



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**Not reportable**

Case No: JR2686/12

In the matter between:

**RAYMOND SHOKE**

**Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER ROB MACGREGOR**

**Second Respondent**

**SAA (PTY) LTD**

**Third Respondent**

**Heard: 14 January 2014**

**Delivered: 20 May 2014**

**Summary: Review application of award made by Second Respondent. Award not reviewable. Evidence indicating that there had been significant dishonesty on the part of the Applicant and his explanation of his conduct**

**improbable. No sustainable grounds of review advanced. Application dismissed.**

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## **JUDGMENT**

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SNIDER AJ

[1] This is an application brought by the Applicant (“the Employee”) to review and correct or set aside an award (“the award”) made by the Second Respondent (“the Commissioner”)<sup>1</sup> in favour of the Third Respondent (“SAA”), dismissing the employee’s unfair dismissal claim and effectively finding that the employee’s dismissal was substantively and procedurally fair. The employee seeks that the matter be referred back to the First Respondent alternatively that this Court substitutes the decision of the Commissioner. The employee further seeks costs of the application from SAA.

[2] Briefly, the background to this matter is that –

2.1 the employee was employed by SAA as a team leader on 10 June 1999 and was dismissed on 9 November 2012;

2.2 the employee was employed in the ticket sales department of SAA. On 20 May 2011 three individuals approached a counter staffed by one Thuli Motaung (“Thuli”) who was a junior to the employee and a ticket sales agent. The individuals concerned wanted to change a booking and were assisted by Thuli in doing so;

2.3 one Phumi Khumalo (“Phumi”) arrived at work at approximately 06h59 on 20 May 2011 and joined Thuli. Thuli was the manager on duty at the time;

2.4 at approximately 07h18, one of the gentlemen who earlier

approached Thuli returned to make payment in respect of the ticket changes which payment was, on SAA's version, in the amount of approximately R5,370; and

2.5 notwithstanding, that cash was handed to Thuli, the upgrade was processed under a "no-charge" category. In the normal course Thuli, or the Employee for that matter, should have taken the money to the cash box which is located a few meters from her counter. However, in this instance Thuli kept the money on top of her counter, with Phumi and the employee being in a position to see this.

- [3] Save for the dispute about the amount handed over to Thuli, which the Employee alleges was R2,500 and not R5,370, the facts set out above are common cause.<sup>2</sup>
- [4] It is also common cause that the money and accompanying documents were put, by the employee, "safely", into Thuli's bag, which was nearby.<sup>3</sup>
- [5] The employee was duly charged with 'gross misrepresentation, gross dishonesty, non-compliance with established / known procedures, fraud and corruption, breach of code of ethics and conduct of SAA, conducting private business or personal matter not related to the company on the premises and or during working hours and prejudicing the administration, discipline or efficiency of the business of SAA or a business unit or department within the company'.
- [6] He was duly found guilty at a disciplinary enquiry (which he failed to attend) and was dismissed.
- [7] I am of the view that I could in fact conclude this judgment on the substantive aspect of the dismissal at this point. This admission on the part of the employee; to have taken the money and put it in Thuli's bag,<sup>4</sup> is so

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<sup>1</sup> A copy of the arbitration award appears on page 16 of the paginated papers.

<sup>2</sup> At page 51 of the answering affidavit and page 155 and 156 of the replying affidavit

<sup>3</sup> At para 14, page 156, replying affidavit

<sup>4</sup> At page 277 to 278 of the transcript.

starkly damaging to his case, and indicates such blatant dishonesty, that I cannot imagine another Commissioner, having heard the evidence set out above at the arbitration, not being able to reasonably come to the conclusion that the Commissioner came to, that is that the employee's dismissal was substantively fair.

- [8] This analysis is in clear consonance with the decisions in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,<sup>5</sup> *Herholdt v Nedbank Limited (Congress of South African Trading Unions as Amicus Curiae)*<sup>6</sup> and, most recently, *Goldfields Mining (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others)*.<sup>7</sup> To cite from the decision of his Lordship Judge President Waglay in *Goldfields (supra)*<sup>8</sup> -

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act<sup>9</sup> ("the LRA") continued to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies that the 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 setting aside of the award if any of the above grounds are found to be present. In other words, in the 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 falls in a band of decisions to which reasonable decisions maker could come on the available material'.

<sup>5</sup> 2008 (2) SA 24 (CC); 2007 28 ILJ 2405 (CC).

<sup>6</sup> 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA),

<sup>7</sup> (2014) 35 ILJ 943 (LAC)

<sup>8</sup> Ibid at para14.

<sup>9</sup> Act 66 of 1995 as amended.

- [9] It is so clearly entirely improper for cash received in a business transaction to be placed in an employee's handbag, and then removed from the place of work, that it is inconceivable to suggest that the conclusion which the Commissioner came to in this regard was unreasonable.
- [10] The employee's explanation<sup>10</sup> that he 'withheld cash as it was short and he was waiting for the agent to come and pay the balance' is simply fanciful.
- [11] In fact, the employee's misconduct went further than attempting to misappropriate the cash received in respect of the upgrade, in addition, a receipt document, called an MCO, was fraudulently produced by him, after the investigation of this incident commenced, in an attempt to legitimise the transaction *ex post facto*.
- [12] Nevertheless, I will continue to consider the remainder of the issues raised by the employee and will also expand, to some extent, on the central issue of the misconduct of the employee on 20 May 2011 as referred to above.
- [13] There is a recurring complaint of the employee in the review application that he was refused a postponement when his representative became unavailable to represent him at the arbitration and this, on his version, renders the award reviewable.
- [14] It appears from the transcript that there was indeed significant debate about the question of a postponement.
- [15] The employee, however, expressed his willingness to continue with the matter without a representative on more than one occasion<sup>11</sup> and it is also clear from the record as a whole that he was able to do so and equally clear that the Commissioner evaluated his ability to do so and came to the same conclusion.

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<sup>10</sup> At page 34 paragraph 6.

<sup>11</sup> At page 169 of the transcript lines 12 to 14 and page 175 of the transcript lines 3 to 10

- [16] Although the Commissioner did refuse the postponement,<sup>12</sup> he did give the employee an opportunity, albeit a short one, to find another representative and also confirmed at great length that the employee was in a position to continue with the matter. Ultimately when given the choice of going to the union's (SATAWU's) offices, which appear to have been in the same building as the First Respondent, to find a representative, the employee rather elected to carry on with the proceedings unrepresented.<sup>13</sup> The Commissioner adopted a firm but reasonable stance. It is trite that he had discretion in respect of granting the postponement, and there is nothing to suggest that he exercised it unreasonably or injudiciously.
- [17] Accordingly, I reject this as a ground of review.
- [18] It is also not a legitimate ground of review that the employee was not given an opportunity to go through SAA's bundle of documents at the arbitration. In fact he had the bundle for a period of at least two weeks between the two sittings of the arbitration.<sup>14</sup>
- [19] Similarly it is not a ground of review that the employee was not given sufficient notice of his disciplinary enquiry and that the Commissioner did not consider this. The Commissioner deals with the issue.<sup>15</sup> The Employee complained of short notice of the disciplinary hearing (less than seven days when the disciplinary code provided for seven days) but in fact there was a long time period, well in excess of the seven days, which elapsed between the initial notice and the final notice. The enquiry was postponed several times. The Commissioner takes the view, reasonably in my opinion, that the provisions of SAA's policy must be viewed in context and that under the circumstances the employee had more than enough notice. Clearly the employee had a more than reasonable opportunity to prepare for the disciplinary enquiry which ultimately he did not attend. Extensive evidence

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<sup>12</sup> At page 177 of the transcript

<sup>13</sup> Transcript page 178 lines 10 - 25

<sup>14</sup> At page 165 to 180 of the record.

<sup>15</sup> At page 22 onto 23 paragraph 12 of the award.

was lead in this regard.<sup>16</sup>

- [20] The failure of the Commissioner to recuse himself when asked to does not constitute a legitimate ground of review in this matter. All that appears to have occurred was that there was a degree of conflict between the Commissioner on the one hand and the employee and his representative on the other. If conflict of this nature were to be a legitimate ground of review, then it would open the flood-gates to a host of spurious review applications.
- [21] There is no sense in the award of any bias on the part of the Commissioner, which is a necessary precursor for a recusal application of this nature. His findings are consonant with the evidence and material which was before him and are reasonable and properly considered.
- [22] The employee raises, as a ground of review, the finding of the Commissioner that the employee did not challenge the video evidence. While there is some debate while the video is actually being shown, particularly in relation to the counting of the money, the employee in fact, did not cross examine the relevant witness in relation to the video. The most important aspect of the video and the events related to it, the placing of the money in Thuli's handbag by the employee is, in any event, common cause. I do not see any basis on which this could constitute a ground of review.
- [23] In all the circumstances the conclusions to which the Commissioner came to were reasonable and another Commissioner with the same facts and evidentiary material before him could reasonably have come to those same conclusions. The conclusions are well within the band of reasonableness referred to in the authorities set out above.
- [24] Given the conduct of the employee which, to my mind, was flagrantly dishonest, I regard his pursuance of the arbitration proceedings and these

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<sup>16</sup> Transcript pages 34, 36, 38, 135, 144, 148, 258 – 267 and 303 – 305 of the record.

review proceedings as bordering on the frivolous and vexatious. In light of this, I am sorely tempted to make a costs order against him. However, I am mindful of the fact that he is an individual who, although it was through his doing, lost his employment and would have great difficulty in paying SAA's costs.

[25] Accordingly, I make the following order -

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

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Snider, A J

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: No appearance

For the Respondents: Advocate Sumayya Tilly

Instructed by: POSWA Inc.

LABOUR COURT