

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR649/07

In the matter between:

TILE AFRICA, GERMISTON

Applicant

And

S HINTSHO N.O

1st Respondent

THE COMMISSION for

2nd Respondent

CONCILIATION

MEDIATION and ARBITRATION

JOHN SITHOLE

3RD Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the first respondent under case number JAJB20879-06 dated 8 February 2007. In terms of the arbitration award the commissioner found the dismissal of the third respondent, Mr Sithole (Sithole) by the applicant to be substantively unfair. It was

for this reason that the commissioner ordered the reinstatement and compensation of Sithole in the amount of R2857 39.

Background facts

- [2] Sithole was employed by the applicant as a sales consultant during May 2002 and was dismissed during September 2006. The duties of Sithole were inter alia serving customers, merchandising and administration and this included doing cash up.
- [3] The version of the applicant is that Sithole refused to carry out instructions given by Mr Van Wyk. When Sithole refused to obey the instruction Van Wyk reported the matter to the branch manager Mr Kotze.
- [4] Kotze then repeated the instructions to Sithole that he should do the cash up. He again refused to carry out the instruction.
- [5] Sithole on the other hand, testified that his primary duty was to service customers and cashing up was his secondary duty. According to him there is a monthly roster which determines who of the employees would be responsible for cashing up and on what particular day.

[6] The reason for refusing to obey the instruction to do the cash up on that particular day was according to Sithole not because it was not his duty to do cash up on that day but because he was busy serving a customer.

[7] After informing Kotze that he was unable to carry out his instructions because he was busy with a customer, Sithole was approached by Jan van Wyk who said to him:

“You must go and do the cash up now.”

Sithole testified that van Wyk appeared to be furious when he instructed him to do the cash up.

[8] Sithole testified that he did not heed the instructions of van Wyk but continued to attend to the customer and after completing the invoice he handed it to the floor staff to pick up the stock for the customer.

[9] In relation to the process of cash up Sithole testified that normally cash up starts at 15H30 or 15H45 but on that day he was informed to do the cash up at 16H00. Sithole also testified that he knew

about the rule against insubordination and that he was aware of the charge brought against him at the disciplinary hearing.

- [10] Mr Ntsibande, the employee who testified on behalf of Sithole, testified that he received an invoice from Sithole at 16H00 to collect the stock for the client. The invoice contained a request from the client that the tiles be cut.

Grounds for review and the award

- [11] The applicant contended that the commissioner ignored the crucial evidence which formed the crux of the case and thus prevented her from arriving at a reasonable and justifiable decision. The award was also criticized because the findings made did not correspond with the evidence and the document which were properly placed before the commissioner.

- [12] In her award the commissioner found that the instruction given to Sithole was unreasonable because at the time it was given he was busy with a client. The commissioner found the explanation by Sithole that at the time he was busy with a client was corroborated by the applicant's own witness van Wyk. She also found that there

was no evidence that a relationship between Sithole and the applicant had broken down.

Evaluation

[13] The test for review as developed in **Z Sidumo & Another v Rustenburg Platinum Mines & Others (2007) 12 BLLR 1097** is that of “*a reasonable decision-maker*”. In terms of this test the labour court is entitled to interfere with an arbitration award only if the arbitrator makes a decision that a reasonable decision -maker could not reach. In **Edcon Ltd v Pillemer N. O & Other (unreported case number DA4/06)** the Labour Appeal Court in interpreting the reasonable decision –maker test said in order for it be said that the decision is reasonable:

“Meaningful strides are taken to refocus attention on the suppose impartiality of the commissioner as a decision-maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come with a reasonable decision. It is infact the relevant factors and circumstances of each case, objectively viewed, that should inform the element of reasonable or lack thereof”.

[14] I understand the approach adopted by the Constitutional Court in **Sidumo** and in the subsequent decisions of the Labour Appeal Court in cases like **Edcon (Supra) and Fidelity Cash Management Services v CCMA and &Other) 2008 3 BLLR 197 (LAC)** to mean that this court is required in determining whether or not the decision of the arbitrator is reasonable to have regard to the reasons given for the decision. The function of the court in this regard is as was held in the unreported case of **Sil Farming CC t/a Wigwan (JR3347/05)** to ensure that the decision made by the commissioner in exercising their functions as the arbitrator fall within the bounds of reasonableness whilst at the same time remaining alive to the distinction between appeals and review. See also **Ladubi Ato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 4902 (CC)**

[15] The important aspect of a reasonable decision-maker test is that the emphasis is on the range of reasonable outcome and not on the correctness of the outcome. See **Gimini Indent Agencies CC t/a SNA Marketing v CCMA 1999 20 ILJ 28752 (LC)** And **Coetzee v Lebea N.O & Another 1999 20 ILJ 129.**

[16] In terms of this test a decision unsupported by any evidence or supported by insufficient evidence or where the decision-maker ignores uncontradicted evidence which is material to the determination that decision will be unreasonable and stands to be set aside. See **Sil Farming (supra) at para (16)**. A decision could also be unreasonable if there is a glaring inconsistency between the facts found by the commissioner and the final conclusion arrive at. See **Morningside Farm v Van Staden N.O & Another (1998) 19 ILJ 1204 (LC)**.

[17] In **Standard Bank of SA limited v Commission for Conciliation Mediation and Arbitration & Others 1998 6 BLLR 622 (LC)** at 627 the court held that :

“Where a commissioner sitting as an arbitrator has misconstrued oral or documentary evidence or has ignore or misapplied legal principle to an extent that it is inappropriate or unreasonable , then such commissioner has failed the task under the Act”.

[18] Turning to the facts of this case it is common cause that Sithole was given instructions to cash up. He refused and the explanation given which the commissioner accepted and formed the basis of

her conclusion is that Sithole was attending to a customer. In my view the commissioner adopted a piece meal approach in dealing with the matter resulting in her failing to apply her mind to the totality of the evidence and circumstances of the case before her.

[19] It is undisputed that the instructions were given by two people at different points in time and in all instances Sithole refused to do what he was asked to do. The instructions were very clear particularly at the stage they were issued by van Wyk. In this regard van Wyk testified during the arbitration proceeding (at page 89 line 4-10 of the transcribed record) as follows:

“John, you must do cash up because Dominique is busy.

When Sithole responded by saying that he was busy with a customer van Wyk said to him the following:

“John, as soon as you finished with your customer you must do cash up”.

[20] Van Wyk further testified on the same issue (at page 89 line 13 as follows:

“I saw him standing at the door with no customer around him. I approached John, I ordered him to cash up and his reply was he wont do it and there was nothing I can do about it”.

[21] It was also undisputed that despite the instruction been given 3 (three) times, Sithole, in a disrespectful and insubordinate manner and in the presence of other refused to comply. I agree with the applicant that this evidence was not seriously challenged or discredited. The commissioner did not reject this evidence and therefore there was no basis in arriving at a conclusion unsupported by this evidence.

[22] The reading of the award and the objective assessment of the circumstances of this case reveal very clearly that Sithole had committed a misconduct. Regard being had to this and the fact that Sithole presented a different version at the disciplinary hearing stating that it was not his turn to do the cash up that he had not been given enough notice and that he had admitted that he was not aware that cash up falls within the ambit of his duty as a sales consultant it is not clear from the reasoning of the commissioner exactly why she found in his favour. It is also not clear how the commissioner could have arrived at this conclusion when on Sithole's own version he was instructed at 16h00 to the cash up. Sithole testified that at 16h00 he handed the invoice to Sibande to collect the tiles. This means that at the time he received that instruction he had just finished with the client. There is also no

evidence assuming that he finished late with the customer that he went to enquire as to whether by that time cash up had already been done.

[23] The explanation for the conclusion of the commissioner in my view can only be found from the analysis of the award which reveals that the commissioner failed to appreciate the task before her, misconstrued the oral evidence which was presented and failed to apply the rules of evidence in her assessment as to which version to reject and which to accept.

[24] In my view the commissioner misdirected herself in the evaluation of the evidence before her and failed to accord the proper weight to such evidence. She accorded undue weight to the evidence of Sithole and more particularly that of Ntsibande. Ntsibande's evidence was simply that he had helped Sithole with a customer. He took the invoice to collect the customer's tiles which he had to cut to specification before handing them to the customer.

[25] In my view it is perfectly clear on the basis of evidence and the circumstances of this case that the commissioner failed to appreciate and decide the true issue of whether or not the conduct

of Sithole amounted to gross insubordination. The approach adopted by the commissioner in concluding that the dismissal was unfair is a misdirection and a gross irregularity. Accordingly the arbitration award of the commissioner stands to be reviewed. It is clear from the record that had the commissioner applied her mind she could have come to the conclusion that Sithole was guilty of gross insubordination. The next issue she would have had to consider was whether the dismissal sanction imposed by the applicant was fair.

[26] There is authority that refusal to obey a lawful command should be viewed in a serious light and may justify a dismissal provided it is wilful and deliberate. In this regard **Humphries & Jewel (Pty) Ltd v Federal Council of Retail & Allied Union (1991) 12 ILJ 1032.**

[27] The facts and circumstances of this case shows very clearly that Sithole refused to obey the lawful and reasonable instruction which means he was guilty of a serious misconduct. Sithole's conduct and attitude was not just a mere disregard of the applicant's authority but posed a serious challenge to the

applicant's authority. The question that then arises relates to the appropriateness of the dismissal sanction.

[28] Thus in my view a reasonable decision-maker faced with the facts and circumstance of this case would have found Sithole guilty of insubordination and in the light of his failure to show remorse the appropriate sanction was a dismissal.

Conclusion

[29] For the above reasons the arbitration award stands to be reviewed and set aside. The circumstances of this case do not dictate that an order of cost be made.

[30] In the premises I make the following order :

“1. *The arbitration award issued by the second respondent under case JAJB20879-06 dated 08 February 2007 is reviewed and set aside*”.

2. The award is substituted with the following award:

“1. *The applicant (Mr Sithole) is guilty of gross insubordination.*

2. *The dismissal of the applicant (Mr Sithole) was fair.*”.

2. There is no order as to costs.

Molahlehi J

Date of Hearing: 29 April 2008

Dated of Judgement: 26 February 2008

APPEARANCES:

For the Applicant: SNYMAN ATTORNEYS

Instructed by:

For the Respondent: SACCAWU

Instructed by: