an order that the applicant, Standard Bank of South Africa Ltd, pay twelve (12) months’ compensation to the respondent, Mr Heiden Leslie, amounting to R171260.00, within ten (10) days of the date of the arbitration award.*’

SAVAGE AJA

Waglay JP and Coppin JA agree.

APPEARANCES

FOR THE APPELLANT: Doctor Cithi

Mervyn Taback Inc.

FOR THE FIRST RESPONDENT: Ditheko Lebethe Attorneys