



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2610/12

MAMPEKA CHRISTINA SEPENG

Applicant

and

DAVID DIBAKWANE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

Second Respondent

BARNETTS

Third Respondent

Delivered: 4 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicant seeks an order to review and set aside the arbitration award dated 19 September 2012 issued under case number GATW195-12 by the first respondent (Commissioner) under the auspices of the second respondent (the CCMA).

- [2] In the award, the Commissioner found that the dismissal of the applicant (Sepeng) was substantively fair, and had dismissed her referral. The review application is opposed.

Background:

- [3] The third respondent is in the business of retail of furniture and electrical appliances. Sepeng was dismissed on 28 May 2012 at the time that she held the position of Store Manager. The dismissal followed upon a disciplinary enquiry into allegations that she had breached company policies by sharing her password with her colleague, and also being negligent for failing to ensure that a stock clerk conducted a section stock take as required by policy. The alleged transgressions had resulted in furniture in an amount of R35 631.00 being stolen from the third respondent's branch in Hammanskraal.
- [4] An unfair dismissal dispute was referred to the CCMA. The dispute came before the Commissioner for arbitration and he found that the dismissal was fair on the grounds that;
- a. the third respondent had proven that Sepeng was aware of its rules regarding the use of password and also of transactions policies;
 - b. Sepeng was the custodian of the third respondent's policies and procedures as a branch manager;
 - c. she had shared her password without taking into account the password policy of the third respondent;
 - d. Sepeng had not done a stock take for the period between January 2012 and February 2012.

The grounds for review:

- [5] The applicant's grounds of review as contained in the founding affidavit are in broad and unsubstantiated terms. In this regard, the applicant merely stated the following;

- a) the Commissioner's award was not justifiable in relation to the reasons given for it.
- b) The Commissioner failed to apply his mind to the evidence and facts presented to him in the arbitration in reaching his conclusion that the applicant's dismissal was substantively fair.
- c) The Commissioner committed a gross irregularity by failing to apply his mind to the evidence, misunderstood the evidence, and attributed motives to the applicant, which could not reasonably be drawn to the evidence submitted.
- d) The Commissioner committed misconduct in relation to his duties by disregarding relevant evidence and issuing an award that indicates that he failed to apply his mind to the facts presented.

[6] The grounds of review were further amplified in the applicant's supplementary affidavit, and in the written heads of argument, with a specific attack against the conduct of the Commissioner, wherein it was alleged that he had committed gross irregularities by;

- a) Limiting the applicant's representative's questions to the extent that the latter was frustrated that he had left the hearing without cross-examination of a witness being finalised;
- b) On numerous occasions refused the applicant's legal representative an opportunity to ask relevant questions; refused the representative's requests for an adjournment to obtain instructions on certain issues raised by the third respondent; refused the applicant's requests for adjournment to take medication; and refused the legal representative an application for a postponement in order to attend to his other commitments as a commissioner at the Small Claims Court even though it was already 16h50;
- c) By refusing the applicant an opportunity to obtain alternative representation and opportunity to present evidence thus depriving her of a fair hearing;
- d) By failing to take into account that the third respondent did not act consistently with regard to similar misconduct committed by other

employees in the past, and historical inconsistency was of huge importance;

- e) By not allowing the applicant an opportunity to present her evidence in regards to inconsistency, and thus essentially depriving her of a fair hearing

[7] In opposing the application, it was submitted on behalf of the third respondent that it has strict stock control procedures and transaction system in place in order to address problems of stock loss, and that each employee using its system had a password which was to be kept secret and not shared with anyone.

[8] In regards to Sepeng and by virtue of her capacity as store manager, the strict rules were even more important as her password had supervisory authority and could be used to override and alter transactions. She had in breach of the rules and policy, shared her password with a number of employees, and this password was then used by the Stock Clerk Mr Moepi, to steal furniture to the value of more than R35 000.00 from the third respondent. She had admitted to having shared her password but denied having given it to Moepi. This however according to the third respondent did not matter as Moepi had used her password in committing the theft, and was subsequently dismissed.

The legal framework in respect of review applications:

[9] The review test is that as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹, and in this regard, the question to be posed is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach on the material placed before him or her².

¹ [2007] 12 BLLR 1097 (CC), held that [at par 110]:

² See also *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2779 (SCA) at para [12] where the SCA held that the test

“... involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the Commissioner was not one that could reasonably be reached on the evidence and other material properly before the Commissioner. ... The reasons are still considered in order to see how the Commissioner 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

- [10] In *Goldfields Mining South Africa (Pty) Ltd v CCMA*³ the Labour Appeal Court in a further explication of the *Sidumo* test held that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material⁴.
- [11] In *Herholdt*, the SCA further re-emphasized that the reviewing court should intervene in circumstances where the decision of the Commissioner is "*entirely disconnected with the evidence*" or is "*unsupported by any evidence*" and "*involves speculation by the Commissioner*"⁵.

Evaluation:

- [12] As already pointed out, the grounds of review as stated in the founding affidavit are of a general nature and it is unclear from the founding affidavit as to what the basis of attacking the award is. It is not sufficient in review applications for broad generalised statements to be made that an award ought to be reviewed due to certain unsubstantiated factors such as not being not justifiable in relation to evidence which, which evidence is nevertheless not identified; or that a commissioner failed to apply his mind to the evidence, or committed misconduct or that the award was one which no reasonable decision maker could made. A foundation must be laid for such allegations to be sustainable.
- [13] The grounds of review as amplified in the supplementary affidavit and in these proceedings as correctly pointed out by the third respondent appear to be directed towards the conduct of the Commissioner during the arbitration proceedings. In this regard, one would assume that in the words echoed in

those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence."

³ (2014) 35 ILJ 943 (LAC) at para [20]

⁴ See also *South African Medical Association obo Mabuza and Others v Commissioner Moletsane and Others* (JR834/12) [2014] ZALCJHB 66 (14 March 2014) at para [8]

⁵ At para [13]

Goldfields, the issue is whether the Commissioner gave the parties a full opportunity to state their respective cases at the hearing. In this regard, if it is found that the applicant was deprived of an opportunity to fully ventilate her case, the Commissioner could not possibly have arrived at a reasonable outcome.

- [14] In his award, the Commissioner stated that he had allowed Mr Phahla, an attorney, to represent the applicant. It had however become clear to the Commissioner during the proceedings that Phahla was disruptive, and further that he was not properly briefed on the matter. In my view, this impression is fortified by the applicant's own submissions that the Commissioner had refused to grant an adjournment simply for Phahla to obtain further instructions from the applicant in regards to certain material raised during the cross-examination of the third respondent's witness.
- [15] In circumstances where as submitted on behalf of the third respondent and as further recorded by the Commissioner that the matter was adjourned on 10 September 2012 and again stood down on 11 September 2012 at 12h00, it had become apparent that Phahla had still not familiarised himself with the matter. The Commissioner was therefore correct in refusing to adjourn the matter any further simply for the purposes of granting Phahla a further indulgence to take proper instructions from the applicant in the midst of cross-examination of a witness.
- [17] It is not uncommon during trial proceedings for representatives to ask for an indulgence from the presiding officer in order to take further instructions from clients on certain issues. However, this does not necessarily call for persistent and prolonged adjournments to do so. Once a representative repeatedly asks for an adjournment in order to take instructions from a client, especially during the course of cross-examination of a witness, it can only confirm that the representative is least prepared to deal with the matter.
- [18] By virtue of clearly being unprepared, the Commissioner and the third respondent had also formed a view that Phahla had resorted to asking irrelevant questions during cross-examination with the hope of buying time.

When the Commissioner refused to adjourn the proceedings before 17h00 in the middle of the cross-examination of the third respondent's witness, Phahla had then sought to be excused from the proceedings as he had another matter to attend to at the Small Claims Court. Clearly this was extremely irregular on the part of Phahla in that a legal practitioner cannot ask for an adjournment or a postponement simply on the basis that he or she have to attend to another matter in another forum.

[17] Phahla's other work commitments were not a reasonable or acceptable excuse to seek an adjournment even if it was a few minutes before 17h00. The Commissioner was correct and had acted reasonably within his powers in insisting that the matter should be finalised even if it was beyond 17h00 in the light of the previous adjournments. I am not aware of any CCMA rule that stipulates that its proceedings must commence at 09h00 and end at exactly 17h00. A Commissioner is obliged to deal with a matter before him or her expeditiously. This however does not imply that this must be done at the expense of fairness. I am however of the view that considerations of fairness in this case were not sacrificed for the sake of expediency as shall further be illustrated below.

[18] According to the Commissioner and the record, Phahla had then sought to "recuse" himself from the matter, and obviously it was up to him and his client if he wished to withdraw from the matter. The exchanges between the Commissioner and Phahla⁶ clearly indicate that the latter was given time to consult with the applicant and the Commissioner had correctly refused to sanction his withdrawal from the proceedings, indicating that it was a matter between him and his client. Following these exchanges, Phahla had then proceeded with the cross-examination of the third respondent's witness for a while, with various interjections by the Commissioner asking what the relevance of the questions were, and rightly so.

[19] At some point during the proceedings⁷, the Commissioner had instructed Phahla to sit down, and when the latter refused, the Commissioner had

⁶ P215 – 217 of the record

⁷ P232 line 20 – p233

recorded this fact and also recorded that Phahla had left the process without his permission, and also left the applicant behind. The Commissioner also informed the applicant that she could proceed on her own, as he was not going to postpone the proceedings. At that point the applicant had proceeded on her own, and continued to cross-examine the third respondent's witness. It is not apparent from the submissions made on behalf of the applicant as to at what stage the Commissioner had refused her to secure alternative representation as this is not evident from the record, nor is it apparent from the record that the applicant had sought a postponement in order to seek alternative representation.

[19] From the record, it is however apparent that Phahla abandoned the arbitration proceedings and then left the applicant to proceed on her own. The Commissioner cannot be accused of having not afforded the applicant an opportunity to ventilate her case in circumstances where legal representation was granted, and her legal representative unceremoniously abandoned her. The matter had been adjourned twice already and when Phahla abandoned the applicant and the proceedings, and thereafter the applicant had continued on her own, the Commissioner could not be accused of misconduct. On the contrary, if anyone is to be accused of any misconduct it is Phahla, who had at worst, acted contrary to his ethical and professional obligation towards his clients.

[20] A legal representative cannot abandon a client in the course of proceedings even if he or she is of the view that the client is not being afforded a fair hearing. It is expected of the legal representative in circumstances where there is a perception that a client is not getting a fair hearing, to record his or her objections in regard to the presiding officer's specific objectionable conduct, and to continue to represent the interests of the client to his or her ability until finality. Even if Phahla wanted to withdraw from the matter for whatever reason, it was required of him to properly do so on record, instead of simply abandoning his client and the proceedings in a huff. Needless to say however, it is apparent that Phahla abandoned his client and the arbitration proceedings in order to attend to his other engagements. The Commissioner

in these circumstances cannot be accused of having deprived the applicant of a fair hearing, and at most, the applicant has recourse against Phahla.

- [21] With regards to the merits of the case, the facts before the Commissioner were that the applicant as a store manager was responsible for all aspects and duties related to the management and operation of the store. It could not have been disputed that such a position came with high levels of trust and responsibilities, especially in matters pertaining to passwords and transactions.
- [22] Key to the applicant's position was adherence with established rules, policies and procedures related to stock control and transaction systems. To this end, each employee was allocated a password, which obviously had to be kept secret. I did not understand the applicant's evidence to be that she could not have been aware of these rules and policies. She had admitted to sharing her password *albeit* with another line manager as this was acceptable practice, and that her password was stolen from the line manager by another employee Nyundu. Her contention was that she could not be held responsible.
- [23] In denying liability, the applicant had further contended that there was a directive from her regional manager that she could share her password. The Commissioner had nevertheless concluded that the allegation of a directive was unsubstantiated. The third respondent's contention however was regardless of the individual the applicant had shared her password with, ultimately, stock was lost as a consequence of the sharing of the applicant's password.
- [24] Sepeng had also contended that the sanction of dismissal was harsh and in this regard, the Commissioner found that the applicant had displayed no remorse. Essentially, the Commissioner had concluded that as a consequence of the applicant having shared her password, stock was stolen from the store using her password. The Commissioner had further found that the third respondent had discharged the onus in respect of the second charge related to failure to do a stock take. The second charge received little

attention from submissions made on behalf of the applicant, and it can be accepted that the Commissioner's findings are not disputed in this regard.

- [25] A number of difficulties are inherent in the applicant's case. The first is that the Commissioner had based on the evidence of the witness who had investigated the matter, Mr Mohulatsi, found that there was evidence to point out that as a consequence of sharing her password, stock was stolen from the store. Mohulatsi had disputed that there could have been any directive from the third respondent sanctioning the sharing of password. This version made sense as the purpose of having secret passwords is obvious, and once its sharing is sanctioned by the third respondent, this would defeat its purpose of protecting its assets and adherence to its transaction policies.
- [26] A further difficulty with the applicant's case was that it was always the third respondent's case that she had pleaded guilty to the charges in the internal disciplinary hearing. This was vehemently denied in the arbitration proceedings, it further being contended in submissions made on her behalf that there was no basis for the chairperson to have recorded this plea when this was not the case. The improbability of this contention is however belied by two central factors as illustrated below;
- [27] The first is that once an employee contends that a sanction was harsh, this can only be confirmation of an admission that indeed the transgression in question was committed, but nevertheless a lesser penalty should have been imposed. The second factor pertains to submissions made on the applicant's behalf that the Commissioner failed to deal with evidence pertaining to inconsistent application of the rules and policies. To be precise, it was submitted⁸ on the applicant's behalf that the Commissioner disregarded relevant evidence insofar as the applicant raised the important issue of consistent application of dismissal in similar cases by the third respondent. It was alleged that she was never afforded the opportunity to present this evidence.

⁸ Paragraph 6.24.8 of the written heads of argument

- [28] Again, once an employee raises allegations that the employer failed to apply its rules, policies and disciplinary measures consistently, the only inference to be drawn is that the infraction in question was committed, but that employee should never have been disciplined harshly on account that the employer has condoned the breach of policies before or contemporaneously.
- [29] In *SATAWU & Others v Ikhwezi Bus Service (Pty) Ltd*⁹ this Court had held that an employer is indeed entitled to impose different penalties on different employees who had committed the same misconduct, provided there was a fair and objective basis for doing so. Thus where inconsistency of application of discipline is claimed, it is for the employee to show in what material respects the employer had acted inconsistently, and it is not enough for the employee to simply make an allegation of inconsistency.
- [30] To the extent that it was claimed on behalf of the applicant that she was deprived of presenting evidence of inconsistency, it is concluded that when account is taken of her position of seniority and trust within the company; the nature of the duties she performed and hierarchy within the organisation; the circumstances surrounding the act of misconduct which was proven; the severity of the misconduct or its impact on the employer and its operations (i.e. loss of R35 000.00); and her failure to show contrition as alluded to by the Commissioner, it cannot be said that the sanction of dismissal was not justifiable in the circumstances.
- [31] In the light of the above conclusions, it is my view that the Commissioner's award is unassailable. When regard is also had to the record of arbitration proceedings, the material before the Commissioner and the decision arrived at, there is no basis to conclude that the decision arrived at can be said to be one that no reasonable decision maker could have arrived at.
- [32] Even though I am of the firm view that this application was ill conceived, I am dissuaded by considerations of law and fairness from making any cost order. Accordingly, the following order is made;

⁹ (2009) 30 ILJ 205 (LC)

Order:

- i. The application to review and set aside the arbitration award dated 19 September 2012 issued by the first respondent under case number GATW195-12 is dismissed.
- ii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants: Mr JM Gouws of Johan Gouws Attorneys

On behalf of the Third Respondent: Mr S Snyman of Snyman Attorneys

LABOUT COURT