



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR1611/11

In the matter between:

WOOLWORTHS (PTY) LIMITED

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER J D SELLO N.

Second Respondent

SACCAWU

Third Respondent

K MOHLAFUNO

Fourth Respondent

Heard: 14 January 2014

Delivered: 20 May 2014

Summary: Review Application, dismissal of Till operator for having excess

funds in her till at the end of a given day. Commissioner misapprehending a central aspect of the evidence relating to the negligence of the employee and finding her to have not been negligent when she clearly had been. Notwithstanding this the Commissioner's finding that the dismissal was unfair on the basis that the sanction was too harsh still within the band of reasonableness referred to in the relevant jurisprudence as set out in the judgment.

JUDGMENT

SNIDER AJ

- [1] This is a review application in terms of which the Applicant seeks an order
- 1.1. settling aside the arbitration award dated 13 June 2011 which was issued by the Second Respondent under case number GAJB1648/11; and
 - 1.2. that this court substitute the arbitration award with the Second Respondent with one which the above Honourable Court deems fit.
- [2] The background to this matter is, briefly, that the Fourth Respondent ("the Employee") was a till operator in the employ of the Applicant and on 2 November 2010 it was found that her till takings were more than they should have been, according to various controls utilised by the Applicant, in the amount of R628.78. This fact was common cause between the parties.
- [3] The evidence was that a so-called "till over" can be as damaging to the Applicant as a "till under" because the necessary implication is that the till operator, the employee in this case, has taken more money from the Applicant's clients than she was entitled to in terms of the transactions which were conducted by her on the day in question.

- [4] Obviously, this can lead to significant dissatisfaction on the part of the Applicant's clients and, on the Applicant's uncontested version, this can also lead to payments in respect of utilities being received from customers but not paid towards the relevant utility bills.
- [5] The employee was duly charged with "misconduct in that on 02 / 11 / 2010 her till was over with (sic) R628.78 in cash which is against company Policy and Procedure".
- [6] A disciplinary enquiry was duly held and, having been found guilty as charged, the Employee was dismissed.
- [7] The employee duly referred her dispute to the First Respondent and the Second Respondent, ("the Commissioner") in his award, which is the subject of this review,¹ came to the conclusion that the employee's dismissal was substantively unfair on the basis that the sanction of dismissal was too harsh in the circumstances. The Commissioner also found that the employee's discrepancy was not occasioned by negligence and the evidence of the Applicant that it did not find any irregularities on the transactions of the employee supports this view.
- [8] The Commissioner also deals with the issue of the Employee not having been dishonest, which, while it may appear to be entirely irrelevant to the enquiry which the Commissioner was bound to undertake, which related only to a procedure, may nevertheless go to the issue of sanction.
- [9] Two recent decisions, one in the Supreme Court of Appeal - *Herholdt v Nedbank Limited (Congress of SA Trade Unions as Amicus Curiae)*² and the second in the Labour Appeal Court - *Goldfields Mining SA (Pty) Limited (Kloof Gold Mine) v Commissioner for Conciliation, Mediation and Arbitration and Others*³ are relevant to this matter. These two decisions

¹ Record at 73

² 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA).

³ (2014) 35 ILJ 943 (LAC).

have once again considered the test on review and reiterated that it is based on the decision in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.⁴

- [10] *Goldfields (supra)* has distilled the test into a, with respect, neat and streamlined form which is of assistance in determining matters of this nature. His Lordship Judge President Waglay sets out two principles which are germane to deciding this matter⁵ –

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him / her; evaluate the facts presented at the hearing and came to a conclusion that is reasonable’.

- [11] Judge Waglay then went on to set out a series of questions which can be utilised for the purposes of deciding review applications -

11.1 In terms of his or her duty to deal with the matter with a minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

11.2 Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have lead their evidence).

11.3 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

11.4 Did he or she deal with the substantial merits of the dispute?

11.5 Is the arbitrator’s decision one that another decision maker could reasonably have arrived at based on the evidence?

- [12] There are two respects in which the Commissioner’s award falls short of the

⁴ [2007] 12 BLLR 1097 (CC).

test set out in *Goldfields*⁶ (*supra*) –

12.1 the discrepancy in the till takings could not have been occasioned other than by the negligence on the part of the Applicant; and

12.2 the Commissioner, with respect, misunderstood the evidence of the Employee that it ‘did not find any irregularities on the transactions’ of the Applicant.

[13] The thrust of this evidence was not that the Employee had simply erred but that the only explanation for the “over” was that the Employee had been negligent.

[14] These findings by the Commissioner illustrate the shortcomings in the process he adopted in coming to the conclusions which he did.

[15] In respect of the third and fourth questions postulated by Judge Waglay in *Goldfields* (*supra*) the Commissioner clearly strayed, again on the issue of negligence.

[16] The difficulty is, however, that ultimately the reasonableness test must be applied on the basis set out in *Goldfields* (“*supra*”) –

‘...the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that

⁵ *Goldfields* (*supra*) at para16.

⁶ *Ibid* at para 20

falls in a band of decisions to which a reasonable decision maker could come on the available material'.⁷

[17] On a conspectus of the facts and available material as a whole that were before the Commissioner the decision he reached was one that a reasonable decision maker could come to and falls in a band of decisions to which a reasonable decision maker could come. It is in essence a value judgment on the appropriate sanction. A commissioner who found negligence, might nevertheless find that the sanction of dismissal was too harsh in circumstances where no dishonesty was shown and a previous incident of an "under" does not appear to have attracted a formal sanction.

[18] In the premises I make the following order -

1. The application is dismissed.
2. There is no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

⁷ Ibid at para 14–.

APPEARANCES

For the Applicant:

Mr B Masuku Tabacks Inc

For the Third and Fourth Respondents: Mpho Mjeza of SACCAWU.