



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

Case No: JR953/13

Not Reportable

In the matter between:

SHOPRITE CHECKERS

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

DIVID DIBAKWANE N.O

Second Respondent

RAWU

Third Respondent

BP MAHLANGU

Fourth Respondent

Heard: 26 November 2014

Delivered: 25 February 2015

Summary: Review application. The Commissioner's decision not unreasonable. The review application dismissed with costs.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number GATW 1873 – 12 in terms of which the second respondent (the Commissioner) found the dismissal of the fourth respondent (the employee) to have been unfair. It was for this reason that the applicant was ordered to reinstate and compensate the employee.

Background facts

- [2] The applicant is a company duly registered in terms of the company laws of South Africa and operates several retail stores across the country. It employs approximately 110,000 employees upon whom it relies on for trust and honesty.
- [3] According to the applicant because of its vulnerability in relation to invoicing and receipt of stock, it relies on receiving clerks to ensure that the correct stock has been delivered. The stock received is checked against the invoice produced by the supplier.
- [4] The employee who was employed as a receiving clerk based at the Silverton branch of the applicant was charged with misconduct relating to the stock which is alleged to have been delivered from Parmalat but which could not be accounted for. The charge proffered against the employee reads as follows:

‘Serious misconduct that on 24/05/2012 you failed to comply with the company’s receiving rules and procedures. This resulted in a POD being issued for goods on invoice nr 403720 (Parmalat) for goods that had not been received into the branch. Resulting in a loss to the company.’

- [5] The outcome of the disciplinary hearing was that the employee was found guilty and dismissed for that reason. Assisted by his union the employee referred a dispute concerning the alleged unfair dismissal to the CCMA and the outcome thereof was that the dismissal was unfair as stated earlier.
- [6] The issue that gave rise to this matter arose from an invoice which was signed by Mr Gryling, the manager of the store where the employee was based.
- [7] The case of the applicant during the arbitration hearing was based on the responsibility of the employee as the receiving clerk. He signed for the receipt of the perishable stock which the supplier had on the basis of the invoice delivered but as stated earlier its whereabouts was unknown.
- [8] The case of the applicant is that the employee was responsible for the receipt of the stock is based on the testimony of Mr Daniels. His testimony focused mainly on the process of receiving goods. According to him, the applicant orders goods from the suppliers via a catalogue where the qualities and the quantities of the goods to be delivered are placed.
- [9] He further testified that on arrival at the gate the driver of the delivery truck will give the invoice of the goods to be delivered to the receiving clerk. The receiving clerk will then take the invoice to the capturing clerk who will then capture and match the goods to see whether the order number is the same. Thereafter the receiving clerk will open the outer receiving gate for the delivery truck to move into the delivery bay if it is free. The stock will then be offloaded and then after taking it the receiving clerk will then lock the gate. The receiving clerk will then go into the cage to check the invoice and see if the quantity of the stock delivered is correct.
- [10] Once the receiving clerk is satisfied that the stock on the invoice correspond with that which has been delivered, it is checked for quality by the IBI, an independent company contracted to perform such a function to the applicant. The IBI clerk will if satisfied with the quality of the goods delivered, place the stamp on the invoice, place the GRN number on it and give it back to the receiving clerk who is then expected

to sign the GRN stamp and to insert on the stamp GRN number on the stamp.

- [11] In relation to what happened in this case, Mr Daniels testified that the documentation for the day in question indicates that the receiving clerk, being the employee entered the GRN number and signed the goods received, indicating on the stamp that the number of stock received on that day was 58.
- [12] During cross examination, Mr Daniels denied that the people who receive perishable stock were only managers. He also disagreed with the employee's proposition that once the delivery truck was inside the cage, the receiving clerk will call a manager who will then go into the cage with the driver of delivery truck to check the quantity of the stock inside the cage. He contended that the manager may come and do the spot check.
- [13] The case of the employee was that although his signature appears on the document, he did not receive the stock in question. He also disputed the validity of his signature as it appeared on the document.
- [14] The employee further disputed that it was his responsibility to receive perishable stock. He contended that the stock in question should have been received by Mr. Greyling. He insisted that in his 30 years of service with the applicant, he had always known that receipt of perishable goods, such as the ones in question, was received by the managers and not the receiving clerks.
- [15] According to the employee, the responsible person to receive perishable stock, as was the case on the day in question, was the manager, Mr Greyling. He did not, however, dispute that the number reflecting the quantity of the stock on the invoice as being 58 was entered by him.
- [16] The hand writing expert testified that the signature on the invoice was not that of the employee, however, the number 58 reflecting the quantity of the stock delivered on the day in question was in all probabilities that of the employee.

Grounds of review

- [17] The applicant contends, in the founding affidavit, that the Commissioner, in accepting the evidence that the employee was not involved in the dishonesty perpetrated by Mr Greyling failed to consider the evidence properly presented before him. It is further contended by the applicant that in concluding that there was no evidence that stock was not received amounted to failure to apply the rules of evidence properly.

The arbitration award

- [18] In arriving at the decision that the dismissal was unfair the Commissioner firstly summarized the evidence of the witnesses who testified during the proceedings. He then evaluated the evidence and focus mainly on whether the receiving clerks were responsible for receiving perishable goods. Attention was also paid to the question of whether the rule in terms of which the employee had been charged with was in force at the time the offense was alleged to have been committed.
- [19] The Commissioner also found that there 'was not evidence led to prove that the respondent was consistent in dismissing the employees who committed misconduct like the one committed by the applicant.'
- [20] The Commissioner also found that although reference is made in the charge to '... Resulting in a loss to the Company no evidence was led by the applicant in that regard.'

The applicable legal principles

- [21] The legal principle to apply when considering a review application is now well known. The power of the court to interfere with an arbitration award does not extend to the determination of the correctness of the award but is to evaluating whether the arbitration award meets the constitutional standard of reasonableness. The enquiry to conduct is stated in Sidumo in the following terms:

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- [22] In a case where the complaint on review is about the conduct of the arbitrator, the court would be entitled to interfere with the arbitration

award where it has been shown that the arbitrator's conduct resulted in an outcome that is unreasonable.¹

Evaluation

- [23] Assuming, that the applicant is correct that the approach adopted by the Commissioner with regard to the issue of inconsistency was wrong, that is not, however, decisive of the determination of whether the dismissal was fair or otherwise. The same applies with regard to the finding that the applicant did not suffer any loss as a result of the alleged misconduct of the employee.
- [24] I turn to deal with the issue which in my opinion is determinative of the fairness or otherwise of the dismissal of the employee. It is apparent from the reading of the record that the Commissioner was faced with two conflicting versions in relation to the facts concerning the application of the rule for which the alleged misconduct of the employee was based on. In this respect, the Commissioner accepted the version of the employee which was according to him supported by the version of Ms Kekana who was also previously a receiving clerk for a period of eight years and had worked for the applicant for about 20 years.
- [25] The Commissioner further accepted the version of the employee that he did not commit any offence and that the offence for which he was accused of was committed by Mr. Greyling.
- [26] The Commissioner rejected the version of Mr. Daniels who testified as indicated above on behalf of the applicant on the basis that although he presented evidence that the two invoices showed receipt of the goods, he led no evidence to that effect.
- [27] In my view, the Commissioner's conclusion cannot be faulted for unreasonableness, regard being had to the totality of the facts and the circumstances of this matter.
- [28] In my view, the challenge to the Commissioner's arbitration award would still be unsustainable even if it was to be found that his finding that there

¹ The approach to adopt in this regard has been set out in *Herholdt v Nedbank Ltd and Another* (2013) 34 ILJ 2795 (SCA) and *Goldfields Mining South Africa (Pty) Ltd (Kloof Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC).

was no fair reasons to dismiss the employee was unreasonable. The further inquiry in that regard would be to determine whether the dismissal sanction was in the circumstances fair including the determination of whether there was proof of breakdown of the trust relationship between the parties.

- [29] Although the charge against the employee labels the offense as serious, there is no evidence to support that allegation. The document titled "Shoprite Company Rules" submitted during the arbitration proceedings do not specifically deal with the offense for which the applicant was charged with. It, therefore, does not assist in determining the seriousness of the offense in order to assess whether the dismissal was a fair sanction.
- [30] The other document submitted during the arbitration proceedings is titled "Receiving Rules." This document also does not assist in the assessment of whether the offense can be regarded as a serious, the breach of which would warrant a dismissal.
- [31] It is also important to note that the applicant did not lead any evidence indicating that the trust relationship between the parties has broken down.
- [32] Based on the above, I am of the view that the applicant has failed to make out a case warranting interference with the Commissioner's arbitration award. Accordingly, the applicant's review application stands to be dismissed. I see no reason in law and fairness why costs should not follow the results.

Order

- [33] In the premises, the applicant's review application is dismissed with costs.
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Molahlehi, J

Judge of the Labour Court

Appearances:

For the Applicant: J Jones of Norton Rose Fulbright South Africa.

For the Respondent: Mr Khoza OF Retail and Allied Workers Union.