



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case no: C 406/13

In the matter between:

TFD NETWORK AFRICA (PTY) LTD

Applicant

and

MARAWU M N.O

First Respondent

**NATIONAL BARGAINING COUNCIL
FOR THE ROAD FREIGHT AND
LOGISTICS INDUSTRY**

Second Respondent

NZWANA MSOKOLI REGINALD

Third Respondent

Heard: 18 March 2014

Delivered: 19 March 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the first respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator found that the dismissal of the third respondent was substantively unfair, and ordered the applicant to reinstate him without retrospective effect. The basis of the award is reflected in paragraph [23] thereof, which reads as follows:

'Taking into account the totality of circumstances, particularly the employees length of service (12 years), with no previous record of the same\similar offence. The fact that it was not disputed that the applicant only consumed a damaged red Bull can without the necessary permission. The severe effect of dismissal on the employee, the potential effect of a serious warning on the employee's future conduct, I find dismissal as a sanction to be inappropriate in this regard (sic).'

Material facts

- [2] The factual background to the present proceedings is not contested. The third respondent was employed by the applicant as a damaged goods assistant. He commenced employment on 13 June 2000, and was dismissed on 19 November 2012. The applicant has a rule in place to the effect that employees are not allowed to eat and drink in the warehouse. The rationale for the rule is that the stock carried by the applicant includes consumable stock and as such, this stock would be susceptible to pilfering in the form of consumption by members of staff. It is not disputed that the applicant's employees had been told that eating and drinking in the warehouse was prohibited, and that any breach of the rule would be considered to constitute a serious misconduct warranting dismissal. Further, the applicant required to employees immediately to report any transgression of the rule or face being deemed to be part of that transgression. Notices were displayed throughout the warehouse to this effect.

- [3] The warehouse is monitored by way of CCTV cameras and it was in the course of a routine review of surveillance footage on 6 November 2012 that the applicant's security manager noticed employees consuming stock in the warehouse. The third respondent specifically was identified as walking to a crate, taking a can of drink, walking to the corner where employees were gathered, and then sitting and drinking the contents of the can. The third respondent did not deny that he had taken and consumed a can of Red Bull; he contended that the can was damaged and that he had permission to consume the goods. This version was rejected by the arbitrator who found the third respondent guilty of the misconduct alleged. However, as I have indicated above, the arbitrator in effect found that dismissal was too harsh a penalty in the circumstances.

Grounds for review

- [4] The applicant seeks to review the arbitrator's award in essence on the basis that the arbitrator was not entitled to consider the penalty that he would have imposed in the circumstances; rather, he was obliged to decide whether the sanction imposed by the employer was fair. In doing so, he was required to have regard to all of the factors set out in the judgment of the Constitutional Court in *Sidumo & another Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC). These factors are set out in the arbitrator's award at paragraph 21, but the applicant contends that by having regard to only two of the relevant factors (i.e. the status of the third respondent's disciplinary record and his length of service) the arbitrator failed properly to exercise the discretion conferred upon him.
- [5] In particular, the applicant submits that the arbitrator ought to have taken the following factual circumstances into account:
- The fact that the third respondent persisted with a false defence to the effect that he had committed no misconduct, and in particular, he's defence that he had been given permission to consume the item in question.

- That the applicant had always applied a zero tolerance approach in regard to the consumption of items in that warehouse.
- That the applicant had suffered a loss of some R1.3 million in four months consequent on pilfering.
- That the ruling question had a valid commercial rationale
- That on the uncontested evidence, a further working relationship between the third respondent and the applicant was unsustainable
- That the third respondent failed at any stage to exhibit any remorse
- That the disciplinary code and procedure prescribed dismissal for the misconduct in question, and that employees had specifically been warned that a breach of the rule would lead to dismissal.
- That the offence is one of dishonesty and tantamount to theft, since the third respondent had taken and consume property that did not belong to him.

[6] The applicant submits that had the arbitrator properly weighed all the relevant facts (including the third respondent's 12 years of service and unblemished disciplinary record), he would have come to the conclusion that the sanction of dismissal was appropriate.

Applicable principles

[7] As the series of recent decisions on the nature of the test to be applied in the present proceedings has indicated, and arbitrator is allowed to be wrong; what matters is the reasonableness of the outcome of the arbitration proceedings. An arbitrator's conduct has not in itself rendered an award potentially reviewable but is not entirely irrelevant. If that conduct has the result of an unreasonable outcome, the award remains reviewable. In this regard, the applicant relies primarily on a long line of authority dealing with the issue of employees consuming company property in a retail environment to submit that the arbitrator's award represents a decision to which no reasonable decision maker could

come on the available material. This authority can be traced back to *Metcash Trading Ltd t/a Metrocash And Carry v Fobb & another* (2998) 19 ILJ 1516 (LC), where Mlambo J (as he then was) said the following in the case that concerned an employee's consumption of 250ml of orange juice that formed part of expired goods:

'Theft is theft and does not become less so because of the size of the article stolen or misappropriated. Trust is at the core the employment relationship. Dishonest conduct by an employee breaches the trust the employer places on the employee.'

- [8] This principle was upheld by the Labour Appeal Court in *ShopRite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2581 (LAC) where the dismissal of an employee for consuming three bowls of pap on the employer's premises was upheld. The court referred to a number of previous decisions where the dismissals of employees for consuming or removing property from their employer's premises were upheld, and concluded that dismissal was an appropriate sanction in circumstances where employees acted in flagrant violation of applicable rules that had been implemented for clear and justifiable operational reasons. Similarly, in *Miyambo v Commission for Conciliation, Mediation and Arbitration & others* (2010) 31 ILJ 2031 (LAC), the court upheld the dismissal of an employee for removing a piece of scrap metal from his employer's premises without the necessary permission in circumstances where the employer had a consistent policy of zero tolerance for theft. In *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] JOL 29789 (LAC), the Labour Appeal Court said the following in circumstances where it found that an employee had not committed misconduct when he consumed donated milk that he genuinely thought was available for consumption by staff:

'However, I need to make myself clear on the following. In my view, this case had absolutely nothing to do with the shrinkage problem or the zero tolerance policy that reportedly existed at the respondent's workplace. The issue of sanction or the proportionality doctrine is thus of no relevance. The critical and crisp issue was the guilt or otherwise of the appellant of the misconduct charge, in the light of the particular facts

of the case. In other words, the effect of this judgment is not intended to create any precedent which deviates from the established jurisprudence, discussed above, and which has been followed by this court in relation to the issue of sanction and employees properly convicted of misconduct involving theft or misappropriation of property belonging to the employer. This court understands and is thus for approved of the zero tolerance policy as a reasonable measure of eradicating shrinkage experienced by these large shopping businesses such as the respondent. However, that issue pertains to sanction which can only be embarked upon after a sustainable conviction.'

Analysis

- [9] The above authorities are binding upon me. The award is reviewable since it represents a failure properly to balance all relevant factors in determining a sanction that would be fair, having regard particularly to the respective interests of the applicant and the third respondent. To the extent that the arbitrator's reasoning is that the third respondent's clean disciplinary record and his length of service trumped any other relevant considerations cannot be sustained, particularly in the face of a well-established principle that recognises the inevitability of the appropriateness of dismissal as a sanction in circumstances where an employee commits an act of dishonesty, falsely denies having done so and then shows no remorse. Had the arbitrator properly applied the relevant legal principles, he would have arrived at an outcome that falls within a band of decisions to which reasonable people could come on the available material. Put another way, another arbitrator conducting the arbitration and arriving at a determination in the absence of the identified irregularity, could not reasonably have arrived at the same outcome. For these reasons, in my view, the arbitrator's award stands to be reviewed and set aside.
- [10] The court has a discretion to either remit the matter to the second respondent for rehearing before a different arbitrator, or to substitute a decision for that of the arbitrator. In the present instance, all of the relevant evidence is on record and little purpose would be served in limiting the matter. The application of the relevant principle would have

resulted in a finding that the third respondent's dismissal was substantively and procedurally fair. That is the order that I intend to make.

It is ordered that:

1. The arbitration award issued by the first respondent on 16 April 2013 under case number WCRFBC 23880 is reviewed and set aside.
2. The award is substituted by the following:
 "The applicant's dismissal was substantively and procedurally fair."
3. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

APPLICANT: Mr Sean Snyman, Snyman Attorneys

RESPONDENT: Ms Shaheedah Abdol, Kirsten Attorneys