



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2019/08

In the matter between:

VALUE FURNISHERS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

DLAMINI S N.O

Second Respondent

LABOUR EQUITY GENERAL WORKERS OF

SOUTH AFRICA

Third Respondent

MAKALENI J

Fourth Respondent

Heard: 20 October 2011

Delivered: 10 November 2011

JUDGMENT

BHoola J

Introduction

- 1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (the Act), for the review and setting aside of the award issued by the second respondent (the arbitrator) on 3 August 2008 in which the dismissal of the fourth respondent (the employee) was found to have been substantively unfair and the applicant was ordered to reinstate her.
- 2] Condonation is sought for the late filing of the applicant's heads of argument and is granted. Although a notice of opposition was entered, there was no answering affidavit filed by the fourth respondent and the matter was enrolled as unopposed.

Background facts

- 3] The employee was a stock clerk who was transferred from the Germiston to the Alberton branch of the applicant on 19 July 2007. She was responsible for all aspects of stock control including incoming and outgoing stock as well as tracking the movement of stock and conducting stock takes.
- 4] On 8 October 2007, she was subjected to a disciplinary enquiry on charges of poor work performance and / or negligence in the performance of her duties. She was found guilty and on 15 October 2007 was issued with a final written warning valid for six months.
- 5] On 30 October, 9 and 16 November 2007, the employee undertook sectional stock-takes at the branch, and reported to the applicant's head office that there were no shortages or 'overs' (in the applicant's parlance 'nil deviations'). The branch manager, of the Alberton branch, Van der Merwe, resigned on short notice on 4 December 2007 and a full stock-take was conducted by head office at the branch. This was undertaken by the employee together with Van Zyl (from head office) and Symes (the new

branch manager). The stock-take revealed a stock loss of some R27 000, which was adjusted to R20 000 after a reconciliation exercise.

- 6] On 7 December 2007, the employee was charged with gross negligence in the performance of her duties as a stock clerk at the Alberton branch and was suspended pending the outcome of a disciplinary enquiry. Following a disciplinary enquiry, she was dismissed on 20 December 2007.

Grounds of review

- 7] The principal ground of review is that the arbitrator, in reaching the conclusion that the employee was not guilty of the misconduct for which she was dismissed, failed to apply his mind to the evidence led, to the extent of committing a gross irregularity.
- 8] In support of this ground of review, counsel for the applicant submitted that the arbitrator did not consider all the reasons advanced for the dismissal. He failed to apply his mind to the balance of the 'discrepancies' for the dismissal identified in the disciplinary enquiry as indicators of the employee's negligence. The discrepancies were listed as including (i) free gifts, (ii) theft of stock by others (iii) outstanding debit notes for repairs (iv) eight base sets missing (v) delivery note file (vi) sectional stock takes (vii) items not marked and (viii) repairs register. None of these are dealt with in the arbitrator's evaluation of evidence and argument, and although he dealt briefly with the sectional stock-take issue he paid no regard to the issue of free gifts or the other issues, on which extensive evidence was led.
- 9] In addition, the arbitrator was preoccupied with irrelevant and extraneous issues. Despite finding that it was common cause that the employee was required to conduct three sectional stock takes per month, and that she conducted only one in October and two in November following which she reported a 'nil deviation', and that losses occurred which were only identified by the branch stock-take conducted on 5 December, the arbitrator did not focus on the misconduct but instead applied his mind to

irrelevant issues. These included what he identified as a 'critical' question regarding the absence of Van der Merwe in the disciplinary enquiry of 8 October. He proceeded to question the absence of Symes, the new branch manager from the enquiry of 18 December, and the value of the evidence of the regional manager (Gordon) who 'got involved intimately with the issues of the branch when there was a branch manager at any given time'. Needless to say, these issues have no bearing on the charges against the employee. Without attempting however to explain this conclusion he instead returns to questioning Gordon's role and the existing reporting lines in minute detail. He concluded as follows :

'Gordon is a problematic witness'¹because he did not explain why he took the responsibilities of branch manager, even becoming the "complainant" when the branch manager was still there. He is the regional manager...[he] mentioned that he has open communication with the employees, but this cannot be used to undermine established structures like reporting lines between respective managers and subordinates'.

10] The arbitrator paid scant regard to the sectional stock-take issue, which was key to determining the substantive fairness of the dismissal. His finding in this regard, which is quoted below, is indicative of a complete failure to apply his mind to the issue he was required to determine.

'.. [The employee] submitted that after two..weeks of the last sectional stock-take having taken place, the shortage could result after this time. She stated that two weeks is a long time. The [applicant] never responded to this, and I have no option but to agree with [the employee] in this regard'.

[11] This version of the employee was accepted by the arbitrator despite the fact that it was not put to Gordon in cross-examination. Indeed, he was not cross-examined much on the substantive merits of the employee's dismissal. In finding in the employee's favour on this aspect, the arbitrator committed a gross irregularity.

[12] The arbitrator failed to have regard to the fact that the employee was not charged with causing the stock loss of R20 000 *per se* but with gross

¹ Counsel's underlining.

negligence in performing her duties as a stock clerk. The fact therefore than if the stock went missing in the period between 16 November 2007 (when the last proven stock take was undertaken by her) and 5 December 2007 (the date of the head office stock take), the employee was by no means innocent of any wrong doing because *inter alia* the 16 November stock take had only been a sectional one not a complete one, with the result that its reflecting a 'nil deviation' did not mean that stock was not missing from other sections (which she had not counted since 16 November). In any event, he disregarded evidence that she failed to undertake the third sectional stock take at the end of November, which according to the evidence may well have resulted in early detection or may well have deterred malfeasance. The fact that the employee was in overall control of stock at the branch and could not provide any tenable explanation for what was a considerable stock loss at the branch was not at all considered.

[13] Lastly, the relief ordered by the arbitrator indicates that, contrary to his conclusion on the merits, he nevertheless considered her to be guilty of the offence. She was deprived of back pay of three and half months which can hardly be reconciled with a finding that there was no substantive fairness for her dismissal. In the result, as was submitted by Mr Myburgh, the award is mutually contradictory, which reaffirms the fundamental failure by the arbitrator to apply his mind to the evidence before him.

Conclusion

[14] As was submitted by Mr Myburgh, the Labour Appeal Court has on a number of occasions upheld the setting aside of awards on this ground². An alternative ground for the review is that the arbitrator acted unreasonably (in the process-related sense in which the term was explained by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) at paras 14, 17).

2 See *inter alia* *County Fair Foods (Pty) Ltd v CCMA and Others* (1999) 20 ILJ 1701 (LAC) at paras 18,19,38 and 40; *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* [2002] 3 BLLR 189 (LAC) at paras 91-92; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* [2002] 6 BLLR 493 (LAC) at paras 60-64; *Miladys, a division of Mr Price Group Ltd v Naidoo and Others* [2002] 9 BLLR 808 (LAC) at paras 31-33 and *Maepe v CCMA and Another* [2008] 8 BLLR 723 (LAC) at paras 8, 22.

[15] For the reasons submitted by the applicant as set out above, the review must succeed on the main ground. It is therefore not necessary to consider whether the award is also reviewable on the alternative ground.

[16] The employee was on a final written warning at the time and failed to undertake the required stock takes. She was therefore guilty of gross negligence in the performance of her duties. Had the arbitrator applied his mind properly to the determination of this issue, as well as to all the evidence before him, and refrained from a focus on irrelevant and extraneous issues, the outcome would in all likelihood have been different. The record clearly sets out the evidence and issues for determination and no purpose would be served by remitting the matter for determination *de novo*

[17] Order

In the premises, I make the following order :

1. The award is reviewed and set aside.
2. The arbitrator's decision is substituted with an order that the dismissal of the employee was substantively fair.
3. There is no order as to costs.

U Bhoola

Judge

APPEARANCES

APPLICANT: A T Myburgh SC instructed by Tabacks .

RESPONDENT: No appearance