THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR310/15

In the matter between:

BLISS BRANDS (PTY) LTD **Applicant**

and

KRISHNA PILLAY **First Respondent**

S BHANA *N.O.* **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: 23 August 2017

Delivered: 3 May 2018

Summary: Reasonableness review – commissioner's finding that employee not guilty of misconduct unreasonable – award set aside and substituted with an order that dismissal substantively fair.

JUDGMENT

MYBURGH, AJ

Introduction

[1] The employee (Mr Pillay) was employed by the applicant company as its warehouse manager. He was dismissed on 30 May 2014 after having been found guilty of misconduct. In an award issued on 9 February 2015, the commissioner found the dismissal substantively unfair on the basis that the company had failed to prove the charges against the employee, and awarded him seven months' remuneration as compensation, totalling some R210 000.

[2] The company now seeks to review and set aside the award in terms of section 145 of the LRA. Its case is that the award is substantively unreasonable on the *Sidumo* test. That then is the issue for determination.

Background facts and basis of dismissal

[3] The company manufactures and distributes washing powders, detergents and soaps. It has plants in Wadeville (East Rand) and at Springbok Road (West of Johannesburg). I refer to these plants as "Wadeville" and "Springbok", respectively. Although the employee worked at Wadeville, he was the warehouse manager of both plants.

[4] As a general rule, all company transactions are processed on a computer system known as JDE. In the event of the system being down or in the case of a power failure, transactions are subsequently entered on JDE when the system is up and running again. Naturally, the failure to enter transactions on JDE could result in records being manipulated or being lost.

[5] The employee was dismissed for gross negligence and gross dishonesty involving three incidents of alleged misconduct:

a) On 9 April 2014, the employee sent goods (cost value R3 440, retail value R5 300) to a colleague, Mr Chetty, for his personal use. The employee did not have authority to do so and admitted that he had committed misconduct. (I refer to this as “the first incident”.)

b) On 12 February 2014, the employee used a manual (handwritten) gate pass to transfer 14 pallets for goods (valued between about R104 000 and R170 000) from Springbok to Wadeville. On the company’s version, the goods were not received at Wadeville. (I refer to this as “the second incident”.)

c) On 17 March 2014, the employee used a manual tax invoice addressed to Primedia to (allegedly) move goods (valued between about R50 000 and R81 000) from Wadeville to Springbok. The goods were not received by Primedia or (on the company’s version) Springbok. The employee claimed that the tax invoice was addressed to Primedia because the goods were returned by Primedia. (I refer to this as “the third incident”.)

<u>The arbitration: overview of evidence</u>

[6] Regarding the first incident, the following emerged in evidence:

a) Mr Chetty is the company’s field sales manager for Limpopo, with Limpopo Cash and Carry apparently being one of the company’s clients.

b) On 9 April 2014, a so-called commercial invoice was generated manually (not off JDE) in favour of Limpopo Cash and Carry, with Mr Chetty being reflected as the reference / sales representative. The invoice was for 12 cases of goods. Although the invoice contains no prices, the value of the goods was as stated above. The goods were delivered by a company truck and driver to Mr Chetty’s home, and not to Limpopo Cash and Carry.

c) In addition to having issued the instruction for the stock to be pulled, the employee had also instructed Afzaal Muhammed (one of the supervisors reporting to him) to prepare the commercial invoice. According to Mr Muhammed, this was "*absolutely not*" a standard document, with documents typically being generated off JDE. It followed that the transaction was not captured on JDE.

d) Read together with what transpired at his disciplinary inquiry, the employee's version was this: (i) he admitted that the stock was not for Limpopo Cash and Carry, but instead for Mr Chetty's personal use; (ii) he had processed the transaction after Mr Chetty had asked him whether he had any "*excess or clearance stock*" (and contradicted himself by testifying that Mr Chetty had asked for "*damaged stock*") and had drawn the stock therefrom; (iii) staff members were given such stock in limited quantities[1] on a monthly basis and because Mr Chetty "*doesn't come every month*", he considered it to be in order to give him 12 cases of stock (albeit that he had no authority to do so; (iv) he would always make use of a commercial invoice where goods were not in stock / not on the system, as was the case here; (v) in mitigation at his disciplinary inquiry, he had "*admit[ted] [that] the first incident was my mistake and will not happen again*" – something which he repeated in evidence at the arbitration; and (vi) he did not quibble with the assertion put to him under cross-examination that he did not have authority to give away company property to Mr Chetty and that, in the result, the company suffered adverse financial consequences.

[7] Regarding the second incident, the following emerged in evidence:

a) On 12 February 2014, a manual gate pass was prepared on the instruction of the employee to facilitate the transfer of 14 pallets of goods from Springbok to Wadeville, the value thereof being as stated above.

[1] Reference was made in argument to a monthly quota of R150 per employee.

b) Two of the employee's supervisors were involved in loading the truck – Nizam Patel (the finished goods supervisor) and Majibur-Rehman Patel (a supervisor who reported to Nizam Patel). According to Nizam Patel, while gate passes were sometimes used to transfer stock, this would then be loaded onto JDE (if the stock was on the system) or otherwise a request would be made for the stock to be transferred onto JDE (if the stock was not on the system). He did not know if this occurred in this instance. According to Majibur-Rehman Patel, this was the first time that he had signed / used a gate pass to effect the transfer of stock, and was unaware of the computer process to be followed.

c) The goods formed part of so-called "*segregated items*", which are referred to as "*excess stock*", and were waiting to be taken into the system so that they could be added to the main inventory.

d) According to the company, the 14 pallets never arrived in Wadeville, with the company's truck tracking report showing that the truck left Springbok at about 09h00 on 12 February 2014, went to Klerksdorp (which was unscheduled) and only reached Wadeville at about 17h45, whereas the trip from Springbok to Wadeville would not have taken more than one hour. The driver of the truck was one Isaac, with the company's evidence (via Amer Iqbal, the head of HR) having been that the drivers reported to the employee.

e) According to the employee, the stock was received by Wadeville – this insofar as he had been so informed by the Wadeville despatch supervisor, Asif Khan. Mr Khan (who had since been dismissed for related misconduct) had testified at the employee's disciplinary inquiry that the stock had not been received (and had signed a statement to this effect before the inquiry), but he was not called as a witness at the arbitration. However, the company's first witness, Mr Iqbal, who testified about the results of the investigation into the employee's misconduct, gave evidence that the goods had not been received. The fact that the truck apparently went on a frolic of its own on 12 February

2014 was also consistent, according to the company, with the goods not having been delivered to Wadeville.

[8] Regarding the third incident, the following emerged in evidence:

a) On 17 March 2014, the employee prepared a tax invoice – using Excel and not JDE – reflecting, on the face of it, the sale of goods to Primedia (Robertville). Although the tax invoice contains no prices, the value of the goods was as stated above.

b) The employee then instructed Mr Muhammed (a supervisor) to load the goods onto a truck – this at Wadeville. As reflected by way of a stamp on the tax invoice, the delivery truck was driven by one Isaac – the same driver who was involved in the second incident. Again, the tracking report reflected that the truck had gone off route – this time to Krugersdorp. According to the company, the goods were not received by Primedia (which turned out to be common cause) or Wadeville.

c) Mr Muhammed testified (with his evidence referred to in this paragraph not having been challenged under cross-examination) that he was given the tax invoice by the employee, whereupon he asked him why a standard JDE document had not been generated. The employee's response was that a standard document had been generated, and that the truck driver (Goodman) had it, but that he was now away. As Mr Muhammed went on to testify:

> "*So the manager told me I must – he gave me the commercial invoice and he said I must load the stock on this invoice on this vehicle*. He got the JD standard documentation and he will – there's no need of doing another documentation in the JD standard system, so as I was instructed by the manager I took the invoice and loaded the stock." (Own emphasis.)

d) In response to questions by the commissioner, the employee testified that despite the tax invoice reflecting the buyer (and party to be notified) as being Primedia, its name had been used because the goods had been *returned* by Primedia. According to the employee, the alleged purpose of the tax invoice was not to effect the delivery of the goods to Primedia, but instead to transfer them from Wadeville to Springbok. (It goes without saying that this makes no sense whatsoever.)

e) Taxed under cross-examination about the invoice, the employee contended that he had not given it to Mr Muhammed, but instead that Mr Muhammed had generated it himself. The problem, though, was that Mr Muhammed's version had not been challenged under cross-examination. In a follow up line of cross-examination, the employee could not explain why a tax invoice – as opposed to a delivery note or inter-warehouse transfer – was generated; repeating that it was prepared (incorrectly) by Mr Muhammed (which must be rejected for the reasons already mentioned). The employee faced further difficulties when asked how the driver would have known, on the face of the tax invoice, that he had to make the delivery to Springbok (and not Primedia) – his answer being that that "*the supervisor tells them to unload, what to do*". Later on under cross-examination, he stated that he had told Mr Muhammed: "*… move that stock to the other warehouse that stock belongs to Primedia. That's when we wrote Primedia on the invoice*." But, again, this had not been put to Mr Muhammed, and was not the employee's initial answer. (This leaves a hole in the employee's defence, with the obvious inference being that he had told Isaac not to deliver the goods to Primedia as per the tax invoice.)

f) Regarding the employee's version on whether the goods had been received at Springbok, given that the second and third incidents were often conflated in evidence insofar as the alleged receipt of the goods is concerned, the employee's version is difficult to decipher. At one point, he appears to have testified that he knew that they were received at Springbok because a request was made to "*production to transfer* *stock to the system*", but this was hardly convincing. Also relevant in this regard is that the truck tracking report for 17 March 2014 does not reflect Isaac's truck as having gone to Springbok (after leaving Wadeville), a fact which appears (from the transcription thereof) to have been common cause at the employee's disciplinary inquiry.

The commissioner's award

[9] The *ratio* of the commissioner's award is contained in paragraphs 30, 31 and 33 of the award. They read:

> "30. The [company's] version that the documents used by the [employee] was not allowed had not been substantiated by proving the existence of such a rule or standard procedure. Even its own witnesses testified that these documents had been used in the past especially when the JDE was down. Furthermore Iqbal reiterated that [the employee] had to develop procedures for his department. There was also no evidence that excess and damaged stock must be captured on the JDE and again the [company's] witnesses confirmed the standard practice of not capturing it. [The employee's] version that only resalabe stock was captured at month end had not been rebutted.
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> 31. It appears that the [company] held [the employee] to be dishonest in respect of stock that apparently went missing when drivers deviated from routes. There was no evidence that he had instructed the drivers where to go; in fact, his version that supervisors dealt with the drivers remained unchallenged. [The employee] was an honest and credible witness who did not deny that these events took place. The [company's] witnesses were not entirely credible and Iqbal's evidence and knowledge did not reflect first hand operational experience. …
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> 33. The [company] had failed to prove the [employee's] guilt on charges of dishonesty and negligence, let alone gross dishonesty and negligence. The [employee] admitted that he did not have the authority to send goods to Chetty, but his version that Chetty asked for them remained unchallenged. In any event this does not prove that he

> was dishonest or negligent and I'm not convinced that it justifies dismissal as a sanction because he had not acted in an underhand manner or benefitted from it. It follows that the [company] had failed to prove it had a valid reason to dismiss the [employee] and the dismissal is therefore substantively unfair."

[10] In circumstances where the employee sought compensation, as stated above, the commissioner awarded him seven months' remuneration as compensation.

Grounds of review: analysis and evaluation

[11] As stated above, the company contends that the award is reviewable because the outcome is unreasonable.

[12] To begin with the commissioner's findings (in paragraph 33 of his award) on the first incident (involving Mr Chetty), I am of the view that they are unreasonable, for these reasons:

a) Once it is accepted that the employee did not have the authority to give away 12 cases of goods with a retail value of R5 300, in the absence of him proffering an acceptable explanation for this extraordinary misconduct, the reasonable inference to be drawn is that he was either dishonest (or at least) grossly negligent in doing so. The employee came nowhere near providing an acceptable exculpatory explanation, and the fact that the commissioner attached any weight to the fact that Mr Chetty had asked for the goods is, in itself, unreasonable. (This notwithstanding the fact that Mr Chetty apparently denied having done so at the employee's disciplinary inquiry.)

b) That the employee was dishonest is apparent from the fact that he was responsible for the generation of an invoice made out to Limpopo Cash and Carry and misrepresented that the goods were to be delivered to it, in circumstances where, in truth, the beneficiary was Mr Chetty and the delivery address was Mr Chetty's home. The employee surely engaged in this deception so as to hide his unlawful dispossession of company property, which was clearly dishonest. A reasonable commissioner could not have acquitted the employee of dishonesty in relation to the first incident.

c) Turning to the issue of sanction, the commissioner's finding that dismissal was not warranted rings hollow, in circumstances where he (unreasonably) did not find the employee guilty of dishonesty. In any event, contrary to what was found by the commissioner, the employee clearly acted in an "*underhand manner*" – this in the circumstances described above. And the fact that there was no evidence that the employee benefitted from the scam (by for example, sharing in the spoils or getting a kick-back from Mr Chetty) does nothing to improve his position.

d) Given the employee's seniority and the trust that the company must obviously have placed in him – as the warehouse manager of both Wadeville and Springbok – to properly control its stock, a reasonable commissioner would have upheld the employee's dismissal in relation to the first incident alone.

[13] Turning now to the third incident (which I deal with before the second incident), to my mind, the commissioner's acquittal of the employee was, again, unreasonable for these reasons:

a) The commissioner's finding in paragraph 30 of his award to the effect that the documents used by the employee (not generated off JDE) were in order, could not reasonably have applied to the third incident. This is so because: (i) the employee did not explain why he had not used a gate pass, as he had done in respect of the second incident, which he contended was an acceptable manner of transferring goods between the plants; (ii) it was the employee's case (albeit false) that he had not generated the Primedia tax invoice, but that Mr Muhammed had done so and incorrectly; (iii) Mr Muhammed's uncontested evidence was that he had raised with the employee the fact that the document was irregular in that it had not been generated off JDE; (iv) the employee's response that the JDE generated document was with the driver (Goodman) appears contrived given that the document never surfaced in evidence – nor was there any evidence of the transaction having been entered onto JDE; (v) the generation of a tax invoice in the name of Primedia in circumstances where it had (allegedly) *returned* the goods has all the hallmarks of a scam designed to facilitate the theft of the goods; and (vi) the employee's version that what the Primedia tax invoice was actually meant to authorise was the transfer of the goods from Wadeville to Springbok also smacks of a fabrication – it being utterly incompatible with the tax invoice itself.

b) Once it is accepted, as it must be, that the employee generated the Primedia tax invoice – and that it was irregular and contrived – then the spectre of the employee having acted (further) dishonestly in colluding with the driver (Isaac) to dispossess the company of the goods looms large. Why else generate the phoney tax invoice? The commissioner never considered this because he found unreasonably that the Primedia tax invoice (not generated off JDE) was in order.

c) To make matters worse, having apparently found that "*stock … went missing when drivers deviated from routes*", the commissioner acquitted the employee because "*[t]here was no evidence that he had instructed the drivers where to go; in fact his version that supervisors dealt with the drivers remained unchallenged*" (paragraph 31 of the award). This, too, is manifestly unreasonable. In fact, on a conspectus of the evidence, the employee – and not Mr Muhammed – must have told Isaac not to deliver the goods to Primedia – this in circumstances where the employee never put to Mr Muhammed that he had done so, or that Mr Muhammed even knew that the goods were not destined for Primedia as per the tax invoice (see para 8(e) above). In circumstances where the employee first irregularly prepared a tax invoice and then irregularly convinced Isaac not to deliver the goods to

Primedia as per the invoice, it is highly improbable that he did not play a hand in the disappearance of the goods.

d) In the light of the above, the only reasonable inference to be drawn is that the employee acted dishonestly in relation to the third incident. In not so finding, the commissioner acted unreasonably. Had the commissioner found the employee guilty of dishonesty in respect of the third incident, as he ought to have done, it would surely have followed that the sanction of dismissal was fair.

[14] Turning now to the second incident, there can be little doubt that the employee’s behaviour was suspicious, particularly as a pattern of behaviour may have emerged. However, insofar as the commissioner apparently found the employee not guilty for the reasons set out in paragraphs 30 and 31 of the award, I am unpersuaded that a reasonable commissioner could not have come to such a finding. This for the following reasons:

a) In the first instance, the finding to the effect that the use of a gate pass to transfer excess stock – that had yet to be loaded on JDE – between Springbok and Wadeville was not irregular, is not unreasonable. Indeed, Nizam Patel (a company witness) testified that this sometimes occurred (albeit that a subsequent JDE entry would be made).

b) Secondly, different to the third incident, the gate pass was not fictitious (like the Primedia tax invoice was), and it cannot necessarily be inferred that the employee interacted with Isaac over the delivery of the goods in question.

c) Thirdly, the company failed to establish in evidence that the stock was not received at Wadeville. This in circumstances where Mr Khan (whose evidence the company relied upon at the disciplinary inquiry) was not called as a witness at the arbitration, and where (different to the third incident), the truck tracking record was not necessarily dispositive of the issue, in that although Isaac undertook an unauthorised detour, he did eventually reach Wadeville (where the delivery might potentially have been made).

[15] In summary, while the commissioner's decision in relation to the second incident was not unreasonable, the same cannot be said for his decision in relation to the first and third incidents. For the reasons stated above, had the commissioner found the employee guilty of dishonesty in relation to the first and third incidents (as he ought to have done), he could not reasonably have avoided finding that the sanction of dismissal was fair.

Order

[16] In the circumstances, the following order is made:

a) The award issued by the second respondent is reviewed and set aside;

b) The award is substituted with an order that the applicant's dismissal of the first respondent was substantively fair;

c) There is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr I Haffegee of Haffegee Roskam Savage

For the first respondent: Mr T M Graham of Graham Attorneys