REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JA3/05

In the matter between:-

FAITH MAHLANGU	First Appellant
EMILY MOKONE	Second Appellant
and	
T MASHIGO, N.O.	First Respondent
A C BASSON, N.O.	Second Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Third Respondent
CLICKS (PTY) LIMITED (SILVERTON)	Fourth Respondent

JUDGMENT

ZONDI, AJA

Introduction

[1] This is an appeal, with leave of this Court, against the judgment and order of the Court *a quo* (Per Revelas J) dismissing with costs the appellants'

application for the review and setting aside of the first and second respondents' (the commissioners) arbitration awards.

[2] In both arbitration awards the commissioners found that the appellants' dismissal was both substantively and procedurally fair and dismissed the appellants' referrals.

Condonation Application

[3] Before proceeding to deal with the merits of the appeal there are two preliminary issues which merit attention. There is an application by the applicants seeking condonation of the late filing of the notice of appeal and the appeal record and another by the fourth respondent seeking condonation of the late filing of the power of attorney and the resolution authorising the fourth respondent's attorneys to represent the fourth respondent in the opposition of the appeal. Both applications are not opposed and in view of the fact that there is a reasonable explanation for the delay and granting condonation will not cause prejudice to any of the parties the late filing of the appeal record, notice of appeal and special power of attorney together with resolution is hereby condoned.

Factual Background

[4] The first appellant (Mahlangu) was dismissed for serious violation of the fourth respondent's (Clicks) rule relating to till and cashing-up procedures and *"breach of trust"*. With regard to the second appellant (Mokone) she was

dismissed for breach of trust and dishonesty. At the time of her dismissal Mokone was employed as a cosmetic consultant and a cashier.

[5] Mahlangu had been employed by Clicks as an office clerk and a cashier. On or about Monday 25 June 2001 at about 08h30 the store manager on conducting a spot check on Mahlangu's till discovered that her till had a shortage in an amount of R340.00. When the store manager confronted Mahlangu about the shortage she was unable to account for it. In particular Mahlangu was asked if she had lent some of her till money to any of the cashiers. Mahlangu denied this.

[6] Later during the day and at about 16h00 when Mokone cashed up she surreptitiously produced an IOU slip purporting to record that on Friday, 22 June 2001 Mokone borrowed a sum of R340.00 from Mahlangu's till. Pursuant to the IOU transaction Mokone allegedly made payment of the sum of R340.00 into Mahlangu's till.

[7] Clicks rejected the legitimacy of the IOU transaction on the basis that it had not been concluded in accordance with its till operation procedures. The till operation procedure regarding the conclusion of an IOU transaction provides that only the management is allowed to authorise the transfer of money from one cashier to another and the IOU slip must be generated in triplicate to record the transfer. The IOU slip must be signed by all the three parties involved in the transfer of money and each cashier must keep a copy of the IOU slip in his/her till. The IOU slip which Mokone produced in the instant case did not bear a signature

of either the store manager or the supervisor. It only bore the signatures of Mokone and Mahlangu.

[8] The other basis upon which Clicks rejected the legitimacy of the transaction pursuant to which the IOU slip produced by Mokone was generated, was premised on the fact that the amount on the IOU slip did not correlate with the total cash amount in Mokone's till when she cashed up.

[9] In this regard Clicks pointed out that when Mokone began her shift on Friday, 22 June 2001 she had coins in an amount of R317.87 in her till.

[10] This amount had been allocated to Mokone by Clicks to use as change. Clicks contended that if Mokone had borrowed R340-00 from Mahlangu as the IOU slip purported to record, Mokone would have had R657.82 change in her till when she cashed-up.

[11] The financial records in Mokone's till indicated that Mokone had R236-65 in her till when she cashed-up at the end of her shift which means that during the day she had only used R81-17. It could be inferred from these facts that Mokone had enough change in her till on Friday, 22 June 2001 and did not need extra change.

[12] At the conclusion of their respective disciplinary hearings both Mokone and Mahlungu were found guilty and dismissed. Dissatisfied with the outcome they

referred the dispute to the CCMA for arbitration contending that they had been unfairly dismissed.

<u>Proceedings before the Commissioners</u>

[13] The arbitration hearings were conducted before the first and second respondents respectively. The crux of the matter at each arbitration hearing was whether acts of misconduct on the part of Mokone and Mahlangu had been established and whether a fair procedure had been followed in dismissing them.

[14] The commissioner, who arbitrated the dispute relating to Mahlangu, found that Mahlangu had not followed the correct procedure in concluding the IOU transaction and concluded that the *“IOU slip produced by [Mokone] was meant to cover!uð shortage in Mahlangu’s till”*. The commissioîer accordingly held ôèat Mahdangu’s diómissal waó sôbstaotifel}(æair> T`e cïlmissioner aíso fismiÿsel Mah)angu’s0conôqntékn`|hat ! proper$pögbeeõre1êed vot(bgef followeä(in di{mis{alw(hio ind held`|hav the"dismissql was procedurilly fair.

[15] It is not clear from the commissioner’s seasonyng if he determined the appropriateness of dismissal as a sanction. But for the reasons$thav will follow nothing tusns on it.

[16] The comoissioner, who arbitrated Mokone’s dispute, also found that on the evidence before him Mokone was correctly found guilty as it was clear that Mokone and Mahlangu had flouted Clicks’ procedures in concluding the IOU

transaction. He concluded that the IOU slip produced by Mokone was part of a scam to cover up the shortage in Mahlangu's till. The commissioner further found dismissal as a sanction to have been appropriate in light of the fact that Mokone's actions constituted dishonest conduct. He also dismissed the suggestion by Mokone that a proper procedure had not ben followed in dismissing her.

Review Proceedings

[17] The appellants thereafter launched two review proceedings in which they sought to review and set aside the arbitration awards contending that the commissioners had committed reviewable irregularities in holding that their dismissals were fair.

[18] The Court *a quo* dismissed Mahlangu's review application holding that there was a rational connection between the commissioner's reasoning and his conclusion in relation to the evidence which was before him.

[19] It went on to hold that *"as a matter of law and logic the dismissal was the appropriate sanction in the circumstances"* as there had been a breakdown in the trust relationship between Clicks and Mahlangu.

[20] The Court *a quo* rejected Mahlangu's procedural challenge of the fairness of dismissal on the ground that she never raised it when she gave evidence or during her cross examination of Clicks' witnesses.

[21] The Court *a quo* dismissed Mokone's review application on the ground it was not persuaded that the arbitrator had not applied his mind.

[22] With regard to Mokone's attack on fairness of dismissal on procedural grounds the Court *a quo* found it to be without basis and rejected it on the ground that it was only raised during argument in reply when the review application was argued.

<u>Proceedings before this Court</u>

[23] In their heads of argument the appellants advanced two grounds upon which they attack the judgment of the Court *a quo.*

[24] They contend that the Court *a quo* should have found that the commissioners' awards *"were not rationally justifiable on the evidence and facts placed before"* them having regard to the admission by Clicks' witnesses, firstly, that an IOU transaction had taken place and secondly that the chairpersons and the initiators of the appellants' disciplinary hearings were one and the same persons.

[25] It is clear from the Court *a quo's* analysis of the review application that it determined the matter on the basis of the review standard as formulated by this Court in **Carephone (Pty) Ltd v Marcus N.O. and Others** [1998] 19 ILJ 1425 and which was the correct applicable standard at the time. At paragraph 37 this Court formulated the test for review as follows:

"…is there a rational objective basis justifying the connection made by the administrative decision maker between the material available to him and the conclusion he or she eventually arrived at?"

[26] The reasonableness standard as the correct standard of review was recently formulated by the Constitutional Court in **Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others** [2007] 28 ILJ 2405 (CC). In departing from the **Carephone** test, the Court had this to say at paragraph 106:

"[106] The Carephone test, which was substantive and involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers , was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse s 145 of the LRA."

[27] The Court went on to hold at paragraph 110 of the judgment as follows:

"To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato

Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

[28] This Court applied the reasonableness test in **Fidelity Cash Management Services v CCMA** (2008) 29 ILJ 964 (LAC). It held at paragraph 92:

" To this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and once it is not reasonable, it can be reviewed and set aside."

[29] The Supreme Court of Appeal in **Edcon Ltd v Pillmer NO and Others** (2009) 30 ILJ 2642 (SCA) explained the application and the ambit of the reasonableness test. At paragraph 16 it held:

"[16] It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the commissioner when making the award. It is remarkable that the constitutional standard of 'reasonableness' propounded by the Constitutional Court in Sidumo is conceptually no different to what the LAC said in Carephone. The only difference is in the semantics - the LAC had

preferred 'justifiability' whilst the Constitutional Court has preferred the term 'reasonableness'."

[30] In determining the question whether or not the commissioners' awards should have been reviewed and set aside by the Court *a quo* I will do so using the reasonableness standard as set out by the Constitutional Court in **Sidumo** case namely, whether the decisions of the commissioners can be said to be decisions which reasonable decision makers could not reach.

[31] I now turn to consider the grounds advanced by the appellants upon which they contend the Court *a quo* erred in not reviewing and setting aside the commissioners' awards.

[32] The first contention raised by the appellants relates to the substantive fairness of their dismissal. They argue that the Court *a quo* should have found that the commissioners' awards were not rationally justifiable in that Clicks' witnesses conceded that an IOU transaction had taken place between Mahlangu and Mokone. And if this fact was accepted there existed no basis upon which the appellants could be found guilty of acts of misconduct.

[33] There is no merit in the appellants' contention. The appellants contention does not accurately reflect the evidence of Clicks' witnesses in this regard. Their admission of the existence of an IOU slip in my view should in no way be construed as an admission of its legitimacy.

[34] On a proper analysis of their evidence what it intended to convey is that the appellants produced a document which purported to record an IOU transaction. It is clear from the record that it was common cause that the appellants purported to conclude the IOU transaction. What was in dispute was the legitimacy of the transaction. In particular Clicks contended that the transaction was irregular and rejected the IOU slip concluded pursuant thereto.

[35] Clicks had put in place till procedures according to which the IOU transaction had to be concluded. Management had to be involved in the conclusion of the transaction. When the transaction in issue was concluded management was excluded. It did not authorise it. Mahlangu did not have authority to conclude the IOU transaction on behalf of management. She was a party to the transaction. She could not have acted in two capacities even assuming, as the appellants suggested, that she was part of the management.

[36] In my view the appellants were correctly found guilty. The question is whether a sanction of dismissal was appropriate for the acts of misconduct the appellants were found guilty of.

[37] It is correct that section 188(2) of the LRA enjoins commissioners in considering whether or not the reasons for a dismissal were fair, to take into account the Code of Good Practice ("the Code"). This refers to Schedule 8 to the LRA. Item 7 (b) (iv) of the Code requires a commissioner to consider whether dismissal was an appropriate sanction.

[38] Item 3(4) of the Code provides that it is inappropriate to dismiss an employee for a first offence, except if the conduct is serious and of such gravity that it makes a continued employment relationship intolerable.

[39] *Mr Khosa* submitted on behalf of the appellants that a sanction of dismissal is not fair in the absence of evidence suggesting that the appellants had acted fraudulently in concluding an IOU transaction. He argued that at the very least the evidence indicated that the appellants, in concluding an IOU transaction, breached the till operation procedures.

[40] Secondly, he submitted that it was unfair to dismiss the employees such as appellants who have worked for an employer for approximately 10 (ten) years without any bad disciplinary record.

[41] While it is correct that there is no direct evidence indicating that the appellants had acted fraudulently in concluding the IOU transaction, indirect evidence of dishonesty may be inferred from their conduct.

[42] In my view the only reasonable inference that could be drawn from the proved facts is that the appellants' conclusion of the IOU transaction was an after thought attempt to establish an *ex post facto* explanation for shortage in Mahlangu's till.

[43] It is common cause that when the store manager cashed up Mahlangu's till on the morning of Monday, 25 June 2001 she discovered shortage in an amount

of about R340.00. Mahlangu was unable to account for it. To her knowledge she had not lent her till money to any of the cashiers.

[44] The situation remained unresolved until later in the day when Mokone's till was cashed up. It is at that stage that Mokone miraculously produced to the store manager an IOU slip purporting to record that she had borrowed R340.00 from Mahlangu's till money.

[45] Clicks rejected the legitimacy of the belated IOU slip on the basis, firstly, that its conclusion was in breach of its till operation procedures and secondly that the total cash in Mokone's till did not support the claim of the IOU transaction having been concluded.

[46] There is no doubt in my mind that dishonesty affects the element of trust which is the foundation upon which the employment relationship is built. That relationship will cease to exist once trust disappears (**Anglo-American Farms t/a Boschendal Resaurant v Komjwayo** (1992) 13 ILJ 573 (LAC).

[47] In my view having regard to the commissioners' reasoning, based on the material before them, it cannot be said that their conclusions were conclusions that a reasonable decision-maker could not reach. In the result I find that the Court *a quo* did not err in not reviewing and setting aside the commissioners' award.

[48] I now proceed to consider the appellants' second ground of attack on the Court *a quo's* judgment. It relates to the Court *a quo's* finding that the appellants' dismissals were procedurally fair.

[49] The submission made by the appellants in this regard is that the Court *a quo* erred in finding that the commissioners had not committed a reviewable irregularity in holding that the appellants' dismissal was procedurally fair.

[50] In developing this argument it was pointed out on behalf of the appellants that at the disciplinary hearings Rachidi, one of Clicks' witnesses, admitted that the person who presided over the disciplinary hearing at which the appellants were found guilty, performed a dual function. He acted both as an initiator and the chairperson.

[51] There is no merit in the appellant's submission. In this regard Mahlangu failed to raise the procedural irregularities relied upon at the arbitration hearing and neither did Mokone. In the circumstances the appellants' attack on the Court *a quo's* judgment based on procedural fairness cannot be entertained. In any event the argument is misconceived. The chairperson did not act as an initiator but adopted an inquisitorial approach which he was entitled to do.

[52] The next question to consider is whether the Court *a quo* was correct in ordering the appellants to pay costs.

[53] In terms of section 162 of the LRA the Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness. It therefore has discretion to award costs and its discretion would not be lightly interfered with unless it was improperly exercised. The Court *a quo* ordered the appellants to pay costs. There is no suggestion by the appellants that the Court *a quo* improperly exercised its discretion when it awarded costs against them. In the circumstances there is no basis to interfere with the order and it should stand. In the present matter I would, however, not be inclined to make costs order relating to the appeal as in my view there was a genuine dispute and the appeal was not unreasonable.

Order

[54] In the circumstances I make the following order:

1. The appeal is dismissed with no order as to costs.

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ZONDI, AJA

I agree

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WAGLAY, DJP

I agree

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LANDMAN, AJA

<u>APPEARANCES</u>

For the appellants : W Khosa

Instructed by : Retail & Allied Workers Union

For the fourth respondent : Adv. Michael Van As

Instructed by: Deneys Reitz Attorneys

Date of Hearing : 16 November 2010

Date of Judgement: 02 February 2011