



**REPUBLIC OF SOUTH AFRICA**

Not Reportable

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN**

Case no: DA7/2013

In the matter between:

**WOOLWORTHS (PTY) LTD**

**Appellant**

And

**COMMISSION FOR CONCILIATION, MEDIATION**

**And ARBITRATION**

**First Respondent**

**COMMISSIONER W. PAUL**

**Second Respondent**

**THANDIWE SHOZI**

**Third Respondent**

**NOKUTHULA YVONNE MDUNGE**

**Fourth Respondent**

**NOKUTHULA PATRICIA THSAPA**

**Fifth Respondent**

**Heard: 16 September 2014**

**Delivered: 17 March 2015**

**Summary: Review of arbitration award – employees dismissed for breach of till policy – commissioner finding employees guilty and upholding dismissal – Labour Court setting aside award – Appeal – evidence pointing to the fact that no persons than employees responsible for the till shortages – appeal upheld – Labour Court’s judgment set aside- review application dismissed.**

**Coram: Waglay JP, Jappie JA et Dlodlo AJA,**

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## JUDGMENT

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DLODLO AJA

- [1] This is an appeal against the judgment (as varied) of the Labour Court (Lagrange J) which upheld a review application brought by the Respondents. The Court *a quo* set aside the award and ordered that the third to fifth Respondents (hereafter “the Respondents”) be reinstated with retrospective effect. The Appellant is before this Court with leave of the Court *a quo*.
- [2] The facts that led to the dispute between the parties are as follows. The Respondents were employed as cashiers at the Appellant’s Hillcrest store in Durban. The Respondents together with a contract worker from a labour broker, one Dlamini, were all working on Saturday 4 July 2009 when the incident that led to their dismissal occurred.
- [3] As it is custom at the Appellant, each cashier received a cash float of R1694 at the beginning of his/her shift. At the end of their shift, the Respondents and Dlamini delivered the contents of their till takings to Philisiwe Ngcobo (Ngcobo) in sealed bags. Philisiwe Ngcobo was the store administrator in charge of receiving till takings on that day. The bags were collected by Fidelity Guard’s employees on Monday 6 July 2009 and then taken to the Appellant’s Bank. On opening the bags at the Bank, it was discovered that the bags of Shoji, Mdungwe and Dlamini each had a shortfall of R1694 which was the value of the daily float received by each of them on Saturday 4 July 2009. The bag of Tshapa had a shortfall of R1684 which was R10 lesser than the daily float that was received.
- [4] Subsequent to these shortfalls, the Respondents were charged for misconduct. Save for the quantum, the same charges were preferred against the Respondents, namely: “*Gross misconduct in that on the 4<sup>th</sup> of July 2009 your till reflected a shortfall of R1684.00 thereby resulting in breach of the till discrepancy policy.*” A separate disciplinary enquiry was held for each of them and they were all found guilty as charged.

- [5] Dissatisfied with their dismissal, the Respondents referred an unfair dismissal dispute to the Commissioner for Conciliation, Mediation and Arbitration (CCMA). As the matter could not be conciliated, it proceeded to arbitration. The Commissioner upheld the Respondents' dismissal. The Commissioner in analysing the evidence rejected the probability that the sealed bags could be opened and sealed again without showing signs of tampering. The Respondents' witnesses particularly Shozi could not demonstrate that the bags once sealed could be re-opened and sealed again without it showing signs of having been tampered with. This could not be demonstrated when the bag was submitted into evidence.
- [6] The Respondents were further aggrieved by the arbitration award and they approached the Labour Court to have the award set aside. The Court *a quo* took issue with the Commissioner's finding that once the bag had been sealed, it could not be re-opened without showing signs of being tampered with. This finding, the Court *a quo* found to be a decision that a reasonable decision-maker could not reach based on the evidence before him. The Court *a quo* held that the Commissioner failed to make a finding by focusing only on whether the bags could be opened without being tampered with. It is the Court *a quo*'s finding that the Commissioner had failed to take into account the fact that there was inexplicable coincidence that the shortfalls occurred on particular weekends when the same store administrator, Ngcobo, was on duty.
- [7] The Court *a quo* further held that the fact that an identical shortfall had occurred on another weekend when Ngcobo was on duty was another coincidence that could not reasonably be disregarded. The Court *a quo* thus concluded that no arbitrator could have reasonably ignored these unusual circumstances as factors which must have had some relevance to the determination of the person responsible for the shortage in the cash bags. The Court *a quo* was therefore satisfied that the arbitrator adopted a narrow approach in weighing the evidence before him thereby committing an irregularity in the proceedings warranting the setting aside of the award. The Court *a quo* later granted leave to appeal to this Court.

### Contentions of the parties

- [8] The Appellant contends in the main that the commissioner committed no misconduct warranting interference and that in setting aside the arbitration award, the Court *a quo* failed to apply the reasonableness test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>1</sup> It was submitted on behalf of the Appellant that the Court *a quo* failed to take into account and weigh all of the evidence led during the arbitration proceedings. Concerning the Court *a quo*'s finding that there was no demonstration in the arbitration proceedings that the sealed bags could be opened without being tampered with, the Appellant contends that a demonstration did take place at the disciplinary proceedings.
- [9] Concerning the court *a quo*'s finding that no reasonable commissioner would have ignored the similarity of the amounts of the shortfalls, the Appellant submitted that the shortfalls were not evidence of the innocence of the Respondents, rather, they indicate that the shortfalls are connected either through collusion or as the work of one person who wanted to pass them off as system errors. It was further submitted that the similarity in the amounts equal to the cash float can only indicate that no persons other than the Respondents acting in collusion with one another are responsible for the shortfalls. The Appellant contends that in deciding otherwise, the Court *a quo*'s finding amounted to speculation.
- [10] As regards the Court *a quo*'s finding that the Commissioner had ignored some evidence which could have suggested a possibility that another person could be responsible for the shortfall, the Appellant contends that in light of the evidence that the sealed bags could not be opened without detection, the commissioner was correct to conclude that the Respondents were responsible for the shortfalls. It is further submitted on behalf of the Appellant that the suggestion that Ngcobo may have opened the bags and stolen the money was dependent on whether it was possible to re-open the bags without detection. The Appellant argues that since the evidence was clear that the bags could not be opened, the Commissioner was correct in his assessment

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<sup>1</sup> (2007) 28 ILJ 2405 (CC).

that on a balance of probabilities the allegations that Ngcobo had taken the money could be rejected. Consequently, on behalf of the Appellant, it was submitted that the Court *a quo*'s conclusion to the contrary was flawed.

- [11] The Respondents oppose the appeal and contend, concerning the opening of the sealed bags, that there was evidence given by the Third Respondent that the bags could be re-opened after they had been sealed and that she demonstrated that this could be done prior to her disciplinary enquiry. They submit in this regard that this version was undisputed during cross-examination. Moreover, the Respondents submit that the Commissioner was wrong when he limited his reasoning to the fact that the bag that was brought to the disciplinary hearing could not be opened without a sign of detection. They contend that the bag that was brought to the disciplinary hearing was a used bag from the Bank which had been sealed a number of times. They submit that there was no evidence of a new bag that was brought which, when closed, could not be re-opened without showing that it had been tampered with. In clear terms, the contention is that a new bag could be opened without showing any detection.
- [12] Concerning the possibility that Ngcobo could be responsible for the shortfalls, the Respondents contend that it was difficult for an employee to see the drop safe when handing the bags over to Ngcobo who was responsible for dropping the bags into the safe. In this respect, they submit that Ngcobo had the opportunity to tamper with the bags if she had not dropped them into the drop safe when the store was quiet on Sundays as she was in the cash office alone. The Respondents also drew an inference that the pattern of shortages occurred when Ngcobo was on duty. Moreover, the Respondents contend that unusual coincidences pointed to the possibilities that Ngcobo could be the person responsible for the shortages and that the Commissioner by failing to find that another person other than the Respondents could be responsible for the shortfalls committed a reviewable irregularity.

### The appeal

[13] The consideration of this appeal is centred on two issues:

- (i) Whether the bag could be opened without showing signs of having been tampered with; and
- (ii) The possibility that another person could be responsible for the shortfalls. The ancillary question raised by this question is whether an employee could see when the bags were dropped into the safe.

The evidence of the parties' witnesses needs to be considered in order to determine this appeal. Their evidence should be limited to the two questions set out above.

#### *The evidence led on behalf of the appellant*

[14] At arbitration, the Appellant's evidence was led by Dhivan Govender (Govender), the store manager at the Appellant's Hillcrest branch. In respect of the question whether the bags could be opened without showing any signs that they were tampered with after being sealed, Govender testified as follows:

*'...In the afternoon a bag is completed for them by the store administrator, they accept the bag, they put all their money in this bag and this bag had got a seal so after you put your money into this bag, you seal it...but once you seal this bag it is a special kind of sticky seal which you cannot open it and if you do try and open it, it creases...'*

[15] During cross-examination, when asked whether the bags could be tampered with, Govender testified as follows:

*'Mr Govender: If you do tamper it will give you signs of tampering with the bag.'*

*Ms Zibi: There will be signs of tampering*

*Mr Govender: And the bottom slit is from Standard Bank, so...*

Ms Zibi: *The Applicants (sic) will testify in this arbitration that this bag if its new, it's a new bag, is issued to you to put out your money and then you close it. And for example maybe there's a cheque that has been left behind, if it's still new you can always open it and put the cheque inside and re-seal it, there will be no signs of tampering, if it's still new. But this one, they are saying this one now has been sealed, nine months down the line.*

Mr Govender: *But clearly if you're sealing it the first time, you're not doing it correctly, then clearly you can, maybe you can open it. But if you're sealing it as it's meant to be sealed, with all the air out, which they have done, then it can't be tampered with.*

Ms Zibi: *Sir, if then this bag a person is able to seal it and then forget a cheque that is left behind and open it and re-seal it, then this bag can be opened, if it's new?*

Mr Govender: *Should I open it. And I'll test these bags and if you fail to seal it properly, the bag will open. But you press down how it's meant to be done, you cannot open it. Remember it's not a Woolworths bag it's designed for Woolworths, but it's from external company, which is Standard Bank.* (own emphasis)

- [16] Concerning the question whether there was a possibility that another person can be responsible for the shortfalls, Govender testified that when the employees hand in their bag over to the store administrator, they “*need to ensure that the bag number is the same and also they need to wait for the money to be dropped before leaving there.*” In this respect, he testified that it is only when the money was dropped into the safe that the till operator and the store administrator would sign to signify that the money was dropped into the safe. Although the till operator could not go inside with the store administrator to drop the money, Govender continued as follows: “*It is quite a distance the drop from the drawer to the floor. And in this occurrence where there was about R8000 there was a lot of change so you would hear the sound of money, it was a heavy bag so you would hear the money dropping to the bottom and then only is the drawer pushed out to say there is no, the money has fallen inside.*”

- [17] Govender further stated that if the store administrator wanted to fake a drop, she needed time to count the money to make up the amount of the cash float because the money in the bags is coins. This is because the office in which the drop safe is located is a general office where all the managers enter regularly and the store administrator cannot see anyone coming in.
- [18] When cross-examined about the possibility that Ngcobo could be responsible for the shortfalls, Govender stated that there is a strong possibility that all Respondents colluded to have a shortfall equalled to the amount of the daily cash float to make it looks like it was a system failure. He further agreed with the Respondents' representative that the shortfalls occurred when Ngcobo was on duty but emphasised that huge shortfalls also happened when she was not on duty and even after she had been dismissed.
- [19] He reiterated what he said during his examination that it could not be proved that Ngcobo was the one who took the money. Again, he stated that a loud sound could be heard when the bags were dropped into the safe because the drop safe is about 1.3 metre deep. In this respect, it is apposite to reproduce the exchange between him and Ms Zibi:

*'Ms Zibi: So when these bags are dropped by this lady in the drop safe, would the cashier outside the window be able to see that my money has gone down the safe?*

*Mr Govender: You can clearly hear it because...*

*Ms Zibi: You can clearly?*

*Mr Govender: Hear it...*

*Ms Zibi: Hear it...*

*Mr govender: Ja*

*Ms Zibi: Only hear, but not see?*

*Mr Govender: And remember after the drawer is pushed the monies in there drops and you pull it out. So clearly you can hear it drop and it is pulled*

*out. And if you pull it out you can see [that] the drawer is shallow so you can see it if you look in.*

*Ms Zibi: Would you be able to see whether the drawer has been closed by this lady?*

*Mr Govender: The drawer is pushed and it is closed. So it pushed for the money to drop and it is pulled out...*

*Ms Zibi: Now these people would they be able to see that, or the drawer now is being pushed, the drawer now is being closed?*

*Mr Govender: Well, when I stand there, I can see so I mean if I am interpreting, you ask me to interpret myself, I can see yes.*

*Ms Zibi: You but not all of them could see, they could only hear the noise?*

*Mr Govender: Yes they could have heard it, whether they see or not I can't answer for them, but I could have seen, but it is difficult to see, but I can see.'*

- [20] The evidence of Govender can be summarised as follows: concerning the probability that another person namely Ngcobo could be responsible for the shortfalls, he excluded such possibility because when the bags are dropped into the safe, the till operator could hear the noise which is loud as the result of the coins. Moreover, he admitted the difficulty to see when the bags are dropped but that it is possible to see that the drawer is empty after the bags had been dropped. Concerning the question whether the bags could be opened without showing that it had been tampered with, his testimony is that regardless of whether the bag is new or old, if properly sealed, it cannot be opened without showing evidence. However, he said that the bag could only be opened without showing signs of being tampered with only if it was not properly closed in the first place.

#### *Evidence on behalf of the respondents*

- [21] The three Respondents led evidence. However, for the present purpose, the evidence is limited to that of Ms Thandiwe Shoji (Shoji) because other

witnesses simply corroborated her evidence. Shozi's testimony concerning whether the bags could be tampered with without showing any evidence is as follows:

*'I have worked here for three years using the very bag and I know that when you go to the cash office you can open it with money in this bag and also that you can re-open this bag and then you can re-close it again. So it is possible to open and close it. And also prior to attending the disciplinary enquiry I requested that they bring this bag so I can show the company how this bag can open and then re-closed again which I did.'*

- [22] As regard the question whether Ngcobo could be responsible for the shortfalls, Shozi clearly stated that Ngcobo was responsible because huge shortfalls always occurred when she was on duty. She further said that she had never had such huge shortfalls. Shozi disputed Govender's statement that Ngcobo could not have enough time to count the money. Instead she testified that she had more than enough time to count the money because she was always alone in the office as managers were not there. When asked whether she could see the bags being dropped into the safe, she testified that she was unsure whether the money was properly dropped *"because the noise of the drawer when it bangs especially when you got the bank notes."*

*Can the bags be reopened without showing that they have been tampered with?*

- [23] At the arbitration, the Commissioner was confronted with two versions and had to decide whether the bags could be opened without being tampered with. The first version is that of Govender who in clear terms said that the bags could not be opened without showing signs of being tampered with. The second version is that led by Shozi on behalf of the Respondents that she demonstrated that the bags could be opened prior to the disciplinary proceedings. The Court *a quo* in setting aside the award, held that the Commissioner ignored the evidence of Govender that the bag could only be re-opened if it was not properly sealed and that of Shozi that she demonstrated that the bags could be re-opened and closed at the internal inquiry. This finding is wrong. Firstly, Govender clearly stated that the bags

when sealed if opened will show signs of tampering and under cross-examination he said if not properly sealed then they can be opened without showing any sign; in other words when sealed properly if opened, they would show sign. Secondly, the demonstration by Shoji that the bags could be opened without any sign of being tampered with was prior to the disciplinary hearing in circumstances which are not clearly set out, nor is it stated before whom did this demonstration take place.

- [24] Lastly, the Court *a quo* ignored the demonstration of Govender at the arbitration as evidenced by the above extract quoted above. Moreover, the following exchange between Govender and the representative of the Appellant evinces that demonstration did take place during the arbitration proceedings:

*'Ms Nair: Can you pass it around for everybody. So if somebody had tampered with this bag then you would see that that seal is opened?'*

*Mr Govender: Ja you would see the little crease, it will have tore as such and you can see further the bag there's cuts, the only cut at the bottom is where the bag gets accepted at Standard Bank, so they open the bottom to count it, that's the only time that bag will have been opened at Standard Bank, when it was sent to Standard Bank to count out. So prior to that there was no cuts or slits in the bag money.'*

*Ms Nair: the bag, are those bags?'*

*Mr Govender: oh ja as we can*

*Ms Nair: Is that for who?'*

*Mr Govender: this is for Thandiwe- thandiwe, ja and again there's no interference with the bag as such. Also, sorry the next one is Nokuthula Tshapa, and again there's no tampering with the bags...'*

- [25] The Commissioner was faced with the demonstration led by Govender that if the bags were to be opened, it will show detection and that of Shoji who simply stated that she had demonstrated the contrary prior to the disciplinary hearing. Her evidence amounted to no more than hearsay evidence. Did the

fact that the Commissioner confined himself to the evidence of Govender without examining Shoji's evidence amount to a reviewable irregularity? I do not think so. The Commissioner was influenced by the demonstration made by Govender and came to the conclusion he did because *"although it was submitted that the sealed bags containing the cash could be opened and closed without showing signs of tampering this could not be proved when the bags was submitted into evidence."* This conclusion falls within the bound of reasonable outcome.

*Is there a possibility that Ngcobo may be responsible for the shortfalls?*

- [26] The Commissioner did not examine this question but based on his finding that the sealed bags could not be opened without showing signs of tampering, found it improbable that *"on the balance of probability the allegations that the cash clerk had opened the cash bags removed the money and re-sealed the bags."* Does the fact that the Commissioner did not examine thoroughly this issue amount to a reviewable irregularity? We should be reminded of the dictum of Waglay JP in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*<sup>2</sup> that:

*'In a review conducted under s145 (2) (a) (c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.*

*To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so*

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<sup>2</sup> [2014] 1 BLLR 20 (LAC) at paras 18-20.

*expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.*

*Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? And (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'*

- [27] It is not every irregularity committed by a Commissioner which must be set aside on review. Put differently, it is not every irregularity that will vitiate the entire award. The reasonableness of the arbitration award must be assessed in light of the totality of the evidence presented at the arbitration. Nevertheless as stated in *Gold Fields supra*, the reviewing court must assess whether the irregularity amounted to a reviewable one. In assessing the evidence, the Court *a quo* reasoned that the Commissioner did not consider the similarity in the shortfalls occurring on the same day and the fact that the shortfalls were equivalent to the till float. This is a case which can go either way. However, the possibility that Ngcobo could be responsible for the shortfalls is less persuasive because of the following: Govender's evidence corroborated by Shoji is that there is a drop procedure which needs to be followed when dropping the bags; even if the cashier cannot see how the bags are being dropped, when dropping the bags there is a loud noise which cannot go unnoticed; it is only when the cashiers hear the noise of the bags being dropped that he/she signs the handover. Moreover, the undisputed evidence of Govender is that it is possible to see that the drawer is empty after the bags had been dropped. It can be inferred from his evidence that no cashier will

sign the drop off documents if he/she is not satisfied that the bags had been dropped.

- [28] It then follows that the probabilities indicate as conceded by Govender that anyone could be responsible for the shortfalls. Govender admitted that Ngcobo could not be excluded as the person responsible for the shortfalls but since there was no evidence pointing to her the Respondents acting in collusion were responsible for the shortfalls. In addition, he testified to the fact that because Ngcobo was dismissed for mishandling petty cash, it cannot be construed to mean that she was responsible for the till shortfalls. This was reinforced by the undisputed fact that huge shortfalls continued after Ngcobo was dismissed and even when she was not on duty. The above evidence compounded by the overwhelming evidence that the sealed bags could not be opened without showing any detection, I find that the Commissioner arrived at a reasonable outcome. Accordingly, the appeal should be upheld and the Court *a quo*'s judgment set aside.

#### Order

- [29] In the circumstances, I make the following order:

- (a) The appeal is upheld with no order as to costs.
- (b) The order of the court *a quo* is set aside and replaced with an order that *"the application to review the arbitration award is dismissed"*.

I agree

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Dlodlo AJA

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Waglay JP

I agree

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Jappie JA

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