IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA3/14

In the matter between:-

WOOLWORTHS (PTY) LTD **Appellant**

and

KHAYALETHU CHRISTOPHER MABIJA **First Respondent**

(Third Respondent in the Court *a quo*)

COMMISSIONER FOR CONCILLIATION, MEDIATION AND ARBITRATION **Second Respondent**

(First Respondent in the Court *a quo*)

COMMISSIONER SIYABONGA COKILE **Third Respondent**

(Second Respondent in the Court *a quo*)

Heard: **24 November 2015**

Delivered: **19 February 2016**

Summary: **Review of arbitration award – employee charged with two counts of misconduct and dismissed – commissioner finding employee misconducted himself in the exercise of his duties but found that sanction of dismissal too hash- employee reinstated without back pay. Commissioner decision falling within the ban of reasonableness – Labour court's judgment upheld. Appeal dismissed with costs.**

Coram: Waglay JP, C J Musi JA *et* Savage AJA

JUDGMENT

C J MUSI JA

[1] This appeal, which is with the leave of this Court, is against the judgment of the Labour Court (Lallie J), wherein it dismissed, with costs, the review application brought by the appellant.

[2] The first respondent (the employee) was employed by the appellant from February 2007. He was dismissed on 17 November 2010. At the time of his dismissal, he was a controller or what was called a weekend manager at the appellant's Greenacres store, Port Elizabeth. It was common cause that the stock of the Port Elizabeth stores was ordered from the appellant's Cape Town warehouse. The stock would then be delivered by truck to the Port Elizabeth stores.

[3] Different container dollies were used for different products. Cold chain products, which must immediately be put in the cooler after being offloaded, were put on cold chain dollies. The products that do not have to be refrigerated were put on ambient dollies. Although the cold chain dollies and the ambient dollies could not easily be distinguished, the cold chain dollies were normally wet.

[4] During the evening of 18 October 2010 the employee and three other employees offloaded a truck. He was in charge of the offloading process. When his other colleagues arrived the next morning, they saw that a dolly with cold chain products to the value of R3675.00 was left unattended and not put in the refrigerator.

[5] The employee also indicated on the official documents, that a pallet of long life products that was brought by another truck was offloaded, but the products were found on the truck the next morning. The cold chain products were not kept at the required temperature for a few hours after being offloaded

therefore they had to be destroyed. This resulted in the loss of R3675.00. The long life products did not result in actual loss but potential loss.

[6] The employee was charged and convicted of gross misconduct in that between 18 and 19 October 2010, he failed to comply with the appellant's cold chain policy and procedure by leaving a dolly with cold chain products unattended. He was also convicted of leaving a pallet of long life products on the delivery truck despite indicating that he received it. He was dismissed.

[7] Dissatisfied with the dismissal, he referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Conciliation was unsuccessful and he referred the dispute for arbitration.

[8] The third respondent (the Commissioner) found that the employee had committed both acts of misconduct. He however found that the sanction of dismissal was too harsh and made the following award:

> 'The dismissal of the Applicant, Khayalethu Christopher Mabija, was substantively unfair.
>
> The Respondent, Woolworths (Pty) Ltd, must reinstate the Applicant, Khayalethu Christopher Mabija, with no loss of service and benefits, into the same or similar position on the same terms and conditions that existed prior to the dismissal on 17 November 2010.
>
> The Respondent, Woolworths (Pty) Ltd, must pay back pay to the Applicant, Khayalethu Christopher Mabija, in the amount of R2 666.66 x 3 months = R7 999.98 (Seven Thousand Nine Hundred and Ninety Eight Rands) within 14 days from the date the Respondent is served with this award.
>
> The Applicant, Khayalethu Christopher Mabija, must report for duty on 20 June 2011.
>
> The Applicant, Khayalethu Christopher Mabija, is given a final written warning valid for a period of 12 months from 17 November 2010.
>
> I make no order as to costs.'

[9] The appellant felt aggrieved by the award and launched review proceedings in the court a *quo*. The court a *quo* found that the Commissioner gave no less that nine reasons why the sanction was too harsh. On the ground of review that the Commissioner failed to consider the fact that the employee raised a fabricated defence, the court a *quo* said the following:

> 'I am not convinced that it is permissible to review the award based on the omission to consider that the third respondent's defence was based on fabrication particularly in view of his reasons for rejecting his version as it did not cause the commissioner to reach an unreasonable decision.'

[10] With regard to the breakdown of the employment relationship, the court a *quo* said the following:

> 'No list of specific acts of misconduct or circumstances which destroy the trust relationship exists. Further, it is not enough for an employer to merely state that the trust relationship has broken down. It is necessary for evidence to be led to prove the breakdown of the trust relationship.'

[11] The court *a quo* also found that the trust relationship does not automatically breakdown each time an employee commits misconduct.

[12] Ms Nel, on behalf of the appellant, left no stone unturned in her criticism of the judgment of the court a *quo* and the award of the Commissioner.

[13] She contended that the Commissioner misconceived the nature of the inquiry because he stated that he was called upon to determine whether the sanction imposed by the appellant was appropriate as opposed to fair in the circumstances. She contended that the Commissioner wrongly embarked on a fresh determination of an appropriate sanction instead of determining whether the sanction imposed by the appellant was fair. A careful reading of the award repays attention. At paragraph 21 of the award, the Commissioner states the following:

> 'In deciding the fairness of the applicant's dismissal, I must consider item 7 of the Code of Good Practice on Dismissal. In this regard the code states that an arbitrator must consider:

> Whether or not the employee contravened a rule or standard regulating conduct in, or relevant to the workplace; and if a rule or standard was contravened, whether or not…dismissal was an appropriate sanction for the contravention of the rule or standard.'

[14] The Commissioner then stated the following:

> 'In determining whether or not the sanction imposed by the respondent on the applicant was appropriate, I have considered that the rules breached by the applicant were important to the respondent, that the respondent's disciplinary code imposed a sanction of dismissal for gross negligence, that the respondent suffered a loss in the amount of R3 675.00, that the respondent's disciplinary code states that the corrective measures or consequences listed therein should be used as guidelines for fair and consistent discipline of employees, that the security of employment is a core value of the Constitution, the circumstances under which the acts of misconduct were committed by the applicant where he was short staffed, that the applicant had been employed as an end of day controller for about two months when these incidents occurred, that no evidence was led by the respondent as to why corrective discipline was not applied in this case and whether additional training and instruction could still result in the applicant repeating the misconduct, that the misconduct committed by the applicant did not involve an act of dishonesty which could lead to the intolerability of the employment relationship, that the applicant had a clean service record, and the effect of the dismissal on the applicant. I therefore find on a balance of probabilities that, the sanction of dismissal was too harsh in the circumstances and conclude that the applicant's dismissal was substantively unfair'.

[15] It is clear from the above that the Commissioner was aware that in determining whether the dismissal of the employee for misconduct was fair, he should consider whether the sanction imposed by the employer was appropriate. In my view, he did not misconceive the nature of the enquiry.

[16] Ms Nel submitted that although the Commissioner acknowledged that Snyman had given evidence on behalf of the appellant that the trust relationship had broken down, he however found that there had been no evidentiary basis laid therefor before him. She submitted that this finding was

clearly at odds with the evidence before the Commissioner and that no reasonable decision-maker could have found as the Commissioner did at paragraph 28 of the arbitration award; that there was no evidentiary basis laid by Snyman for a finding that the trust relationship was broken.

[17] Paragraph 28 of the award reads as follows:

> 'On the issue of sanction imposed by the respondent, I observed in the last paragraph of paragraph of 54 of the respondent's bundle of documents that the chairperson's finding that the respondent would find it extremely difficult to trust the applicant was not supported by evidence and as such the chairperson entered the arena by making a finding in favour of the respondent without any evidentiary basis. Even though, Hein Snyman testified that he regarded the trust relationship as broken there was no evidentiary basis that was laid down by him on what basis the trust relationship was broken.'

[18] A proper reading of paragraph 28 reveals that the Commissioner firstly criticized the chairperson of the disciplinary inquiry's finding relating to the trust relationship in the absence of any evidence in that regard. It must be remembered that Snyman did not testify at the disciplinary hearing; he only testified at the arbitration. Secondly the Commissioner found that Snyman's testimony before him was not sufficient to make the finding that the trust relationship had broken down. Snyman was asked how this incident made him feel and he said the following:

> 'It upset me quite a bit; because it wasn't long before that we decided I'm taking Khayalethu onto my team. And we had quite a variety of options. And we employed then as weekend managers. So they were in a sense higher than the end of day controller. They were end of day manager (sic). And he was responsible for ensuring that this shouldn't happen and it still happened. So in a sense the trust relationship for me was broken'.

[19] The court a *quo* also found that Snyman's evidence was insufficient because the mere fact that misconduct was committed does not *per se* lead to a break down in the trust relationship. The court a *quo* correctly pointed out that various factors should be considered before the conclusion that the trust relationship has broken down is reached. The court a *quo* then said those

factors included "the industry the appellant operates in; the nature of the misconduct and its effect on the parties, and whether training and progressive discipline cannot prevent a recurrence of the misconduct."

[20] Snyman did not testify that the trust relationship had been destroyed. He did not testify as to what the impact of this specific incident was on the trust relationship. He dithered.

[21] The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonestly, cannot be visited with dismissal without any evidence as to the impact of the misconduct. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such break down.[1] Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair.[2] The Commissioner in this case considered this aspect.

[22] Ms Nel further contended that the Commissioner did not give weight to the fact that the employee lied and proffered a fabricated version. She submitted that the fabrication also led to the breakdown of the trust relationship. The Commissioner found that the employee "did not approach the CCMA with unclear hands." The Commissioner used two negatives in this phrase. The question that arises is; what did he mean.

[23] Mr Nyondo, on the one hand, submitted that the one negative is a typographical error. Ms Nel, on the other hand, submitted that it means that the employee approached the CCMA with clean hands because the two negatives cancel each other out.

[24] Double negatives ordinarily refer to the situation when two forms of negation are used in the same phrase. In some languages, like Afrikaans, the use of

[1] *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ (SCA) at para 19
[2] *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* 2008 (2) SA (CC) at para 116

double negatives is acceptable because the second negation intensifies or emphasised the negativity of the sentence as a whole. In English, however, double negatives in a single phrase or clause cancel each other out to become a positive. The use of double negatives in English is unacceptable because of the confusion it causes. We must consider whether the use of double negatives in this case was deliberate or a mistake.

[25] Having regard to the entire award, the only sensible conclusion is that the use of double negatives, in this case, was a grammatical or typographical mistake. The Commissioner rejected the employee's version in respect of both counts. He accepted the appellant's version. In simple terms, it means that he rejected the employee's version as false. He rejected the employee's version because he found it to be "unreliable and improbable". He could therefore not have found, in the same award, that the employee approached the CCMA with clean hands. The Commissioner further ordered the reinstatement of the employee from the date of his dismissal; he however found that he should not be paid back pay from that date. This clearly shows that he used his discretion against the employee (by not ordering his reinstatement with full back pay) *inter alia* because the employee lied during the proceedings. The Commissioner was alive to the fact that although an employee's lies, during disciplinary proceedings, may destroy the trust relationship; there are instances where such inference is not warranted in the absence of clear evidence to that effect.

[26] Ms Nel also contended that the Commissioner did not consider that the employee was convicted of two counts of misconduct; the one causing actual loss whilst the other caused potential loss. In my view, this submission is without merit. It is clear from the award that the Commissioner was alive to the fact that the employee was convicted of two charges of misconduct. In the award, the Commissioner states that "those incidents were isolated incidents" and "I have considered that the rules breached by the applicant were important to the respondent". He used the plural nouns instead of singular

ones. He might not have mentioned the potential loss but that does not mean that he did not consider it. In *Rex v Dhlumayo,*[3] Davis AJA remarked that:

> 'It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked…'[4]

[27] It is ironic that during the disciplinary hearing, the appellant's representative was requested to make written submissions setting out aggravating factors. He wrote the following:

> 'I think the chairperson should impose a harsher penalty because Khayalethu knows the importance of maintaining cold chain, as he holds a leadership position first as on EDD controller and now as a weekend manager. Also the chairperson should consider the fact that the business has lost money in excess of R3675 because those products had to be written off as waste as they were outside the cold chain for more than 4 hours. Also I think by imposing a harsher penalty it will show other employees that policies and procedures are there to be followed hence the reason for our policy'.

Even the employer did not mention the potential loss.

[28] I agree with the Court a *quo* that the decision of the Commissioner is one which a reasonable decision-maker could make. The appeal should therefore be dismissed. There is no reason in law or fairness why a costs order should not be made in this matter.

[29] I make the following order:

The appeal is dismissed with costs.

____

C J Musi JA

Waglay, JP and Savage AJA concurred in the judgment of C J Musi JA.

[3] 1948 (2) SA 677 (A).
[4] At 702.

APPEARANCES:

FOR THE APPELLANT:	Adv Nel
	Instructed by Macgregor Erasmus Attorney
	Port Elizabeth
FOR THE FIRST RESPONDENT:	Adv Nyondo
	Instructed by Maci Incorporated
	Port Elizabeth