REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 3449/10

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION, AND ARBITRATION	**First Respondent**
COMMISSIONER N.C. MALUMBETE *N.O.*	**Second Respondent**
SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION	**Third Respondent**
JANE MOTAU	**Fourth Respondent**

Heard: **17 January 2013**

Delivered: **12 June 1013**

Summary: **CCMA Arbitration Proceedings – Review of Arbitration Award – gross irregularity – whether the Commissioner failing to have regard to material facts**

JUDGMENT

GAIBIE, AJ

Introduction

[1] This is an application for the review of an arbitration award dated 8 November 2010. In his award, the commissioner found that the dismissal of the fourth respondent, Jane Motau ("Motau") by the applicant ("Shoprite Checkers") was procedurally and substantively unfair on account of her being not guilty of misconduct, and accordingly reinstating her with full back pay.

Relevant background

[2] Motau was employed by the applicant since 9 October 1999 and she held the position of administration manager since 1 July 2005. On 14 December 2009 Motau was served with a notice to attend a disciplinary hearing on 15 December 2009. She was charged with the following:

> "Serious misconduct in that you did not follow the correct dropping and banking procedure by not ensuring that the correct amount of money were made up as per Fidelity banking bag. You were accountable and responsible for the money and thereafter caused the company to suffer a financial loss to the amount of R9707.17".

[3] Motau was unable to secure representation at the disciplinary hearing at such short notice, and pursuant to a request from her, the disciplinary hearing was postponed for three hours from 9 am to 12 pm. When it was evident that she required further time to do so, the hearing was postponed for a further two hours from 12 pm to 2 pm that day. At 2pm Motau explained that she was still unable to secure the presence of her representative at the hearing at such short notice. At this point the chairperson of the hearing, Ms Isabel Kirchner ("Kirchner"), an employee of Shoprite Checkers, postponed the disciplinary hearing to 12 January 2010 on condition that Motau accepted that she would be suspended during this period without pay. Pursuant to the hearing held on 12 January 2010, Motau was found guilty of the charge of misconduct and dismissed.

[4] Much of the evidence presented in this matter centred around the procedures at Shoprite Checkers that had to be complied with for the purposes of

counting, recording, safely securing and ensuring delivery of monies to ABSA Bank.

[5] In summary, Petro Wilmi Enslin (“Enslin”), on behalf of Shoprite Checkers, indicated that this process involved the following:

a) The money from the cash tills must be transferred by the cashiers to the cash office. Upon receipt of the money at the cash office, the cash office clerk must ensure that the cash-up slips from a particular cashier corresponds to the physical money in hand and that the details thereof are recorded in a deposit book.

b) Thereafter, the cash office clerk must record the details of such monies in the drop-safe control records. Once that process is complete, the cash office clerk must request the administration manager - in this case it was Motau - to verify that the details on the deposit slip corresponds with the physical money on hand.

c) There must be one deposit slip in a money bag. The deposit slip must reflect the amount of R50 000, a deposit slip number, the date and the signature of both the cash office clerk and the administration manager. It goes without saying that the bag must also contain the cash amount of R50 000.

d) Once the cash office clerk and the administration manager agree that the money balances with what is recorded on the deposit slip, the administration manager must sign off on that deposit slip and the money bag, and together they must open the drop-safe and drop the money bag into the safe.

e) Keys to the drop-safe are kept in a float bag which gets sealed with a unique seal. Both of them must sign for it, open the safe, drop the money bag into the drop-safe and then put the keys back into a float bag. When the float bag is sealed with the key, a new number is recorded.

f) When the money is placed in the drop safe, arrangements are made for guards from ‘Fidelity Guards’ to come to the store to collect the money bags and to deliver them to ABSA bank. The relevant guard will have his or her own key which is also sealed in a float bag with a unique seal and its own number.

g) Then the three parties, the cash offer clerk, the administration manager and the relevant security guard must open the drop-safe simultaneously. The safe cannot be opened if they don’t have the Fidelity key and the applicant’s key. In other words, all three parties are present when the safe is opened and the bags are removed by the guard. When the money bag is taken out, the bag number must correspond with the number recorded in the drop-safe control records. The guard will also record the bag numbers in the Fidelity control sheet. Once that is done, the administration manager must confirm that the details are reflected correctly in the Fidelity control sheet. The administration manager must sign off on that information and the guard must give the administration manager one copy as proof that he or she has taken the bags listed in that control sheet to the bank.

[6] For the purposes of the charge of misconduct, the disciplinary enquiry was aimed at determining whether Motau had or had not followed the correct counting, dropping and banking procedures, and in particular whether she had:

a) concluded or signed off on two deposit slips in the amount of R50 000 each and placed both deposit slips in one money bag with R50 000 in cash (“the first money bag”); and

b) in relation to the second deposit slip (found in the first money bag), simply arranged for the delivery of a further amount of R40 292.83 (without a further deposit slip) to ABSA Bank (“the second money bag”).

[7] Shoprite Checkers presented its evidence through five witnesses. These included 2 witnesses from the Norkem branch of ABSA bank, Mr Andre Du Toit (“Du Toit”) the Branch Manager, and Thuso Moatshe (“Moatshe”) a teller

who reported to Du Toit. The applicant also led: Enslin, the Regional Administration Manager for Shoprite Checkers Waterberg region, and the person who was responsible for investigating this matter; Mr Werner Venter ("Venter"), the Branch Manager of Shoprite Checkers; and Kirchner, the chairperson of the disciplinary hearing.

[8] The first person at ABSA bank who dealt with the first money bag was the teller, Moatshe. He indicated that on 29 November 2009 he received the first money bag, that there was no money inside the bag only a deposit slip that reflected the amount of R50 000. According to him, the first money bag was effectively empty. As a result, he telephoned Motau and she informed him that the money would be delivered to ABSA bank the next day without a deposit slip. He said that on 30 October 2009, he received the second money bag which had no deposit slip but the amount of "R40 000.00 plus". He also indicated that he had an amount of R292 which was not accounted for, but he was clear that the amount was not from Shoprite Checkers.

[9] Moatshe said that at some stage, Venter came to the bank and completed a deposit slip for the amount of R40 292.83 in respect of the second money bag. When he was asked why he proceeded to process this transaction in the amount of R40 292.83 in light of his earlier evidence, he stated the following:

> "Because the slip came to me having this amount and I don't make those kind of decisions that I cannot do this and this and this. I do as I'm told".

[10] It is common cause that Moatshe's activities as a teller would have been recorded and was recorded on a video recording. I will return to this matter later in the judgment.

[11] The next person who dealt with the money bags was Du Toit. In essence, he stated that once the discrepancy in relation to the first money bag had been reported to him, and after he had counted the money, he concluded that the amount of money did not correlate with the deposit slip. His evidence was

equivocal to say the least and he ultimately relied on a letter that he had drafted several months after the event[1] which recorded the following:

a) Upon his investigation of the matter he found that they had received the first money bag from Shoprite Checkers with two deposit slips (numbers 926759 and 926774) which reflected the amount of R50 000 each and the cash amount of R50 000.

b) The bank informed Motau about the first money bag and she told them that she would send the outstanding amount on Friday (the next day).

c) On Friday ABSA received the second money bag from Shoprite Checkers with the cash amount of R40 292,83 and no deposit slip. He contacted Venter about the money. Pursuant to that call Venter and Enslin went to the bank and watched the video and agreed that they had only received the amount of R40 292.83 in the bag.

[12] Du Toit's evidence was fundamentally different from Moatshe's evidence in this regard. According to Moatshe, the first money bag only had a deposit slip which reflected the amount of R50 000 and the second money bag had a cash amount of R40 000. According to Du Toit, the first money bag had two deposit slips indicating a total value of R100 000 and the cash amount of R50 000; and the second money bag had the cash amount of R40 292.83. Du Toit's evidence accordingly indicated that they had received R50 000 more in cash than Moatshe had indicated.

[13] The applicant's third witness was Enslin. Issues relating to any shortages or discrepancies with the deposit of monies with ABSA Bank fall within matters that she is authorised to deal with. She was notified of a shortage by Venter. She investigated the matter and pursuant thereto she gave evidence at the disciplinary hearing as well as the arbitration proceedings in this matter. She gave undisputed evidence about the process involved with the collection of monies from the cashiers and to their ultimate collation, counting as well as deposit with ABSA Bank.

[1] The events in question occurred on the 29th and 30th October 2009 and the letter is dated 24 February 2010

[14] Thereafter Enslin proceeded to deal with the relevant facts associated with this matter. Unfortunately, Enslin had no less than four versions about the number of bags and deposit slips and the amounts involved in this matter. Her versions included the following.

a) First, she indicated that the deposit slip indicated an amount of R50 000 but that the money bag contained the amount of R40 292.83.

b) Second, she indicated that Motau had sent two money bags to the bank with only one deposit slip.

c) Third, she stated that there were two deposit slips with one money bag and there was R40 292.85 in cash.

d) Her fourth version was a refinement of the third version in which she indicated that there were two deposit slips amounting to R100 000 (each slip indicating R50 000) and the physical amount at hand was R40 292.85.

[15] These versions were given by Enslin on the assumption that she had conducted an investigation of the matter. At some stage, after her fourth version, the commissioner pointed out to her the contradictions and the confusion created by her various versions. At that point, she attempted to clarify her evidence, and it was clear that her knowledge as to what occurred in relation to this matter was not premised on any investigation but was reliant on the information provided to her by Du Toit, the Branch Manager of ABSA. In this regard she indicated that:

a) Motau had sent two deposit slips in one money bag to ABSA and each deposit slip had R50 000 written on it;

b) Du Toit informed Motau that there was one deposit slip extra with no money;

c) Motau had informed the bank that she would send the balance of the money the next day;

d) On the 31st of October 2009, Motau had sent another bag to the bank not with R50 000 but with R40 292.

[16] It was apparent from her evidence, that Motau's involvement in the second money bag that was sent to the bank on 31 October 2009 could be verified by the control records kept at Shoprite Checkers. However, it was patently clear that she relied on the information conveyed to her by Du Toit in so far as she alleged that Motau was responsible for sending the second money bag with the amount of R40 292.

[17] Against the background of the contradictory evidence presented by the applicant's witnesses, the applicant did not produce the following relevant and objective evidence that would have clarified Motau's involvement, if any, in relation to the two money bags. The allegations could have been verified by the following evidence:

a) On the applicant's version (presented by Du Toit and Enslin), Motau had sent two deposit slips in the first money bag with deposit slip numbers 926759 and 926774. Notwithstanding the applicant's evidence that four copies of the deposit slip are produced in relation to each deposit, that a copy is kept at the applicant's premises and that three copies are sent to the bank, it was unable to produce a copy of deposit slip number 926774 to verify its contention that Motau had completed this slip and included it with slip number 926759 in the first money bag that was sent to the Bank. On its version, the deposit slip could not be produced because the relevant ABSA Branch had burnt down.

b) The video footage. It appears from the record that Venter and Enslin had gone to the bank to go view the video footage regarding the money bags that were allegedly sent by Motau. Motau attempted, unsuccessfully, to see the video recordings prior to the disciplinary hearing and was informed that it was not available. The footage was also not produced during the arbitration proceedings.

c) There was no evidence regarding the detail as to how the second money bag was allegedly sent by Motau with the amount of approximately R40 292.00 to the bank on 31 October 2009.

d) Enslin did not consider it relevant or necessary to interview the cash office clerk, Grace Ramoroki, about her involvement in respect of first and or the second money bag. What was pertinent about her evidence, was her contention that the first money bag could not have included deposit slip numbers 926759 and 926774 because the deposit slips were contained in one book and would therefore have had consecutive numbers. Her evidence was not disputed and no counter evidence to this effect was given by the applicant. It is also unclear from the evidence of the applicant as to why a deposit slip for the amount of R40 292 was only completed by Venter on 20 November 2009.

[18] In the context of the contradictions in the evidence of the witnesses on behalf of the applicant, and Motau's denial of the charge of misconduct, it is clear that objective verifying information which would have cleared up any of the contradictions and referred to in the preceding paragraphs was not produced.

[19] In the circumstances, it is my view that the applicant had not discharged its onus in respect of the charge of misconduct against Motau.

<u>Procedural Unfairness</u>

[20] It was common cause between the parties that the matter was initially set down on 14 December 2009 for it to be heard the next day at 09h00. When Motau was unable to secure representivity at such notice, the disciplinary hearing was initially postponed to 12 pm, and thereafter to 2 pm that day. Thereafter, the chairperson of the disciplinary hearing insisted that Motau sign an agreement in terms of which she would be suspended without pay until January 2010 when the matter was heard, and Motau was ultimately dismissed. The chairperson's involvement in discussions with Motau about the postponement of the hearing as well as her achievement of an agreement from Motau that she would not be paid during the period of the postponement

reeked of unfairness. It was extremely unbecoming of a chairperson who was meant to be independent and impartial to be involved in such an arrangement.

[21] The crisp issue that arises for decision in respect of this matter is whether the chairperson's conduct in the postponement of this matter from 15 December 2009 to 10 January 2010 on the basis of an unpaid period of suspension was unfair. The chairperson was an employee of the applicant. Her involvement in securing such an agreement from Motau demonstrated a confusion in her role as an employee on the one hand and as an impartial and independent chairperson for the purposes of the hearing, on the other hand. What the chairperson should have done in this matter was to determine the application for postponement and to make a ruling in respect thereof. Insofar as she sought an agreement for the benefit of the applicant in this matter, she acted pro-actively as the employer rather than the chairperson, and in so doing created the impression that the matter was pre-determined. To that extent and notwithstanding the fact that Motau was given a reasonable opportunity of time between the period 15 December and 10 January to prepare for the matter, the perception that the process was one sided had already been created as at 15 December 2009 and to that extent the process was clearly unfair[2].

Grounds of Review

[22] The applicant contends that the commissioner's award is reviewable on the ground that his decision is one which no reasonable decision maker could have reached, having regard to the evidence before him and alternatively or on the other hand, the applicant contends that the commissioner ignored material evidence and that his conduct aforesaid constitutes a latent gross irregularity.

[23] In this regard, the applicant takes issue with the findings made by the commissioner in paragraphs 6.7 to 6.12 of the award wherein the commissioner found as follows:

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[2] See in this regard issues relevant to bias and perceptions of unfairness in the judgment of Van Niekerk J in *Protech Khuthele (Pty) Limited & Another v Wabile N.O. & Others 2013 34 I:J 1246*

"6.7 As already indicated the witnesses of the respondent contradicted themselves in all material respects. It is not clear whether a bag was sent with the deposit slip without money as alleged by Mr Thuso Moatshe or whether a bag was received with two deposit slips of R50 000.00 each but only with R50 000.00 cash inside, as alleged by the other witnesses.

6.8 I am confronted with two different versions of the respondent and the version of the applicant. The version of the applicant is however plausible and as such I admit her version and reject that of the respondent.

6.9 I find that the applicant's dismissal was substantively unfair.

6.10 It is not in dispute that the disciplinary hearing which was to take place on the 15th December 2009 was postponed until 12 January 2010. This was however done after the applicant agreed to be suspended without pay.

6.11 The condition for a postponed was very unfair, taking into consideration the fact that the applicant was only given the notice on the 14th December 2009 to attend the hearing on the 15th December 2009. She was within her right to ask for postponement as the time given to her was not enough for her to prepare her case.

6.12 I find that the pre-dismissal procedure was unfair".

<u>The Review Test and Latent Gross Irregularities</u>

[24] The test on review in <u>*Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Limited & Others*[3]</u> <u>is the following</u>

> "Is the decision reached by the Commissioner one that a reasonable decision maker could not reach"

[25] Insofar as the test for latent gross irregularities is concerned, it is fairly wide knowledge that the Labour Court together with the Labour Appeal Court have developed a test for such irregularities. An assessment of the jurisprudence in this regard indicates that reliance is placed on the minority judgment of Ngcobo J in <u>*Sidumo*[4]</u> about the meaning of such an irregularity in terms of section 145 of the LRA, in which he stated that:

[3] 2008 (Volume 2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)
[4] See footnote 2 above

"It follows, therefore, that were a Commissioner fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the Commissioner fails to perform his or her mandate. In so doing….the Commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the Commissioner has committed a gross irregularity in the conduct of the arbitration proceedings[5].

[26] Since this minority dictum, various judgments of this Court and the Labour Appeal Court have refined and extended the nature of this ground of review. In essence, a commissioner's award can be reviewed on the basis that the commissioner may not have considered material facts or considered materially irrelevant ones, but also on the basis that the commissioner might have placed erroneous constraints on the process of the evaluation of evidence which may have caused him not to consider material facts or issues.

[27] Examples of such gross irregularities will include the wrong evidentiary test[6] or for instance if the commissioner narrows the nature of the enquiry by misconstruing or misunderstanding the nature of an applicable rule[7]. In these circumstances, the error applied by the commissioner results in material facts or issues being ignored and the matter being determined on the wrong basis resulting in a wrong finding. This test relating to latent gross irregularities has received wide spread approval by the Labour Appeal Court in various judgments[8]. It is perhaps necessary at this stage to indicate that the Herholdt judgment[9], the LAC's test for interference in the case of a latent irregularity has been taken on appeal to the Supreme Court of Appeal and is yet to be determined in that Court.

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[5] At para 268

[6] *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others [2006] 9 BLLR 833 (LC) at 837 e to f*

[7] *S.A. Custodial Management (Pty) Limited v Commission for Conciliation Mediation & Arbitration & Others (2013) 34 ILJ 1255 LC*

[8] Including *Ellerine Holdings Limited v CCMA & Others (2008) 29 ILJ 2899 (LAC) at 2905 g to I; SAMWU v Platinum Ltd & Others (2012) 33 ILJ 329 (LAC); Afrox Healthcare v CCMA & Others (2012) 33 ILJ 1381 (LAC); Gaga v Anglo Platinum Ltd & Others (2012) 33 ILJ 329 (LAC)l; Herholdt v Nedbank Limited (2012) 23 ILJ 1789 (LAC) at para 38*

[9] See footnote 7 above

[28] Given my assessment of the evidence in this matter, it is clear that the issue in this matter is ultimately one that must be determined in terms of the Sidumo test.

Application of the Facts

[29] It is evident from the Arbitration Award that the commissioner in this matter was alive to all the material facts in this matter. These facts included the details as to whether there was one or two money bags, whether there was one or two deposit slips, the details as to how and when the money bags were received by ABSA Bank and whether there was evidence that established that Motau either sent monies short on the first day or indeed sent another money bag without a deposit slip on the second day. In the circumstances, the decision reached by the Commissioner is one that a reasonable decision maker could have reached.

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

The application for review is dismissed with costs.

GAIBIE AJ

Acting Judge of the Labour Court

Appearance:

For the Applicant: Mr. D Cithi

Instructed by: MervynTabacks Inc.

For the Fourth Respondent: CJA Lourens Prokeus