REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

CASE NO: P564/12

In the matter between:

MASSCASH (PTY) LTD) A DIVISION OF MASSMART HOLDINGS LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
BONGANI MBALI *N.O.*	**Second Respondent**
VIVIAN NCEDANI	**Third Respondent**

Heard: 04 September 2014

Delivered: 05 September 2014

Summary: (Review - reasonableness).

JUDGMENT

LAGRANGE, J

Introduction

[1] The third respondent in this matter was dismissed on 18 January 2012 having been found guilty of failing "...to safeguard company assets in that on 2 December 2011 you failed to keep Abigail's float bag in the safe and as a result the business suffered a financial loss of R6800.05". She referred her dismissal to the CCMA and on 8 October 2012 the arbitrator issued an award to the effect that her dismissal was substantively unfair and awarded her retrospective reinstatement. The applicant has applied to review and set aside that award.

The arbitrator's award

[2] I do not intend to set out the award in any detail but only to focus on the essential findings of the arbitrator which were:

2.1 The issue was whether or the third respondent's failure to keep the cashier's float bag in the safe, after the cashier had handed it in and been given a seal to seal the bag, was the cause of the financial loss.

2.2 The arbitrator rejected the evidence of the applicant's administrative manager that the safe was big enough to keep the float bag in favour of evidence of the administrative clerk and of the third respondent herself that there was no space at the time to put the bag in the safe, because it was full.

2.3 The arbitrator found that there was a rule that the cashier ought to have deposited the money in the float bag before leaving it with the third respondent with only sufficient cash for a float inside.

2.4 Had the cashier complied with this procedure the financial loss would have been avoided.

2.5 There was an anomaly about the fact that the seal found on the cashier's bag when it was discovered to have been opened was not the same seal she had been issued with by the third respondent, but the arbitrator decided that there was no evidence that the seals had to be issued in a particular sequence and did not regard this as relevant to the issues he had to decide.

2.6 The third respondent had testified that she had left the office where the bag was being kept to go to the bathroom but had not locked the door because another clerk was present and she had asked her to look after the office in her absence.

2.7 The employer had caused the situation which led to the financial loss by not addressing the shortage of space for keeping float bags.

2.8 The conduct of the cashier in failing to deposit the bulk of the money in the bag when she had to go to a meeting was not explained, and she was responsible for safeguarding the assets in it.

2.9 The third respondent was not dishonest and had requested police to be called to identify who had handled the bag.

[3] The arbitrator found that the inference which the employer had drawn from the evidence was not the only one that could be drawn and others were possible which could explain how the money went missing. Anyone in the cash office could have removed the seal based on the applicant's witnesses' version. In consequence, the third respondent could not be found guilty of negligence. She alone could not be blamed as there were other factors contributing to the loss when the totality of factors is considered.

[4] Without making an express finding that the third respondent was not guilty as charged (which might have formed the basis of another ground of review but was not raised by the applicant) the arbitrator concluded that her dismissal was substantively unfair. In understanding the arbitrator's reasoning, it is apparent that the basis of the arbitrator's decision was that the full amount of the loss could not be attributed to the third respondent and therefore the applicant had failed to prove its case on a balance of probabilities.

Grounds of review

[5] As frequently happens in review applications the grounds of review appear to be more like grounds of appeal. It is clear since the LAC decision in ***Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA***.[1] that an arbitrator's failure to take material facts into account is not determinative of the question whether the test for review has been satisfied or not. The reasonableness test as expressed in the *Sidumo*[2] judgement must also be met.[3] The critical factors in a case such as this, in which the attack is on the alleged failure by the arbitrator to consider material facts, is whether the arbitrator dealt with the substantive merits of the dispute and whether the decision is one that another arbitrator could have reasonably arrived at on the evidence.

[6] While there are other issues raised by the applicant as grounds of review, which relate to the failure of the arbitrator to make adverse credibility findings about the third respondent, the principal grounds of review are twofold. Firstly, the applicant contends that the arbitrator failed to appreciate the evidence that when the cashier handed her float bag to the third respondent, the third respondent had a duty to safeguard it. Secondly, the arbitrator allegedly failed to take account of the third respondent's failure to lock the door of the cash office when she went to the bathroom when she was aware that there was a lot of cash in the office which was not secured in the safe.

Evaluation

[7] Considering the first ground, although it must be said that the evidence supports the third respondent that the normal procedure for a cashier with a considerable sum of money in her float bag would have been to deposit the bulk of that money with only a small amount being retained in the bag as a float, it was clear from the evidence of the applicant's witnesses that

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[1] (2014) 35 ILJ 943 (LAC) at 950, paras [21] to [25]

[2] Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

[3] *Goldfields Mining* at 949, para [15]

once the chief cashier had issued a seal for the bag to the cashier, the chief cashier was responsible for the safekeeping of the bag.

[8] The key contention of the third respondent, which the arbitrator appears to have accepted is that had the cashier complied with the rule of depositing money the loss would not have been so great. The arbitrator plainly adopted this line of reasoning in arriving at his conclusion. The first question the arbitrator should have asked is whether the third respondent was guilty of breaching her responsibility to safeguard the contents of the bag. Having determined that the question of whether her breach of that duty was the sole cause of the extent of the loss or whether that responsibility should have been shared with the cashier is an inquiry that might only have had a bearing on the determination of an appropriate sanction, not on the essence of the charge which was her failure to safeguard the employer’s assets. It seems that the arbitrator might have collapsed these issues into one question. Whether the arbitrator thought that the loss could be totally attributable to the third respondent or not, it was necessary for him to determine if she had acted in breach of that duty. On the evidence, it is difficult to see how a reasonable arbitrator could have concluded that she had not acted in breach of that duty when she left the cash office where the unsecured bag was being kept, without even locking the door. This brings the second principal ground of review to the fore.

[9] Regarding the second ground, the arbitrator remarkably concluded that there was no evidence of a rule that the third respondent ought to have locked the door to the cash office when she went to the bathroom. He then proceeded to focus on the fact that if there had been sufficient space for the bag in the safe and if the cashier had deposited the bulk of the contents of the bag, the loss might have been avoided. Following this discussion, the arbitrator then arrived at his conclusion that there were alternative explanations for the disappearance of the money and the applicant had not proved that its version was the most probable explanation.

[10] By reasoning in this manner, the arbitrator avoided the essence of the charge which was the third respondent's failure to safeguard the assets contained in the cashier's bag. In circumstances, where it was not in dispute that the bag ought to have been locked up in the safe but could not be for lack of space, it is absurd for the arbitrator to reason that there was no duty on the third respondent to take reasonable alternative precautions to safeguard the bag such as the simple expedient of locking the door, rather than relying on the hopefully watchful eye of someone who was not charged with the responsibility of safeguarding the bag.

[11] For the above reasons, I am satisfied that the arbitrator's conclusion that the third respondent's dismissal was substantively unfair was a consequence of him failing to take the considerations above into account and cannot be supported on the evidence before him.

Relief

[12] In light of the above, I am satisfied on the evidence that the third respondent was guilty of not safeguarding the assets in the cashier's bag. As such, her omission was the final step in a chain of causation which resulted in the loss. Whether the loss might have been reduced to a lesser amount had the cashier deposited the money, does not alter the fact that she was guilty of misconduct and that, on a balance of probabilities, the loss would not have occurred had she safeguarded the bag more diligently.

[13] In the circumstances, the next consideration is to determine if dismissal was an appropriate sanction in the circumstances, which naturally was not an issue considered by the arbitrator. There are some nuances in this case which might be factors in determining the question of substantive fairness, apart from the usual mitigating and aggravating factors, such as the other omissions in the chain of causation leading to the loss. I think it would be undesirable for the court to decide on an appropriate sanction in the absence of these issues being ventilated in argument. Accordingly, it ought to be remitted to the CCMA for this purpose.

<u>Order</u>

[14] The second respondent's finding in the arbitration award issued on 8 October 2012 under case number ECEL 448-12 that the third respondent's dismissal was substantively unfair and the consequential relief ordered in paragraphs 41 to 45 of the ward inclusive is reviewed and set aside.

[15] The second respondent's finding is substituted with a finding that the third respondent was guilty of failing to safeguard the company's assets on 2 December 2011 by failing to safeguard the float bag of Abigail, as a result of which the company suffered a financial loss of approximately R 6,800.

[16] The matter is remitted back to the first respondent to determine if the dismissal for the said misconduct was substantively fair, based on the record in the original arbitration, and after hearing the submissions of the parties.

[17] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: S Cokile of Siya Cokile Inc. Attorneys

THIRD RESPONDENT: L Poni of SACCAWU