REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR962/08

In the matter between:

CHIPKINS CATERING SUPPLIES (PTY) LTD **Applicant**

and

FAWU obo MASHIANE PHINEAS **First Respondent**

COMMISSIONER M C MELLO **Second Respondent**

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 15 December 2011

Delivered: 8 March 2012

JUDGMENT

KUMALO AJ:

[1] This is an application by the applicant, CHIPKINS CATERING SUPPLIES (PTY) LTD,

for an order in the following terms:

(a) That the Arbitration Award dated 8 April 2008, issued by Mehlomelele Christopher Mello of the Commission for Conciliation, Mediation and Arbitration under case number LP 1383-08, and served upon the applicant on 25 April 2008, be reviewed and set aside;

(b) Alternatively that this matter be remitted to the third respondent who shall appoint another Commissioner.

(c) Directing the first respondent and any other respondent who wishes to oppose this application to pay the applicant's costs;

(d) Further and/or alternative relief.

[2] The founding affidavit of Michael Lockley was used in support of the application. A supplementary affidavit served in terms of rule 7 A(8) was filed after the handwritten notes of the DC Enquiry chairman, and the documentation handed in by the applicant at the Arbitration hearing had been delivered by the second respondent.

[3] The disciplinary hearing was held on 30 January 2008, chaired by Chris Campbell who works for the Chipkins Bakery, which is part of the Bidvest Group. The employee, Phineas Mashiane, was represented by the Trade Union FAWU. The employer, by Michael Lockley, Human Resources Director, of the applicant.

<u>Background</u>

[4] At the disciplinary hearing the charge against the employee was misconduct for gross negligence in that the employer suffered stock losses of about R96, 000 in January 2008. At that time it was alleged he was the only employee who had the key to Sea World store room where the stock losses occurred. The other employee of the applicant who had a key to the store was on leave. He was in Malawi from the middle of December 2007 to the middle of January 2008.

[5] The disciplinary hearing was concluded on the 4 February 2008. He was found guilty and was dismissed. He appealed against his dismissal; that appeal was dismissed on 14 February 2008.

[6] The Arbitration hearing was held on the 27 March 2008 before the Commissioner Mello, the matter having been referred to the Commission for Conciliation, Mediation and Arbitration for conciliation-arbitration; had remained unresolved after conciliation.

<u>Applicant's Evidence</u>

[7] The evidence for the employer was given by James Alfred Jeffries Parmiter, the Operations Manager. He said in evidence that the charge was gross negligence where the first respondent was responsible for ensuring the stock control of the hardware and liquor storeroom at Sea World as he was the only person in possession of the storeroom key at Sea World and as a result of his actions the company incurred a stock loss of minus-plus R89, 000 on 18 January 2008.

[8] He said when the stock arrives at the Chipkins warehouse; a receiving clerk will receive the stock, verify the stock on the invoice to the actual stock, sign the invoices and would put the invoices to the buying department where they will read the stock into the system which is called the GRV (Goods Received Voucher). They will then print a second report called the GRN (Goods Received Note). Then the first respondent in the case of the Sea World stock will check the stock from the GRN. He will secondly check the stock to confirm that it was correctly received into the store.

[9] Parmiter will then arrange transport for the goods to be taken to the Sea World warehouse by the driver and first respondent where they would unload it and secure it in the storeroom. The reason the first respondent would go with the driver is that he was the only person with the key for the storeroom.

[10] When stock has to be taken from Sea World to Chipkins the first respondent would take the picking slips, pick the stock with the driver and load it onto the delivery vehicle, off-load it at chipkins where the stock would be invoiced for the following day's delivery.

[11] When cross-examined on behalf of the first respondent, Parmiter said in his answer that he was appointed as a picker with extra responsibilities but did not know whether that

was in his contract of employment. He agreed that Moffard Matika was the other person with a key to the Sea World storeroom, but that key he kept in the cabinet.

[12] He said when they load the stock at Chipkins to take to Sea World the first respondent will check the stock for any discrepancies and if there were any, will report them to him. He said after the delivery vehicle had been loaded at Chipkins the driver would lock its door, and agreed that there was a possibility that they might unlock the door and steal the stock.

[13] In re-examination he agreed that Moffard did have access during the day to the Sea World storeroom with his own key without the first respondent being there. He was not sure when he had done that but thought that it was during the middle of December 2007 and the middle of January 2008. He would have a picker's list which showed, for example, how much Black Label was needed, and how much castle. He would be doing that with the driver.

First respondent's evidence

[14] The first respondent gave evidence. He said he was a picker and his duty was to take out the stock for the customers. At Chipkins he was not the one checking the stock that was going to Sea World. He would be in the warehouse doing another job. He would not know how much stock was loaded. He would not be given any forms or papers for it. He had nothing to do with the Goods Received Voucher (GRV). That was the responsibility of France and Nomri. At Sea World he and the driver would just off-load the stock and take it to the storeroom.

[15] He said he was given the key by Kerspen in November and was told by him he was just the keeper and not the controller. When stock taking, he would shout how much stock there was, Parmiter would be writing it down but he would not check what he wrote down.

[16] Under cross-examination he said he was not unhappy with the fact that Campbell was going to be the chairman nor did he have a problem with that. He said he was not aware of any managers from outside Chipkins Catering that come to chair Disciplinary Committee enquiry.

[17] He said he did not get the goods received note (GRN) and that was the truth. It was Nomri Malatho who is a clerk who did the second check for stock received. He was not responsible for the hardware store at Chipkins as well as the liquor store at Sea World.

[18] He said he knew that Moffard did go to the Sea World warehouse without his

knowledge, this was before his dismissal. It was middle of December 2007 before Moffard went on leave and before the stocktaking at middle of January 2008.

[19] The applicant then sets out in paragraphs 5-11 of his supplementary affidavit what he claims is '…uncontested evidence…' before the commissioner, and what is '…also manifest from the record…'

[20] But an examination of the record of the Disciplinary Committee enquiry shows that the applicant merely repeats what he said in his opening address, the evidence in chief of his only witness, James Parmiter, the latter's cross-examination, the exchanges between himself and the commissioner when the latter was seeking clarification of what is being said and lastly, his concluding submissions to the commissioner.

[21] So far from the evidence before the commissioner being uncontested, it remained fiercely disputed by the respondent employee. So when the commissioner drew the conclusion at paragraph 7.5 of the award that,

> 'I therefore do not accept the Respondent's contention that the Applicant was the only person who could have caused the stock losses. Even if the applicant was responsible for the safekeeping of the stock, the fact that some senior officials of the company had the keys to the warehouse makes it unfair to single out the applicant as the culprit. On this basis I find that the dismissal was substantively unfair because the Respondent had failed to prove on a balance of probabilities that the Applicant had committed the alleged misconduct.',

he was not accepting that the respondent was the culprit. He was well aware of the thrust of the respondent's defense as set out in the above paragraph, in particular that Mr. Matika, the General Manager, also had a key to the Sea World warehouse and was found by the respondent inside the warehouse. This was between mid-December 2007 and mid-January 2008, in any event before the stock taking on the 18 January. The Commissioner said:

> 'The Respondent could not sufficiently challenge this allegation as Mr. Matika was not at the arbitration hearing to rebut it.'

and he concluded,

> ‘It is therefore clear that not only the Applicant had access to the warehouse where the stock in question was kept, but other employees of the Respondent also had access.’

[22] The applicant’s criticism of the decision of the commissioner in paragraph 7.5 of the award, and in paragraphs 12 – 16 of his supplementary affidavit (page 168 index bundle), is on three counts, namely it suggests that the commissioner

> (1) concluded that the employee was responsible for the stock.
>
> (2) did not understand the evidence before him, namely that at the time of the loss the only person who had keys was the employee.
>
> (3) seemed to accept that the employee was indeed a culprit but that there must have been other culprits, which was not the evidence before him.

He then concludes that the commissioner’s decision is not the decision a reasonable decision-maker would have reached after a full conspectus of the evidence presented at the arbitration.

[23] In *Pep Stores (Pty) Ltd v Laka NO and Others,*[1] Mlambo J, as he then was, said:

> ‘Where a commissioner has considered all the facts of evidence before him and applied relevant legal principles, his award is not reviewable simply because someone else or any court would have come to a different conclusion if seized with the same matter. The Act makes no provision for an appeal from arbitration proceedings of the Commission and this Court cannot import same into its power or jurisdiction under the guise of reviews.’

[24] I am of the view that the applicant’s criticism, as set out in paragraph 22 above, simply amounts to no more than that the award is reviewable because any commissioner seized with the same matter would have come to a different conclusion. This is not the test for the reason that the learned judge in the above case stated. The applicant has not pointed to any serious error of law committed by the commissioner.

It was common cause between the parties at the disciplinary enquiry that the first respondent had been dismissed from his employment and the commissioner correctly stated that, as the existence of the dismissal is established, the onus was on the employer to prove that the dismissal was fair and that this was in terms of section 192(2) of the Act, as amended; that in the circumstances the applicant employer must prove on the balance of probabilities that it was the first respondents 'negligent` conduct which caused the alleged stock losses in January 2008. He failed to do this.

[24] In my view the commissioner weighed up all the relevant facts and circumstances of the case and came up with a conclusion of which it cannot be found that a reasonable decision maker in the position of the commissioner could not reach the conclusion which he did. See *Edcon v Pillemer NO and Others* [2008] 5 BLLR 391 (LAC) at p 398H.

[25] Accordingly, the application for the review and setting aside of the arbitration award made by commissioner MC Mello on 8 April 2008 under case no LP1383-08 ("the Arbitration Award") is dismissed with costs.

Kumalo AJ

APPEARANCES:

FOR THE APPLICANT: Advocate Sarah Wainwright

[1] (1998) 9 BLLR 952 (LC) at para 33, at 962. .