



REPUBLIC OF SOUTH AFRICA

Not reportable

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

CASE NO: JR 2283-10

In the matter between:

**JENNIFER PHATELA & SARABANO
ABDULLAH**

Applicants

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**DUMUSANI JOHANNES NGWENYA
(N.O.)**

Second Respondent

PICADILLY (PTY) LTD

Third Respondent

Delivered: 27 January 2015

Summary: (Review - dismissal).

JUDGMENT

LAGRANGE, J

Introduction

[1] Ms J Phatela ('Phatela') and Ms S Abdullah ('Abdullah') were dismissed for gross dishonesty by the third respondent Picadilly (Pty) Ltd, a clothing retailer ('the employer').

[2] The following summary of pertinent evidence is gleaned from the arbitrator's brief award:

2.1 The dishonesty concerned their alleged joint attempt to defraud the employer by marking a garment that was not a sale garment with a tag indicating it was a sale garment which reduced its price by 50%.

2.2 The only garments that were supposed to be marked for sale were oddments. Items were only marked as oddments, the only three items or less of the same make and colour. If there were more than three items of the same make and colour they were referred to as 'a range' and would not be marked down without the express permission of a manager.

2.3 A witness testified that she saw Abdullah give Phatela the tag in question, which Phatela attached to the garment. She alerted her supervisor because it seemed odd that a garment was being marked as a sale garment when it was part of a range that was still on the shop floor.

2.4 Phatela claimed that she had simply found an unmarked red skirt and asked that it be marked so she could buy it for another staff member. Abdullah had simply denied any wrongdoing.

2.5 The applicants both claimed that they had not been given an opportunity to state their version. Their evidence was contradicted by the initiator at the enquiry, Ms T Bhamjee.

[3] The arbitrator found that:

3.1 The applicants had not disputed that the skirt in question was part of a range on the shop floor, nor had they contested that items which were part of a range could not be marked down to 50% without the

permission of the manager. They also had not disputed that the skirt in question was part of a range and had been marked down without the necessary permission.

- 3.2 The applicants could not provide an explanation why Phatela had a skirt marked down by 50% which was part of a range on the shop floor.
- 3.3 The most likely explanation was that the applicants had collaborated to reduce the skirt price in order to defraud the employer.
- 3.4 Their actions destroyed the trust relationship that ought to exist between them and their employer and the employer was entitled to dismiss them in the circumstances.
- 3.5 The evidence of the initiator to the effect that they were given an opportunity to state their versions was not disputed and accordingly their dismissals were also procedurally fair.

Grounds of review

- [4] By the time the matter was heard Phatela had withdrawn from the application and Abdullah was the only remaining applicant.
- [5] The initial grounds of review, which obviously represented a preliminary attempt to identify what was wrong with the award, were that-
 - 5.1 After a round table discussion between the parties and the employer's premises, where the arbitration hearing was held, the arbitrator left the room with Mr F Jassat ('Jassat'), the store manager, which led them to believe that the arbitrator was biased.
 - 5.2 The arbitrator's reasoning was contradictory in saying that Abdullah did not admit to any wrongdoing as well as saying that they admitted that the skirt was part of a range.
- [6] In the supplementary affidavit, clearer grounds were set out, obviously after obtaining some advice. In summary, these were that the arbitrator:
 - 6.1 misconstrued the evidence;

- 6.2 arrived at conclusions unsupported by the evidence, which no reasonable arbitrator could have reached;
- 6.3 exceeded his powers;
- 6.4 created a perception of bias by failing to call for a Portuguese interpreter for the applicants;
- 6.5 failed to consider all the evidence and all the versions of the parties and the probabilities in a reasonable fashion, and
- 6.6 ignored crucial evidence which resulted in him committing errors of fact and law.

[7] Some of the above grounds were broadly stated and no detail was provided in support of these submissions. It is important in this regard to emphasise that it is not sufficient simply to state grounds of review in bald terms. The applicant must set out the facts which it relies upon for stating a particular ground of review. Unless the applicant does so, the opposing party is not really in a position to respond to such broadly stated claims. In the supplementary affidavit some specific evidence was identified, which the applicants felt was crucial in explaining the failures of the arbitrator. These were that:

- 7.1 The applicant's witness, Ms J Nape, said it was herself who had marked down the garments to 50% including the red skirt, because it was an oddment which she wished to buy: it was not the applicants who had done this.
- 7.2 The same witness testified that she had colluded with Phatela to have a former staff member purchase the garment for her, but the witness was only issued with a written warning.
- 7.3 The arbitrator failed to decide if there was a well-known ruling which had been breached by the applicant.
- 7.4 The arbitrator failed to determine the matter in light of the evidence that Abdullah had acted on Phatela instruction in removing the garment from the shop floor.

7.5 The arbitrator also overlooked the evidence of Phatela and Nape, which vindicated Abdullah.

7.6 The arbitrator failed to have regard to the guiding provisions of the Labour Relations Act, schedule 8 items 2(1), and 3(1) to 3(5) inclusive. No further details of why this claim was made were provided.

[8] At the time the matter was heard, additional grounds of review had been mentioned in the heads of argument filed on behalf of Abdullah by the South African Equity Workers' Association. However, the Court is bound to consider only those grounds which are raised in the founding and supplementary affidavits.

Evaluation

[9] In relation to the complaint about the absence of a Portuguese interpreter, this was never an issue raised as a problem by either of the applicants at the arbitration proceeding. The arbitrator can hardly be blamed for being unaware of this need if it was not brought to his attention that the applicants were unable to understand what was being said in the proceedings or were unable to give any evidence or make representations on this account.

[10] The essence of Ms J Nape's testimony was that she had marked the item down because it was on the rail where the sale items were, which were being marked down to 50%, and the team leaders had told her that it was not part of a range but an oddment. She testified that she would have marked down even if she had not been personally interested in buying the item. This evidence was corroborated by Jassat who said the staff who were marking the discounts would not know which items were oddments and which were not. The importance of her evidence was that she only marked the skirt down to 50 % because that is what she was told to do.

[11] The question of inconsistent treatment being meted out was not an issue that the employer was challenged on during the arbitration, and was only raised once by Abdullah, and only under cross-examination. An arbitrator

cannot be criticised for not dealing with an issue that the employer's witnesses were not asked to comment on by the applicants.

- [12] The evidence of Jassat was that Abdullah knew that the skirt was not an oddment. Abdullah also moved the other items in the range from the shop floor at Phatela's request, but if she had genuinely believed that the item was correctly marked at 50% discount, she would have queried why it was necessary to move the other items from the shop floor and put them in the main store upstairs. He contended that the only reason for removing the other items marked at 30 % from the floor late in the day, was that Phatela became aware that sale of the under-priced skirt was discovered by Jassat and it was necessary to conceal the fact that it was part of a range and not an oddment. There was no rational reason for removing the other similar items off the shop floor. Moreover, it was also well known that permission was needed from someone more senior like a manager or director if stock was to be removed in bulk from the shop floor. This practice was also confirmed by Ms Munyai, a supervisor, in her testimony. Neither Phatela nor Abdullah provided a cogent business related explanation for this behaviour, and when the director of the company, Mr F Bhamjee, gave evidence he was not challenged when he testified that Abdullah had no reason to be moving garments off the floor at 17h00, especially given that she was a team leader upstairs and in the absence of instructions from a manager.
- [13] The arbitrator failed to decide if there was a well-known ruling which had been breached by the applicant. In fact there was no material dispute arising from the evidence about the practice of distinguishing oddments from a range of items and the rules for discounting range items and oddments.
- [14] Ought the arbitrator to have determined the matter in light of the evidence that Abdullah had acted on Phatela's instruction in removing the garment from the shop floor? It is true that Abdullah had acted on Phatela's request, but she never questioned why the remaining garments in the range had to be removed upstairs when Phatela told her that there was a problem with the price of the skirt, which Phatela was arranging to be

bought by another person on her own behalf. The issue was whether Abdullah had collaborated with Phatela's scheme to obtain the garment at a 50 % discount. In this regard there was also the eyewitness testimony of Ms Mokgosi who said she saw Abdullah give Phatela an orange sticker, which was used for oddments, to place on one of the skirts on the shop floor that had no markings. Mokgosi also testified that there were five or six of the skirts forming part of a range. Her testimony was unchallenged in any important respect by either Phatela or Abdullah.

[15] It is unclear why Abdullah contends that the evidence of Phatela and Nape, which vindicated Abdullah. Insofar as Nape's evidence is concerned, when considered in its totality, it does not vindicate Abdullah. Phatela's version in her evidence in chief was that the skirt in question was not the same as ones on the floor (thereby implying it was an oddment) and that when she saw the sold items had been retained by Jassat she went to Abdullah and said it seemed as if there was a problem with the item and asked her to take the other skirts off the floor and check them. One only has to state this version to see the inherent difficulty it contains: if the skirt was not the same as the others on the floor, what point would be served by checking the other skirts? Later, under cross-examination, Phatela struggled to advance a justification for the removal of the items from the shop floor. Further, once it became difficult to persist with the claim that the skirt was not part of a range, Phatela shifted to suggest it had a different code from the other similar skirts and for that reason was considered an oddment.

[16] On the question of the arbitrator supposedly failing to have regard to the guiding provisions of the Labour Relations Act, schedule 8 items 2(1), and 3(1) to 3(5), no specific support for such claims were advanced.

[17] The test for review on grounds of the reasonableness of an arbitrator's evaluation of the evidence was formulated in the following way in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***¹.described the new test as being whether:

¹ (2013) 34 ILJ 2795 (SCA) at 2801, para [11]

“... the award was one that a reasonable decision maker could not reach. That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.”²

[18] In this instance, for the reasons stated above, I conclude that the arbitrator's findings are ones that a reasonable arbitrator could have reached on the evidence before him, quite apart from his own justification for doing so. Consequently, the review application must fail.

Order

[19] The review application is dismissed.

[20] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

² At 2802, para [12].(emphasis added)

APPEARANCES

For the Applicant: A P Landman (pro bono)

For the First Respondent: S U Roeloffs instructed by De Villiers & Du Plessis