



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JR1815/14

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

BRETELL EVELYN RICKMAN HONE N.O.

Second Respondent

SACCAWU obo MARIA SEEMELA

Third Respondent

Heard: 14 December 2015

Delivered: 07 February 2017

**Summary: Misconduct – Cashier under-ringling – CCMA finds dismissal harsh and reinstate. *Code of Good Practice: Dismissal* applied.
Negligence not necessarily Dishonest.**

JUDGMENT

MOSIME, AJ

- [1] The applicant seeks an order to review and/or to set aside an arbitration award¹ issued by the fourth respondent (“the Commissioner”) on 21 July 2014 under the auspices of the first respondent, with case reference number *LP32/14*, or remit it to the first respondent or substitute it with an Order that this Court may consider appropriate. This Court is moved through application and the founding and supplementary affidavits of Mr. Coenraad Willem Hendrick du Toit, the applicant’s Senior Case Manager: Labour Relations, Northern Region. The union representing the third respondent opposes the application.
- [2] The facts in this case are summarised in the questioned commissioner’s award and the record, and are outlined in the body of this judgment. The third respondent (referred to in the record and this judgment as “Maria”) has supplied the Court with the opposing affidavit deposed by herself personally. However, she was represented during the application proceedings by the union official from the South African Commercial and Catering and Allied Workers Union (SACCAWU).
- [3] Maria was employed by the applicant for a period of seventeen (17) years and was not shown to have any disciplinary record. At the time of her dismissal, she was stationed at the tills as a cashier. On the 19 September 2013, at 11h15, Maria was deployed at one of the express tills of the applicant’s retail stores in Tzaneen. A footage of the video recording² admitted as evidence and was placed before the second respondent during the arbitration hearing shows Maria attending to a customer who was purchasing four loaves of white bread at the store. The customer placed the loaves at the counter of the till before Maria. The footage apparently shows Maria communicating with the customer and then scanning bar codes of two loaves only. It is not clear what Maria said to the customer. The customer is then shown thereafter placing all four loaves of bread in the plastic bag and leaving the till with them towards

¹ Pleadings bundle, 19-26.

² Record, 19 – 22.

the exit. Maria was then shown attending to the next customer without paying further attention to the customer leaving the till with two unpaid loaves of bread. Audio recordings of the communication between the customer and Maria were not available.

- [4] The customer was apprehended at the exit point by a security officer, Ms Grace Makhubela (“Makhubela”). The latter reported the matter to Mr Simon Nomvela (“Nomvela”), a manager at the perishable section, and told him that the customer was leaving the store with four loaves of bread but was in possession of a till slip that showed she had paid for only two.
- [5] The explanation supplied by Maria to Nomvela and another senior manager was that she told the customer to pay for the other two loaves to Lucas Poto (“Lucas”), the cashier at the next till. She also spoke to Lucas and asked him to accept the payment of the two loaves. She did not see where the customer went when she left her till.
- [6] A summary of this evidence as recorded in the transcript³ is that the customer approached Maria with a bag of apples and four loaves of bread. She scanned two plastic bags and the apples first. Before she could scan the bread, the customer stopped her and told her she wanted to pay for the other two loaves separately. Maria then made attempts to call the supervisor but the customer stopped her because she was in a hurry and could not wait for the supervisor. She abandoned the call and put the loaves aside. The customer presented her with a hundred rand note to pay for the two loaves but she did not have enough change in the till. She had received the float, but that was only in coins. Customers do not prefer coins when they had tendered high notes. Maria did not have enough change (in notes) in the till as this was her second customer for the day. The customer took the R100 note back and tendered a smaller amount of R30. Maria then called Lucas, who was at the next till, and told him that the customer would pay for the other two loaves of bread at his till. This testimony is largely corroborated by Lucas⁴, who

³ Record, 42 – 43.

⁴ Record, 64.

confirmed that Maria spoke to her and also stated that he expected that the customer was joining his 'long' queue to tender payment for the two loaves Maria spoke to him about. Lucas also testified that he was never called to give a version during the investigation of the incidents.

- [7] Maria stated further that later on the day, she was approached by a security officer named Peter, who was accompanied by the customer. Peter then instructed Maria to assist the customer and she rang the other two loaves. She stated that she confronted the customer and repeated that she had explained to her that she needed to pay for the other two loaves of bread at the next till. This testimony was never challenged. The customer then left. After her lunch time, she was called to Nomvela's office, accompanied by a shop steward. She explained the whole incident to Nomvela and the latter then resolved the issue by allegedly telling her that she would be required to sign a Written Warning. She stated that the warning was never issued.⁵ This version was not put to Nomvela during his cross examination. She was surprised when a week later she was called in and informed that she would be formally charged and disciplined.
- [8] According to Nomvela, it is the duty of the cashier to ensure that a customer pays for all the goods purchased before leaving the store with them. Under ringing occurs when the customer leaves the till point and the cashier had only rung fewer goods than what the customer is supposed to pay for. It is clear from the evidence of both Maria and Nomvela before the second respondent that Maria neglected to ensure that the customer indeed went to the Cashier at the next till and did not leave the store with the loaves that were not paid for.
- [9] Maria admittedly⁶ continued attending to the next customer. She stated under cross examination that she thought that the customer was going to Lucas as she had spoken to both Lucas and the customer. She admitted that she did not check to ensure that the customer indeed went to pay for the loaves to

⁵ Record, lines 15-25, p44.

⁶ Record, line 5-10, p46; line 12, p46.

Lucas. She said that she a 'mental disturbance' and was having family problems that day and she could only attribute her failure to check to that.

- [10] In the transcript of the record⁷ Mr Du Toit, who also deposed the founding affidavit, put to Maria that '... you thought [that the customer would go to Lucas on the next till] but you did not check, you have the responsibility. The two witnesses testified that you had the responsibility'. This was also acknowledged by the second respondent in the award⁸. In the award⁹, the second respondent summarised the evidence of Keagile Teme, the Floor Manager, for the applicant, as that the cashier was 'responsible for ensuring payment of the items paid', and that Maria ought to have ensured that 'the customer went to the cashier next to her to pay for the other two breads' (sic).
- [11] It is clear from this evidence that, at the centre of the charge is the fact that Maria neglected or failed to ensure that the customer went to the next till to pay for the two loaves that the customer left her till without paying for. The commissioner found that Maria was careless, and thus her conduct amounted to negligence, in this regard.

The Commissioner's Award

- [12] In the commissioner's award, the second respondent identifies the issue she was called upon to determine as whether or not the dismissal of Maria was substantively fair and if so, determine an appropriate relief. Maria did not challenge the procedural fairness of the disciplinary inquiry. The offence that Maria was charged with at the inquiry leading to her dismissal was framed as follows:

'Under-ringing, in that on the 19 September 2013 you rung two with loaves of bread instead of four loaves of white bread ...'¹⁰

⁷ Record, 48.

⁸ Pleadings Bundle, 20, at paragraph 4.16 of the Award.

⁹ Pleadings Bundle, 19, at paragraph 4.10 of the Award.

¹⁰ Pleadings bundle, 30.

[13] In the analysis, the commissioner identified three contentious aspects that she was called upon to determine, namely whether or not the applicant had proved that Maria committed the misconduct, the sanction of dismissal was too harsh and that the applicant was consistent in the application of discipline in respect of Maria's case compared with how similar cases were treated in the past. This Court finds that the commissioner had asked the correct questions in order to enable herself to proceed on the correct path with the inquiry. Without any further ado, the commissioner immediately dismissed the claim of inconsistency.¹¹ The basis for the dismissal of the claim was that the evidence that sought to prove the claim was based largely on hearsay, and that there were insufficient facts supplied on the comparative case cited by the union, to enable her to determine in what respect the two cases were similar. She thus found that there was no support for the challenge on this substantive ground.

[14] The commissioner noted that Maria had acknowledged that she had committed the offence of under-ringing as alleged in the charge, but raised a defence including the fact that she did not have enough small change for the high denomination tendered by the customer and that she told the customer to pay for the other loaves on the next till. However, the video shows the customer leaving the store without paying for the loaves. After traversing all the evidence before her, the commissioner then made the following conclusion¹²:

'Regardless of which version of events is the more probable, what is clear to me is that the Applicant was negligent in under ringing the two loaves and failing to make the least effort to follow up on whether the customer paid for the unpaid loaves. The customer's actions that we could see on the video do not support the Applicant's version. She (the customer) packed the four loaves and appeared to head for the exit. If the Applicant had passed the two unpaid loaves to Mr Poto, who was at the till next immediately next to hers, then this would vindicate her version of events'

¹¹ Pleadings Bundle, 19, at para 5.7 of the Award

¹² Ibid, para 5.12 of Award.

And:

'Whilst I cannot make a finding that the Applicant was dishonest, her carelessness was sanctionable. The question is was it sufficiently serious to warrant dismissal?'¹³

[15] In resolving this question, the commissioner considered the Code of Good Practice: Dismissals in the Labour Relations Act¹⁴, specifically *Item 3(4)* of the Code. In that regard, the commissioner considered the following directives from the Code to be of crucial importance:

15.1 The fact that Maria had a clean disciplinary record in her lengthy service with the applicant. Maria had been employed for a period of at least 18 years with the employer at the time of her dismissal, and the commissioner considered that period to be 'considerable'.

15.2 The commissioner found that although Maria's negligence had the potential to cause financial loss to the applicant, and is serious, in her view, it does not render the employment relationship intolerable, which an offence involving dishonesty would.

15.3 The circumstances of the Applicant's case were not sufficiently serious to justify dismissal, which she found was substantively unfair.

[16] Having so concluded, the commissioner determined that it would not be fair on the respondent to be expected to continue the employment of Maria as a cashier when she had been negligent in this role and had caused actual or potential financial loss. The commissioner opined that Maria's long period of absence from work was sufficient sanction for her negligence. She ordered that the applicant reinstates Maria in "*any suitable position other than that of a cashier or money handler without any reduction in her pay or benefits*".

The test on review

[17] Numerous judgments in this Court have dealt with test that must apply when deciding whether the commissioner's decision is reviewable, and these have

¹³ At para 5.13 of the Award.

¹⁴ Act No. 66 of 1995, as amended.

been rehashed innumerable times since the Constitutional Court judgment in *Sidumo v Rustenburg Platinum Mines Ltd*¹⁵ and should be now crystallised. The test is whether the conclusion reached by the commissioner was so unreasonable that no other commissioner could have come to the same.

[18] In *Sidumo*¹⁶ the Constitutional Court very clearly held that the commissioner's conclusion must fall *within a range* of decisions that a reasonable decision-maker could make. This reasonable test was succinctly adumbrated in the pre-*Sidumo* case of *Computicket v Marcus NO and others*¹⁷, thus: 'The question I have to decide is not whether [the commissioner's] conclusion was wrong but whether ... it was unjustifiable and unreasonable.'

[19] This decision was followed in a vast number of other decisions and I do not find it necessary to repeat the position here. It is, in my view, aptly encapsulated in *The National Commissioner of the South African Police Service v Myers and Others*¹⁸, where the LAC held:

'Whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the commissioner's decision ... is a decision that a reasonable decision-maker could reach.'

[20] A commissioner should then be criticised if, when determining the matter before him or her, fails to ensure, before reaching a conclusion on a decision that he or she is about to make, that the award will be legitimised by reasonableness, justifiability (in the light of the material that he took into account), and freedom from prejudice. Deviation will result generally in gross unreasonableness. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA*¹⁹ Van Niekerk J also observed that it may be inferred from the judgment of the Constitutional Court in *Sidumo* that *section 145* also invites scrutiny of the process by which commissioners reach their conclusions.

¹⁵ [2007] 12 BLLR 1097 (CC).

¹⁶ *Supra*, paras 118-119.

¹⁷ (1999) 20 ILJ 343 (LC) 346.

¹⁸ CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) paras [103] – [104].

¹⁹ *Supra*.

- [21] It was held in *CUSA v Tao Ying Metal Industries and Others*²⁰ that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.
- [22] It is submitted in the applicant's heads in this case that the arbitration award is reviewable on the basis that the commissioner committed a gross irregularity in the conduct of the proceedings, which led to an unreasonable result.

Grounds of review

- [23] It appears from the notice of motion that this application is made on the basis that the commissioner committed a gross irregularity on the grounds that the commissioner acted unreasonably by failing to take into account materially relevant evidence placed before her, and thus reached a decision that no reasonable decision-maker could reach.
- [24] The criticism against the commissioner is that she ignored the alleged Maria's "gross dishonesty", failure to show remorse and the alleged fabrication of the fact that she did not have sufficient change for the customer. I have to determine whether or not, from the applicant's submissions, any other decision maker could have come to that conclusion from the evidence before the commissioner.
- [25] It is not disputed, and this was conceded by Maria that she did have a float of R300, but that was in coins and not notes. She stated in her evidence that when the customer tendered a R100 note, she told the customer that she did not have "change" but only had "coins". The commissioner also made a finding in that regard²¹. Maria states further in her testimony, *'Normally, customers don't want too much coins ... that is why I raised my hand so that the supervisor can come and assist me and the customer said she is in a*

²⁰ (2008) 29 ILJ 2461 (CC) at para [134].

²¹ Pleadings Bundle, 24, at para 5.10 of the Award

hurry'.²² It is therefore not entirely correct that her defence was that "*she did not have change*".²³ Indeed she confirmed that she had a float of R300. There was therefore no need for the commissioner to dwell on this aspect of the evidence, as there was nothing contrary before her.

[26] It is also common cause that the video evidence does not provide any assistance with regard to the recording of the voices. The commissioner considered what Maria said to the customer and also to Lucas. This is that she told the customer to pay for the other two loaves at the till next to her, and that she spoke to Lucas, the customer listening, and told Lucas that she was sending the customer to his till to pay for the other two loaves. This evidence was corroborated by Lucas.

[27] However, Du Toit states in his affidavit²⁴ that Maria "lied" to the commissioner '*throughout the arbitration proceedings stating that she did not have change to give to the customer and therefore told the customer to go and pay at a different till*'. He also states as follows:

'As a result, the Commissioner himself found that the Third Respondent's version was not supported by any of the evidence even that of her own witnesses'.

[28] It is difficult to find any basis for this deposition with reference to evidence on record or in the award. The commissioner made neither a finding that Maria was a dishonest witness nor that did she lied about the fact that she did not have sufficient change. However, the commissioner found that the applicant had proven that Maria failed to ring the two loaves as alleged by the applicant. She also found that '**regardless of which version was probable**', Maria was '**negligent in under ringing the two loaves and failing to at least make an effort to follow up on whether the customer paid for the unpaid loaves**'.

²² Record, 48, line 23.

²³ Pleadings bundle, p11-12; See generally the Founding Affidavit, at para 36.

²⁴ Pleadings bundle, 12, at par 37.1.4 of the founding affidavit.

[29] It is not clear therefore, how the applicant comes to a conclusion that the phrase '*regardless of which version was probable*' implies that the commissioner '*failed to consider and evaluate the probabilities of the parties' versions*'.²⁵ The phrase, understood in its ordinary meaning, means that it did not matter in this case which version is probable on the facts, even after having evaluated and considered all versions, and perhaps even after agreeing with the employee's own version, the conclusion that remains clear is that Maria was negligent. Having found that Maria was not negligent, the commissioner proceeded to consider whether or not there was any dishonesty on Maria's conduct, and concluded as follows:

'Whilst I cannot make a finding that the Applicant was dishonest, her carelessness was sanctionable'.

[30] Furthermore, the commissioner clearly rejected Maria's version on her word as compared to the video recording. She had already acknowledged that there was no audio recording and it cannot be disputed that Maria told the customer to go pay at the till next to hers. However, the video shows the customer leaving the store and not paying. Maria makes no effort to ensure that the customer goes to pay for the two loaves at the till next to hers. It is in this regard that the commissioner then finds that '*the customer's actions that we could see on the video do not support the Applicant's version*' that she said what she said she said to the customer. By not following up on what she told the customer, Maria was 'careless', thus negligent. There cannot be anything more for the commissioner to say to indicate that she had made a finding on which version was probable.

[31] This illustrates the commissioner's logic as this Court understands. The applicant contends that Maria lied on the receipt of the float. Applicant also contends that Maria lied when she said she told the customer to pay for the other loaves at the next till. The commissioner evaluates the evidence and finds that Maria did not lie about the float. She in fact admitted that she received the float, but in coins and the customers do not prefer coins. The

²⁵ Applicant's Supplementary Heads, para 8.

commissioner accepts her explanation. The commissioner however, finds that Maria had under-rang the two loaves and was thus culpable. Maria explains that she told the customer to pay for the two loaves to Lucas at the next till. This is corroborated by Lucas. There is no audio recording of the communication. Despite what Maria and Lucas said, the customer leaves the store with the two loaves, and Maria is seen attending to the next customer. She makes no effort to ensure that the customer does what she was told. The commissioner finds that Maria was negligent (careless) in failing to ensure that the customer pays for the bread.

[32] There is no legal basis to support a view that if a court rejects a party's version on the facts, then there must necessarily and automatically follow a conclusion that that party was dishonest. In any event, the Code of Good Practice provides a guide to arbitrators on what may constitute a serious misconduct 'of such gravity that it makes a continued employment relationship intolerable'. This includes gross dishonesty, wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault and gross insubordination. The Code enjoins commissioners that even if they found the misconduct to be serious, they still cannot conclude that a dismissal sanction is appropriate without further considering the personal circumstances of the employee, the nature of the job and the circumstances of the infringement itself. These the commissioner has taken fully into account in this case and has, in my view, come to a reasonable decision. The Code of Good Practice is mandatory and must be taken into account when a commissioner decides on the sanction.

[33] The cases cited in the Applicant's Supplementary heads speak to the procedural and substantive defects that are now accepted as forming the basis of irregularities in the commissioner's conduct of the arbitration hearing. In my view, they are not fully applicable to the manner in which the commissioner in this case came to her decision. Her decision is reasonable and is probably what any other commissioner, faced with the same facts, would have made.

[34] In my view, therefore, the third respondent in this matter has rendered an award which any reasonable decision maker would have given. I find that she has properly and rationally applied her mind and came to justifiable conclusions. Her award is therefore reasonable and must stand as decreed.

[35] I have considered that this is not a matter where an award of costs is necessitated against the losing party. I thus make no order in that regard.

Order

[36] In the premises, I make the following order:

1. The application is dismissed.
2. No order is made as to costs.

Mosime, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms Samantha Coetzer

Instructed by:

Bowman Gilfillan, Sandton

For the Third Respondent:

Ms L Marakalo

Union Official, SACCAWU
