



THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

Case number JR 53 /15

In the matter between:

JDG TRADING (PTY) Ltd t/a HIGH -FI CORPORATION

Applicant

And

WESSELS N.O

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

MNYAIZA LUNGILE

Third Respondent

Date of order: 3 May 2016

Reasons dated: 6 February 2017

REASONS FOR JUDGMENT

MOLAHLEHI J

- [1] On 3 May 2016 this Court made the order reviewing and setting aside the arbitration award issued by the first respondent ('the Commissioner') under case number MP 5729-14 dated 16 October 2014. The arbitration award was further substituted by the order that the dismissal of the third respondent ('the employee') was substantively fair.
- [2] The review application was unopposed. The reasons for the order are set out in this judgment.

Background facts

- [3] The employee was prior to her dismissal charged with "dishonest behaviour" and "breach of staff purchase policy." The employee pleaded guilty and was consequently dismissed.
- [4] The first witness of the applicant was Mr Clarke ('Clarke'), the branch manager, who testified that the employee was dismissed for failing to comply with the policies relating to staff discount purchases and that relating to the purchase of televisions.
- [5] The charges against the employee arose from the purchase of a television set by a customer, Mr Mbonambi ('Mbonambi'). Clarke testified that in purchasing the

television Mbonambi, initially failed to provide the receptionist with a valid TV license. He stated that the employee colluded with Mbonambi in producing the identity document of a certain Mr Nkosi (Nkosi) and used that for the purpose of purchasing the television set.

- [6] According to Clarke, the receptionist who was responsible for processing the sale, initially queried the details of Mbonambi. He also testified that the employee pleaded guilty to breach of the “staff purchasing policy, “in that she purchased a DSTV Explorer for a friend”. This according to him resulted in the breakdown in the trust relationship between the applicant and the employee.
- [7] During the disciplinary hearing the employee, according to Clarke, raised the issue of the alleged inconsistent application of discipline by the applicant. This point was unsustainable because the facts which she relied on in the disciplinary hearing was distinguishable. The case was distinguishable because the employee, in that case, Ms Strange (‘Strange’) purchased the item in question for her husband to whom she was married in terms of customary law.
- [8] The second witness of the applicant was Strange, the administrative manager, who essentially in her testimony confirmed what was stated by Clarke in relation to her purchasing an item for her husband in terms of the staff policy.
- [9] The third witness of the applicant was Ms Jiyane (‘Jiyane’) the receptionist who processed the sale for Mbonambi. She testified that Mbonambi went to the floor of the store and spoke to the employee when she questioned him about the details which he had furnished for the purpose of the sale. On his return after

speaking to the employee, he came back with what appeared to be the correct information. Although she was still suspicious of the information furnished by Mbonambi, she proceeded to process the sale. She subsequently informed her manager about her suspicion.

- [10] The fourth witness of the applicant was Ms Nkwane ('Nkwane'), the receptionist. She testified about another incident wherein the purchase of an item before her, the identity document of Mr Nkosi was also used. The customer referred her to the employee when she enquired from him about the details of the identity document. She, however, never confronted the employee about the matter.

The employee's case

- [11] The employee was the only person who testified in her case. She testified about the process applied by the applicant in issuing a warranty for the goods to be sold. This is the process she was mainly involved in and not the sale of goods. She denied any involvement in the sale in question. She contended that her involvement was limited to the issuing of the warranty agreement.
- [12] In relation to the purchase she testified that she assisted a friend who is their taxi driver to purchase the TV and did so after speaking to her manager.

Grounds for review

- [13] The essence of the applicant's complaint is that the Commissioner's arbitration award is unreasonable in that the findings made are irrational and thus rendering the award to be unreasonable.

Evaluation

[14] In considering and determining the review application the test which this court applied is that of a reasonable decision maker set out in *Sidumo v Platinum Mines (Pty)Ltd and Others*.¹ The inquiry conducted in this regard is that of determining whether the decision reached by the Commissioner that the dismissal of the employee was unfair is one which could be reached by a reasonable decision maker. An objective approach was adopted in assessing all the evidence that was before the Commissioner when the decision was made that the dismissal of the employee was unfair.

[15] In restating and explaining the reasonable decision maker test the Labour Appeal Court in *Gold Fields Mining (Pty) Ltd v CCMA*² had the following to say:

“In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.”

[16] The issue of fairness of the procedure followed by the appellant in dismissing the employee in this matter was not placed in dispute. In the assessment of the reasonableness of the decision of the Commissioner, consideration was given to the fact that the employee had pleaded guilty to the charge relating to breach of the staff discount purchasing policy.

¹ (2007) 28 ILJ 2405 (CC)

² (2014) 1 BLLR 20 (LAC) at para 16

[17] I agree with the applicant that there is no reasonable connection between the evidence as a whole and the conclusion reached by the Commissioner. In my view, had the Commissioner, in dealing with the evidence adopted the approach set out in *Gold Fields*³, the outcome of the arbitration hearing would have been different. In that case, the court held:

“[18] 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.”

[18] In the present matter had the Commissioner taken into account the totality of the evidence he or she would have found that the employee assisted Mbonambi in the purchase of the TV set and assisted him also in the filling in of all the relevant documentation for that purpose. The other aspect of the evidence which the Commissioner ignored is that when asked to provide certain details by the receptionist, Mbonambi went into the store and spoke to the employee and returned to the receptionist with all the relevant information.

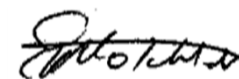
³ id

[19] It, therefore, means that the Commissioner failed to properly and fairly determine the probabilities of the facts before her and thus committed gross irregularity. An objective and proper analysis of the evidence which was before the Commissioner leads to an irresistible conclusion that the employee was guilty as charged and that in the circumstances of this case, the sanction of dismissal was fair. In other words, in the circumstances of this case, it cannot be disputed that the conduct of the employee was dishonest and accordingly destroyed the trust relationship between her and the applicant.

Order

[20] It was for the above reasons that I made the following order:

1. The arbitration award made by the First Respondent under case number MP 5729-14 dated 16 October 2014 is reviewed and set aside.
2. The arbitration award of the First Respondent is substituted with the order to the effect that the dismissal of the Third Respondent is substantively fair and thus his claim of unfair dismissal is dismissed.



E. Molahlehi

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Snyman Attorneys

For the Respondent: In person