



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P414/11

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER DONOVAN DOMINGO N.O

Second Respondent

FRANCINA FREDERICKS

Third Respondent

ELAINE LOURENS

Fourth Respondent

Heard: 30 July 2013

Delivered: 30 July 2014

Summary: An award which is inconsistent with the evidence led at the arbitration may be reviewed if the inconsistency leads the commissioner to reach an unreasonable decision.

Review in terms of section 145 of the LRA-Dismisal for misconduct.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent in which he found the applicants' dismissal substantively unfair, ordered their reinstatement and substituted their dismissal with final written warnings valid for twelve months. It is opposed by the third and fourth respondents.

Factual background

- [2] The third respondent was employed by the applicant on 15 September 1986 until her dismissal on 13 May 2011 at a time she was a fruit and veg controller at the St George's Square branch of the applicant. The fourth respondent took up employment with the applicant at the same branch on 1 May 1996. She was a deli assistant on her dismissal on 16 May 2011. The third and fourth respondents were captured on video camera on 29 April 2011 consuming food designated to be sold to the applicant's customers. They were both charged with the following:

'Gross Misconduct in that on 29 April 2011, you failed to comply with standard company rules and regulations by acting in an unlawful and disorderly manner by consuming company property of which you were not the lawful owner and without permission from management, thus in breach of company rules 1,8 and 13'.

- [3] They were found guilty of the charges which were preferred against them and dismissed. They referred unfair dismissal disputes to the first respondent where the second respondent issued the arbitration under review.

The award

- [4] In his award the second respondent spelt out the rules the third and fourth respondents were accused of breaching which also formed the basis of their dismissal. Rule 1 required employees to comply with all rules and regulations of the applicant and to carry out all reasonable instructions given by their superiors and to behave in a lawful manner at all times. Rule 8 prohibits strictly, eating in the workplace except in areas designated by the manager for that purpose. It further prohibits strictly, tasting or sampling of merchandise without proper authorization of management. Rule 13 precludes employees from being in possession of, or consuming, or attempting to consume or remove from the applicant's premises, by any means or in any manner whatsoever, any property of the applicant, supplier, customer or other property of which the employee is not the lawful owner, including stock, without following the correct staff buying procedures or without authorization of management. The rule further requires employees to report to their managers any conduct by customers, suppliers and fellow employees which could lead to any loss being suffered by the applicant.
- [5] Recording his observation of the video footage of 29 April 2011 at 10h01, the second respondent stated that the third respondent was initially observed spreading mayonnaise on chicken filling which was in a food container. She then tasted the food. Over the next seven minutes she is observed opening another mayonnaise container spreading it onto the chicken filling at random intervals, helping herself to the food and occasionally looking down the passage. The second respondent observed the fourth respondent tasting pickled fish twice over approximately 90 minutes and thereafter taking it to the front of the deli. The video footage was reliable, clear and not disputed by the third and fourth respondent.
- [6] Giving reasons for his decision, the second respondent made the finding that the third respondent did not dispute the applicant's evidence, tendered by Mr Oosthuizen ("Oosthuizen") and the video footage. She conceded that she was aware of the shrinkage at the applicant's business and she also knew the rules. She was remorseful and expressed the view that the applicant could

have considered a sanction less than dismissal in view of her 25 years of unblemished service. The second respondent stated that he accepted the third respondent's unchallenged testimony that she went to the deli to place orders as usual. She was asked by a temporary employee for assistance and lost sound judgment and engaged in a rather foolish act. He was not persuaded that the third respondent's behaviour was planned, calculated and with the intention to be dishonest. He considered aggravating circumstances which included her supervisory position, her knowledge of the rules, her obligation to be exemplary and the applicant's need to curb shrinkage. He also considered mitigating circumstances which included the third respondent's 25 years of unblemished service, she was remorseful and appealed for leniency, she suffered the indignity of being unemployed, her conduct was not pre-meditated or wilful and her actions did not cause the applicant substantial harm.

- [7] The second respondent made similar findings with regard to the fourth respondent. She disputed neither Oosthuizen's evidence nor the video footage. She was aware of both the rules and the applicant's shrinkage problem. She expected her 15 years of unblemished service to have worked in her favour. The second respondent accepted as unchallenged the fourth respondent's evidence that she would have helped herself to a generous portion of the pickled fish and set down if she wanted to eat it. He however, was not impressed by her denial of having noticed a copy of rule 8 despite being shown a photograph depicting that it is attached to the wall. He described it as a childish defensive reaction to the situation that she found herself in. He was not persuaded that the fourth respondent's behaviour was deliberately aimed at causing the respondent harm. He was also not convinced that her behaviour was planned, calculated and with the intention to be dishonest.

- [8] The second respondent considered aggravating circumstances which consisted of the fourth respondent's experience at the deli section, her knowledge of the rules, her duty to be exemplary, and her contribution to shrinkage when she was charged with the responsibility to curb it and the applicant's duty to curb shrinkage. The mitigating circumstances he considered in favour of the fourth respondent are similar to those he took into

account in favour of the third respondent. The second respondent reinstated the third and fourth respondents each with a final written warning valid for a period of 12 months.

Grounds for review

- [9] The applicant's main grounds for review are that the second respondent committed misconduct in relation to his duties as an arbitrator. He committed gross irregularities in the conduct of the arbitration proceedings. He exceeded his powers. He arrived at a decision which a reasonable decision-maker could not reach and prevented the applicant from having a fair trial. He failed to apply his mind to material issues by not taking all relevant factors into account. He also failed to consider the totality of the matter. His findings that the actions of the third and fourth respondent were not intentional, dishonest or wilful are not supported by evidence. The second respondent's finding that the conduct of the third and fourth respondents did not cause the applicant substantial harm is not supported by evidence. The second respondent's finding, in the absence of a credibility finding, that the third respondent had reason to be at the deli was unreasonable. So is his failure to take into account the fourth respondent's lack of remorse.
- [10] The third respondent denied eating copious portions of the chicken mayonnaise filling and submitted that she merely tasted a portion which could not affect shrinking significantly. The fourth respondent also insisted that her tasting the pickled fish did not contribute to shrinkage. The third respondent's evidence that she usually placed her orders at the deli was uncontested. The third and fourth respondent further submitted that the decision of the second respondent is a decision of a reasonable decision-maker who took all the evidence into account. They denied that the award has the flaws highlighted by the applicant and submitted that there are no grounds to have the award reviewed and set aside.
- [11] The law of review is settled. For an arbitration award to stand the scrutiny of review, it must not be a decision that a reasonable decision maker could not reach. In this regard see *Sidumo and Another v Rustenburg Platinum Mines*

*Ltd and Others*¹. The Court dealt with the approach to be adopted by commissioners in performing their duties as arbitrators as follows at paragraphs 78 to 79:

[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances'.

[12] The Court in *Goldfields Mining SA (Pty) Ltd v CCMA*² enunciated the review test thus:

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a 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 ("LRA") continue 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 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

¹ 2008 (2) SA 24 (CC) at paras 78 and 79.

² [2014] 1 BLLR 20 LAC at para 14.

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 a reasonable decision-maker could come on the available material'.

- [13] The Court summarised the correct approach for the review court to be to ascertain whether the arbitrator considered the principal issue before him or her, evaluated the facts presented at the hearing and come to a conclusion that is reasonable.
- [14] What needs to be established first is whether the second respondent committed misconduct and gross irregularities when conducting the arbitration or exceeding his powers as the applicant alleged. Should the answer be in the affirmative I need to determine whether the second respondent's conduct led him to reach an unreasonable conclusion. When the evidence which served before the commissioner is considered in its totality it reveals that he considered the principal issue before him which was the fairness of the third and fourth respondents' dismissal for misconduct. He also evaluated the facts presented at the arbitration. He however, did not come to a reasonable conclusion for the reasons I have provided below. The commissioner tabulated the factors he needed to take into account as envisaged in *Sidumo (supra)*, he however, did not consider them but considered the third and fourth respondents' service with clean disciplinary records. This is reflected by his comment that they could not be dismissed for eating or tasting food after such long service with clean disciplinary records. He failed to apply the relevant legal principles and down played the nature of the misconduct he found they had made themselves guilty of. With regard to the third respondent, the second respondent found that the video footage showed that she consumed the chicken and mayonnaise filling over a period of seven minutes, she could not explain why she continued tasting it despite having a cold and she was not sure why she occasionally looked down the passage while tasting the food. He also found unchallenged, Oosthuizen's evidence which included the evidence that the third respondent should not have been at the deli to place her orders

over the phone as she had access to a cordless phone. The commissioner could not reasonably conclude that the third respondent went to the deli to place her orders as she always did. The versions presented by Oosthuizen and the third respondent are mutually exclusive and required the commissioner to have chosen one and given reasons for his election. Although the commissioner was required to give brief reasons for his decision, he deliberately avoided making a ruling whether the third respondent was asked by a temporary employee to taste the chicken or not. He referred to the third respondent's conduct as engaging in a rather foolish act after losing sound judgment and concluded that the behaviour was not planned, calculated and with the intention to be dishonest. Oosthuizen's evidence which the commissioner said was undisputed by the applicant painted a totally different picture. It depicted the third respondent as a supervisor who left her department and went to the deli to consume food in breach of the applicant's rules, knowing that her conduct would lead to shrinkage and was dismissible. There was a duty on the commissioner to give reasons for rejecting undisputed evidence.

- [15] The commissioner elected to rely on *Shoprite Checkers (Pty) Ltd v CCMA and Others*³ which is distinguishable from the matter before him. A case in point is *Shoprite Checkers (Pty) Ltd v CCMA and Others*⁴ in which the Court having taken into account the decision the commissioner relied on found as follows:

'This decision appears to adopt a different approach to the body of jurisprudence as analysed in this judgment. However, in that case, the employee had 30 years of unblemished service. While that employee contended that he had been authorised to taste food in the areas where the video clip had showed him to have so eaten, and that, on one of the occasions, he was eating his own food, unlike the present case, he had not gone so far as to produce manufactured evidence that manifestly was concocted in order to support his own mendacious account, as was evident in the present dispute'.

³ [2008] 12 BLLR 1211 (LAC).

⁴ [2008] 9 BLLR 838 (LAC) at para 24.

In terms of the commissioner's ruling that Oosthuizen's evidence was undisputed, the third respondent fabricated her evidence to support her mendacious account.

- [16] Also when dealing with the fourth respondent's case, the commissioner watered down her version. He accepted that the fourth respondent was aware of the rule against tasting. The commissioner down played the fourth respondent's untruthfulness when she denied having been made aware of rule 8 which prohibited employees from eating or tasting merchandise without authorization of management. He described it as a childish defensive reaction to the situation that she found herself in. Her conduct constitutes what the Labour Appeal Court in the Silverton judgment referred to as going so far as to produce manufactured concocted evidence in order to support her own mendacious account.
- [17] The commissioner concluded that the third and fourth respondents had made themselves guilty of the misconduct which led to their dismissal. He committed gross irregularities in concluding that the sanction of dismissal was inappropriate. His decision is not based on the evidence before him including evidence he found undisputed and is inconsistent with his rulings. The decision to reinstate the third and fourth respondent is based on a version which the commissioner decided to deliberately water down and his deliberate omission to consider all the circumstances of the case before him. The value of the third and fourth respondent's length of service and clean disciplinary records were artificially elevated with a view to justify their reinstatement in the absence of real justification for reinstatement. All the gross irregularities the commissioner committed led him to reach a decision a reasonable decision-maker could not reach.
- [18] The third and Fourth respondent did not act unreasonably in opposing this application, granting a costs order is in the circumstances would have been inappropriate.
- [19] In the premises the following order is made:

19.1 The arbitration award issued by the second respondent under case number WEGE 1124-11 and dated 27 July 2011 is reviewed and set aside.

19.2 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Ms Kok of Van Zyl Incorporated

For the Respondent: Advocate Ah Shene

Instructed by: Liesel Scholtz Incorporated

LABOUR COURT