



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR811/2011

Not Reportable

In the matter between:

MUTUAL SAFES & SECURITY (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER W KRUGER

Second Respondent

LYDIA HLAHLA BANDA

Third Respondent

Heard: 10 July 2012

Delivered: 8 August 2012

JUDGMENT

Dodson AJ

Introduction

- [1] This is an application for the review of an award of the second respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration

("the CCMA"), the first respondent.

- [2] In his award, the second respondent found the dismissal of the third respondent by the applicant to be unfair and ordered the applicant to pay compensation equivalent to eight months' salary.
- [3] The review application was not opposed.

Factual context

- [4] The third respondent was employed by the applicant from 8 March 2007 and at the time of her dismissal, held the position of office manager – service and despatch administrator at the applicant's Johannesburg branch.
- [5] As at the time of her dismissal her responsibilities included:
 - [5.1] organising deliveries;
 - [5.2] following up on collection;
 - [5.3] day-to-day administration of the branch, including showroom and warehouse neatness, ensuring stocks of pamphlets were available for clients and managing the cleaner;
 - [5.4] general stock and product control, including regular stock-taking and maintaining of stock lists; and
 - [5.5] ensuring the smooth running of the branch.
- [6] During June 2010, the applicant was informed by an employee who had resigned, that there were irregularities taking place at the Johannesburg branch relating to the illegal sale of refurbished safes and related theft and fraud. The applicant sells new as well as refurbished safes. The investigation revealed that refurbished safes had left the premises without the necessary paperwork having been completed or with incorrect paperwork having been used and that moneys paid pursuant to the incorrect paperwork had not been deposited into the applicant's bank account.
- [7] The applicant then held a meeting with the employees in the Johannesburg

branch in order to bring the situation to their attention and to investigate with them the reasons for what had transpired. The first person to be called into the meeting was a Mr Albert Herholdt, a salesman, who had been identified by one of the applicant's clients as the person that they had dealt with in relation to a tainted transaction. Initially Mr Herholdt denied the allegation, then attempted to shift blame to the general manager, Mr Lombaard, but finally acknowledged that he had been guilty of unlawful conduct in selling refurbished safes and retaining the proceeds. His computer was confiscated and on it further evidence of theft and fraud was found. In acknowledging his unlawful conduct, Mr Herholdt denied that any other employees had been involved and insisted that he was solely to blame.

- [8] The applicant doubted this and proceeded to hold a further meeting with its Johannesburg branch employees on 30 June 2010. It was on this occasion that the third respondent revealed for the first time that some one or two weeks before this time, when she, Herholdt and Helen Kgatle had been having drinks in the company bar, in her words, "Albert got talking when he had a couple too many". He revealed that cash was being received, misappropriated and kept in a safe in the office of Mr Lombaard. The third respondent had however never previously reported any of this to the applicant.
- [9] Lombaard, the third respondent and Helen Kgatle were requested to undergo polygraph tests. Lombaard and the third respondent refused but Kgatle agreed. However she failed her test.
- [10] This took place against the backdrop that it was the third respondent's duty to ensure that all stock was accounted for, and, in particular, that she was responsible for keeping the keys of the safes which were held in stock. The keys were to be kept safely and were only to be handed over when a safe was to be transported to a client pursuant to a valid sale and the necessary paperwork was in place. According to the applicant, central to the necessary paperwork was a rule that in respect of every delivery, she was required to make out a delivery note which was generated along with an invoice by the firm's Pastel computer software system.

- [11] What the investigations revealed, however, was that in respect of some of the fraudulent transactions, stock was despatched on the basis of pro forma invoices which were not properly completed and which in any event was not allowed. The third respondent's answer to this was that she was permitted to do so by Mr Lombaard.
- [12] Lombaard, Helen Kgatle and the third respondent were then subject to formal disciplinary enquiries. The third respondent was charged with-
- [12.1] gross misconduct in not reporting theft or fraud by a co-worker;
- [12.2] gross negligence in the execution of her duties as branch controller in not seeing to the proper paperwork and controls instituted and required in the despatch area;
- [12.3] gross negligence in not acting in the best interest of her employer.
- [13] The disciplinary enquiry was held on 13 July 2010 and was presided over by Mr Lucas Coetsee from the South African Employers Organisation. The third respondent pleaded guilty to the first charge and not guilty to the second and third charges.
- [14] She was found guilty of all three charges and dismissed on 16 July 2010. An internal appeal failed.
- [15] The third respondent then referred the matter to the first respondent. Conciliation failed and the arbitration was then held over a period of six days, concluding on 11 March 2011.
- [16] On 17 March 2011, the second respondent handed down his award.
- [17] In brief, the second respondent reasoned as follows. He drew an adverse inference against the applicant because it failed to call either Helen Kgatle or Albert Herholdt or Hennie Lombaard or the chairperson of the disciplinary enquiry as witnesses to rebut the third respondent's version that blame was to a greater extent attributable to those three than herself. He was particularly critical of the fact that the other two persons charged were treated differently.

Helen Kgatle, who was responsible for invoices, was subject to the same three charges, also pleaded guilty to the first charge, was found guilty of the other two charges but was only demoted. Hennie Lombaard, the general manager was dismissed but the applicant entered into a contract with him as an independent contractor with a sister company.

[18] However the second respondent recognised that “the applicant is not totally blameless in this case. If she had put proper systems in place the fraud could have been prevented. However, there is no prove(sic) that she was dishonest. There is also no prove (sic) that she was grossly negligent.” He considered that she had been “over powered by the general manager and ‘cheated’ by Albert Herholdt”.

[19] He declared her dismissal to be unfair and awarded eight months compensation.

Legal context

[20] Having regard to the decision of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ the Labour Appeal Court in *Andre Herholdt v Nedbank Ltd*² and of this Court in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,³ amongst others, the decision of a Commissioner of the CCMA is reviewable with reference to-

[20.1] the substantive reasonableness of the decision, with the focus being on whether the result or outcome of the decision-making process is one which a reasonable decision-maker might reach; and

[20.2] the dialectical or “process-related” reasonableness of the decision, with the focus being on the logical path by which the decision-maker arrived at his or her decision.

¹ (2007) 28 ILJ 2405 (CC) at paras 109 – 110.

² Unreported judgment of the Labour Appeal Court under Case No. DA20/2010 dated 4 May 2012 at paras 33 – 41.

³ [2009] 11 BLLR 1128 (LC).

Analysis

- [21] Taking into account the fact that the second respondent's award must withstand scrutiny in terms of both substantive and dialectical reasonableness as outlined above, there was a failure on his part to consider a number of important aspects of the evidence before him.
- [22] Perhaps the most important of all was the fact that the third respondent was aware of a serious instance of fraud and theft against the company but did nothing to report it for somewhere between one and two weeks. To her credit, she made no attempt to dispute this and pleaded guilty to the relevant charge. Yet this is only taken into account in the second respondent's reasoning in comparing the treatment of Kgatle and the third respondent. Because Kgatle also pleaded guilty to the first charge and was not dismissed, the implications of this misconduct are given no further consideration. This evidence had to be considered in deciding whether or not the third respondent's admitted misconduct in this respect rendered her dismissal unfair, regardless of how Kgatle was dealt with. On this basis alone, the award is, in my view, unreasonable, at least in terms of dialectical reasonableness and possibly in terms of substantive reasonableness in terms of the overall outcome.
- [23] A further fundamental error on the part of the second respondent was his having given significant consideration to the absence of proof that the third respondent had been dishonest. This fact was entirely irrelevant because none of the charges alleged dishonesty against her. The only charge or complaint that came close to that was the complaint that she failed to report evidence of fraud and theft that she came across. On that charge there is no dispute that she was guilty. Moreover, her purported explanation of the failure to report the matter was manifestly unsatisfactory – namely that she was conducting her own investigation into the matter. No reasonable decision-maker would give such an explanation credence.
- [24] A further aspect of the reasoning process of the second respondent which crosses the bounds of reasonableness is his finding that there was no evidence that the third respondent was grossly negligent. This finding is

simply not in any way supported by the evidence that was led before the arbitrator. There was significant evidence that pointed to negligence on the part of the third respondent. Yet the second respondent plainly failed to have proper regard to it or to assess whether it constituted the gross negligence complained of.

[25] On the third respondent's own version she conceded that-

[25.1] she had responsibility for controlling the stock of refurbished safes, yet, at some stage, lost control over the stock. She did attempt to attribute blame for this elsewhere, but certainly did not testify that she reported this fact to anyone or attempted to take corrective steps herself or call for assistance;

[25.2] if she had applied and maintained the correct control mechanisms, none of the dishonesty or fraud pertaining to the refurbished sales would ever have taken place;

[25.3] the keys for the refurbished safes which she was meant to exercise control over used to go missing;

[25.4] notwithstanding that she was responsible for the smooth running of the office, the office did not run smoothly; and

[25.5] notwithstanding that she was responsible for general stock and product control the products and stock were not controlled in the Johannesburg branch.

[26] At the very least, it was incumbent upon the second respondent to acknowledge that this did indeed constitute evidence of what the applicant considered to be gross negligence and, if he disagreed, to provide a logically reasoned basis for his conclusion in that regard.

[27] The second respondent was strongly influenced in his decision, by his perception that there was inconsistency in the treatment of the three employees charged. However, there were two important components of the evidence which he failed to take into account and those were -

[27.1] the fact that the third respondent had a prior written warning for gross negligence in allowing an amount of R3622,81 to go missing;

[27.2] the applicant's explanation as to why it treated Hennie Lombaard and Helen Kgatle differently. On the evidence, it seems clear that Helen Kgatle was not vested with nearly as much authority, responsibility and trust as was the case with the third respondent. As far as Hennie Lombaard is concerned, not accommodating him in some way would, according to the applicant, have resulted in the loss by the applicant of three major contracts.

[28] None of this evidence was analysed as to why it might or might not be a legitimate basis for differentiation. He also failed to have regard to the applicant's uncontested evidence that if it had been able to find a position similar to that of Lombaard for the third respondent, it would readily have done so. However, no similar position was available.

[29] A further respect in which the second respondent's award fails the test of dialectical reasonableness is that he proceeded on the basis that the question of procedural fairness was in issue despite the fact that it had been conceded by the third respondent's legal representative in argument that the dismissal was procedurally fair.

[30] There are other respects in which the commissioner's decision can be criticised. However the above is sufficient to show that the award does not withstand scrutiny either on the basis of dialectal or substantive reasonableness. The errors on the part of the second respondent were serious and amounted to material irregularities preventing a fair trial of the issues. Accordingly, the award stands to be reviewed and set aside.

Appropriate relief

[31] The applicant asks that this court substitute its award for that of the second respondent. Because the matter is unopposed, I am faced with a situation where there are no competing contentions advanced on behalf of the third respondent.

[32] In view of the distinction drawn between the review of arbitration awards of the CCMA, on the one hand, and judicial review of administrative action under the Promotion of Administrative Justice Act No. 3 of 2000 on the other, in the *Sidumo* judgment,⁴ as well as the emphasis placed by the Constitutional Court on the need for finality in labour matters, I am of the view that substitution is an appropriate remedy in this case.

[33] Having regard to the fact that-

[33.1] the third respondent pleaded guilty to the first charge of failing to report fraud and dishonesty, a charge which this court considers to be of the utmost seriousness;

[33.2] the concessions made by the third respondent as to the complete failure on her part to carry out the responsibilities attaching to her post, together with the causal connection between that failure and the significant losses suffered by the applicant as a result of fraud and theft;

[33.3] the fact that, on the basis of the concessions made by the third respondent in this regard, the only conclusion to which a reasonable decision-maker could come was that there was gross negligence on her part;

[33.4] the fact that the third respondent had a prior written warning for similar misconduct;

[33.5] the fact that the third respondent bore considerably more responsibility and had more trust reposed in her than Helen Kgatle;

[33.6] the considerations identified in the above analysis of the award of the second respondent,

I am satisfied that the third respondent was fairly dismissed.

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, (2007) 28 ILJ 2405 (CC) at paragraph 98.

[34] I accordingly make the following order:

[34.1] the arbitration award made by the second respondent on 17 March 2011 under Case No. GATW9087-10 is reviewed and set aside;

[34.2] the award is substituted with the following award:

‘1. the dismissal of the applicant [third respondent in the review application] was fair.’

[34.3] No order is made as to costs.

Dodson AJ

APPEARANCES:

FOR THE APPLICANT: Ms E Duvenhage of Duvenhage Attorneys