IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 828/16

In the matter between:

SACCAWU obo JOYCE MAMUREMI **Applicant**

And

TOKISO **First Respondent**

ABDUL OSMAN *N.O* **Second Respondent**

JDG TRADING t/a JOSHUA DOORE **Third Respondent**

Heard: **27 November 2018**

Delivered: **17 May 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The Applicants seek an order reviewing and setting aside the arbitration award issued by the Second Respondent (Arbitrator) dated 18 March 2016. SACCAWU and the Third Respondent are parties to a collective agreement in terms of which disputes between the parties are to be resolved under the auspices of TOKISO Dispute Settlement, a private dispute resolution agency. The Third Respondent ('JDG') opposed the review application.

[2] Ms Joyce Mamuremi (Mamuremi) was employed by JDG with effect from November 2009. JDG is in the business of furniture retail . At the time of her dismissal by JDG, Mamuremi was employed as a Branch Manager at JDG's Tzaneen branch. She was dismissed on 14 November 2014 on account of allegations of misconduct pertaining to breach of JDG's Dispatching Article Policy and Procedure.

[3] The case against Mamuremi was as follows;

3.1 On 9 October 2014, a salesperson (Mr Simon Maake) at the branch under Mamuremi, sold a black lounge suite which was the only one of its kind in the branch, to a customer, Ms Matilda Maake (The customer). Mamuremi ostensibly facilitated the sale by issuing a proof of delivery (POD) on the lounge suite on 13 October 2014.

3.2 Despite the sale and the POD having been issued, the lounge suite was not delivered to the customer. On 16 October 2014, the customer came to the branch and spoke to Maake and demanded her money back. She was then referred to Mamuremi. The matter was not resolved and it came to the attention of Mamuremi's immediate supervisor, Mr Andrew Langa.

3.3 Langa despite a search, could not find a delivery note in respect of the transaction in an attempt to do his reconciliation. Upon asking Mamuremi where the delivery note was, she told him that she was still

busy with it, as the customer wanted to cancel the sale. Ultimately, Mamuremi had advised Langa that she had pre POD the goods and confirmed that they were still in the store. At some point, Mamuremi informed Langa that she had used her own money to deliver the goods to the customer on 13 October 2014.

3.4 JDG contends that the irregularities leading to the charges is that a POD cannot be issued before the good are delivered in accordance with its policies and procedures, as it serves as proof that goods were delivered to a customer.

3.5 A disciplinary enquiry was initiated and convened on 6 November 2014. At those proceedings, Mamuremi produced an affidavit deposed to by the customer, in which the latter averred that the lounge suite was delivered to her house on 13 October 2014, but that she had returned it to the branch and requested Mamuremi to keep it for her. The Chairperson of the enquiry, Mr Jerry Mnisi expressed doubts about the veracity of the customer's affidavit, and concluded that a dismissal was appropriate in the circumstances, as Mamuremi had breached company policies.

[4] Following an unsuccessful internal appeal, Mamuremi as assisted by SACCAWU referred an unfair dismissal dispute to TOKISO, which matter came before the Arbitrator for determination.

<u>The arbitration proceedings:</u>

[5] JDG led the evidence of three witnesses at the proceedings, *viz*, Messrs Maake, Mnisi and Langa.

5.1 Maake's testimony was to confirm that he sold the lounge suite to the customer, and that Mamuremi was present at the store at the time. The goods were however not delivered to the customer. He confirmed that the customer came to the store on 16 October 2014 and was agitated as her goods had not been delivered after the sale.

5.2 Mnisi is the Area Manager for Witbank and had presided over the disciplinary enquiry. His evidence, to the extent that the procedural fairness of the dismissal was not placed in dispute, was only pertinent in regards to factors considered in deciding on a dismissal. He took into account the fact that Mamuremi was a senior manager; was aware of the policies and procedures that prohibited pre POD items; had a final written warning on record for a similar offence, and that the offence in question was met with a dismissal according to the company's Disciplinary Code and Procedure.

5.3 Mnisi also referred to the affidavit from the customer, which was received on the morning of the enquiry, which contained averments and explanations which were not proffered by Mamuremi before. He further testified that the customer was called by someone in the Head office on 21 October 2014, and she had denied that she had received the goods as yet. It was as a result of that information that investigations were then conducted into whether the delivery note was pre POD by Mamuremi.

5.4 Mnisi further testified that if the goods were returned as alleged by Mamuremi and the customer in her affidavit, then a reversal of goods movement form would have been completed, reflecting the delivery as unsuccessful, or that the returned stock would have been treated as access stock to be re-entered into stock, or at most, the sale deal ought to have been cancelled.

5.5 Mnisi had denied that Mamuremi had informed him of allegations of sexual harassment by her immediate supervisor, Langa, or that Langa had committed a similar offence that she was charged with.

5.6 Andrew Langa, the Regional Manager and Mamuremi's immediate supervisor testified in regards to events after the customer confronted him on 27 October 2014 to complain about the goods that were not delivered. He had confronted Mamuremi, who had confirmed that she had pre-invoiced the goods which were still in the store as at

27 October 2014, despite the sale having been made on 9 October 2014.

5.7 Langa had done his own reconciliation and discovered that the delivery note of the customer was missing and when he enquired from Mamuremi, the latter's response was that she was still busy with it as the customer wanted to cancel. The delivery note however re-surfaced on 30 October 2014, and he had refused to sign it off as it was not there previously. Mamuremi had further informed him that she had paid for the delivery of the goods on 13 October 2014 out of her pocket. This was despite the fact that the goods were still in the store on 27 October 2014.

5.8 According to Langa, when a pre POD is done, this could result in the manipulation of figures in order to achieve budgets. He further testified that goods could only be invoiced once the delivery note came back after a successful delivery. It was only him who could authorise the hiring of private transport for delivery of goods.

5.9 Langa had denied having committed the same offence or having had ulterior motives to charge Mamuremi. Under cross-examination, Langa had conceded that he had also not followed company procedures. He further conceded that despite Mamuremi having been dismissed, he had allowed her to work in the store for a number of days and entrusted her with the keys to the store.

5.10 He had denied having had personal clashes with Mamuremi over the purchase of a mobile phone from the store or having had any romantic designs over her. He contended that she had not filed a grievance against him in respect of any of her allegations. This was despite having conceded that he had sent her a number of sexually explicit material on her phone, and that she had returned the favour by sending him material of similar content.

[6] Mamuremi's evidence was essentially that the lounge suite was delivered to the customer timeously, but was returned to the store as it could not fit into

the doorframe of the customer's house. Mamuremi had then requested and was granted permission by the Regional Manager to keep the goods for the customer, but not for longer than a month. The customer returned after eight or nine days and reported that the goods could be delivered as the door problem was resolved. She had then arranged transport for the goods to be re-delivered.

[7] Mamuremi denied having made a pre POD as the goods were delivered and the customer had signed in that regard. She denied that there was anything wrong with having used private transport to deliver the goods as it was previously done with Langa's approval. She further testified that Langa had in the past asked her to pre-invoice goods which she had refused to do.

[8] The friction between the two according to Mamuremi emanated from when Langa asked her to buy a mobile phone on his behalf in the store, but failed to pay her back. She further testified that she had rebuffed his advances towards her, and after he had sent her sexually explicit material. She denied having sent similar material to him, and confirmed that she did not lay a grievance against him because his girlfriend was also her friend.

[9] Under cross-examination, Mamuremi testified that her previous warning was in regard to a failed audit and not pre POD. She conceded that she was aware of the policies and procedures, and the fact that a pre POD was harmful to the business and customers. She was further aware that a number of branches also used pre POD.

[10] She denied having asked the customer to depose to an affidavit before her disciplinary enquiry. She confirmed however that any other transactions that were not in accordance with policies and procedures that she was aware of were not brought to the attention of management.

[11] The customer, Mathilda Maake testified that the goods were delivered on 13 October 2014 but had to be returned to the store as they could not fit into her door frame. She did not cancel the sale and had gone back to the store some two or three weeks later with her own private transport to collect the goods. She confirmed having received a call from JDG Head Office enquiring

about the delivery of goods and had confirmed that she had not, but did not give an explanation. She denied having gone to the store to complain about the non-delivery of the goods she had purchased, and confirmed having deposed to an affidavit after Mamuremi called her.

The award:

[12] The Arbitrator's conclusions and findings were that based on the mutually exclusive versions of the witnesses,

12.1 The customer's version was unreliable as she was evasive and an unreliable witness, whilst JDG's witnesses had largely corroborated each other's versions regarding the transaction.

12.2 Whilst Langa was equally evasive and had contradicted himself in regards to the allegations made against him by Mamuremi, she had nonetheless conceded that she had not lodged any complaint against Langa, and accordingly, her claim of inconsistency should fail.

12.3 Based on all the considerations, JDG had discharged the onus placed on it to prove that Mamuremi was guilty of issuing a POD before delivery and also failing to deliver the goods timeously to the customer. A sanction of dismissal was appropriate in the light of Mamuremi being aware of the company rules and procedures that she could not pre POD and further since she was issued with a final written warning in the past for similar conduct.

Grounds of review and evaluation:

[13] The test on review is settled. It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach.[1] This requires of this Court to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*[2007] 12 BLLR 1907 (CC) at para 10.

reviews, provided that the result is one that a reasonable decision-maker could have reached.[2] In a further explication of the reasonableness test, the Constitutional Court in *Duncanmec (Pty) Limited v Gaylard NO and Others*[3] stated that;

> *'Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.
>
> This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[14] To the extent that Mamuremi only challenged the substantive fairness of her dismissal, it is necessary to have regard to what the essence of the charges proffered against her entailed, and to ask which rules, procedures or policies she was alleged to have breached.[4]

[15] It was common cause that Mamuremi was alleged to have breached JDG's Dispatching Article Policy and Procedures, as she had pre POD delivery note

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[2] See *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)*[2013] 11 BLLR 1074 (SCA) at para 25, where it was held that;

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) …the Arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Arbitrator could not reach on all the material that was before the Arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[3] [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 - 43

[4] *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC) at para 57

without the goods having been delivered to the customer. The effect of such breaches according to Langa, was that they resulted in the manipulation of figures in order to achieve budgets.

[16] The grounds relied upon in seeking a review is that the Arbitrator failed to apply his mind properly and failed to consider important facts raised by Mamuremi; that the Arbitrator failed to consider that the goods were delivered on time and returned to the store as requested by the customer, and also upon permission having been obtained from the Regional manager; and further failed to take into account allegations of inconsistency raised by Mamuremi.

[17] Having had regard to the record and the facts placed before the Arbitrator and his conclusions in that regard, it should be concluded that there is no basis to conclude that the Arbitrator reached an unreasonable decision to warrant interference by this Court in relation to the aspect of substantive fairness of the dismissal. My conclusions in this regard are based on the following considerations;

17.1 Mamuremi was a senior employee and was fully aware of the policies and procedures she is alleged to have breached, and was fully aware of the consequences of the breach, having previously been issued with a final written warning for similar breaches in the past. Equally so, she was aware of the consequences of issuing a POD before delivery.

17.2 The sale of the goods in question having been concluded on 9 October 2014, I am prepared to accept as the Arbitrator had done, that as at 21 October 2014, the goods had not been delivered, and the testimony of the customer was correctly rejected by the Arbitrator as being unreliable.

17.3 Maake's testimony was that having sold the lounge suite to the customer, she came back to the store on 16 October 2014 agitated because goods had not been delivered. All that the customer did was to deny having come back to the store to complain, and contended that she only came back some two or three weeks later to recollect the

goods as they could not initially be delivered due to the door frame at her house. This was in contrast to Mamuremi's evidence, which was that she came back some eight or nine days later after the sale, and after the goods were returned to the store, to collect them. Added to that, she testified that she came back with her own transport, which evidence was in direct contradiction to that tendered by Langa, that Mamuremi informed him that she had arranged for the transport and paid for it out of her pocket.

17.4 Even more worrisome with the customer's version is that she confirmed that Mamuremi contacted her after the sale and informed her of her 'situation'. The only probable inference to be drawn is that in the light of Mamuremi having found herself in a pickle, she had contacted the customer, and together they had concocted a version that resulted with the affidavit before the disciplinary enquiry, and her concocted version before the Arbitrator.

17.5 The evidence clearly demonstrated that upon the sale of the goods on 9 October 2014, they were not delivered to the customer, hence she came back on 16 October 2014 to complain. She had further confirmed that the goods were not delivered when contacted by JDG's Head Office on 21 October 2017. He contention in the arbitration proceedings that she had however not explained the reasons why the goods were not with her at the time is clearly self-serving, in the light of the concocted version that the goods were returned to the store at her request.

17.6 Had it been correct that the goods were delivered to the customer and that she had asked that the store keep them for her, there would clearly have been no need for any investigation. To this end, as a result of her coming in to the store on 16 October 2014 to complain in an agitated state, and further upon her confirmation with Head Office on 21 October 2014 that the goods had not yet been delivered, an investigation was initiated. This led to a discovery that Mamuremi had contrary to standing policies and procedures, pre POD the transaction,

and lied to Langa about the delivery note when asked about it. On Langa's evidence, Mamuremi had informed him that she had paid for the delivery of the goods on 13 October 2014 out of her pocket. This was despite the fact that the goods were still in the store on 27 October 2014.

17.7 There are further inherent improbabilities and contradictions with Mamuremi's evidence which led to the Arbitrator's decision to reject her version. JDG correctly points out that inasmuch as Mamuremi sought to deny that she had done anything wrong as the goods were timeously and properly delivered and a POD obtained, in the same vein, her contention was that she got permission from Langa to do a pre POD. It is either she got permission to do the pre POD or she did not do it. It cannot be both.

17.8 Mamuremi also sought to cast aspersions on the evidence of Langa, and inasmuch as she had succeeded in demonstrating a non-professional relationship between the two, the nub of the allegations against her leading to the fairness of her dismissal remained intact. It is apparent that the relationship between the two was less than professional, as they readily and happily exchanged sexually explicit material despite her denials. The explanation that she did not lodge a grievance or a complaint because Langa's girlfriend was also her friend is clearly unsatisfactory. I fail to appreciate what her friendship with Langa's girlfriend had anything to do with the workplace.

17.9 Furthermore, the contentions that the charges against her were because Langa was a scorned man who was a sexual pest were clearly an after-thought and conjured up to bolster a faltering concocted version. She had not complained of any sexual harassment by Langa until when faced with disciplinary proceedings. It is not suggested that there is no merit in her allegations that she was sexually harassed. The issue is that if it did happen, it was not reported.

17.10 Equally so with allegations of inconsistency. Mamuremi at no stage brought it to the attention of JDG that Langa was involved in pre POD. An employer cannot be expected to act against misconduct by its employees unless made aware of them. Mamuremi confirmed that none of the breaches were reported. It is ironic that Mamuremi as a senior employee failed to report any similar transgressions on the part of Langa and only did so more out of convenience when she was about to be dismissed. It therefore follows that there is no merit in the contention that Langa was treated differently, or that the decision by Langa to have her charged was as a result of her having rebuffed his romantic advances.

[18] In the end, I am satisfied that the Arbitrator considered the primary issues before him, carefully evaluated the evidence and gave reasons why certain evidence was accepted or rejected, and applied a balanced approach in that regard. Ultimately the Arbitrator came to a decision that falls squarely within a band of reasonableness.

[19] I have further had regard to the requirements of law and fairness in respect to the issue of costs, and I am satisfied that the facts and circumstances of this case calls for the applicants to be burdened with its costs. This review application was ill-considered for a variety of reasons. It is apparent, as already indicated in the body of the judgment, that Mamuremi and the customer conspired to present a concocted and convoluted story with the aim of not only misleading the chairperson of the disciplinary enquiry, but also the Arbitrator. Irrespective of the relationship between Mamuremi and Langa, and in the light of her having been issued with a final written warning for the same misconduct, she ought to have known that any further transgression would lead to her dismissal. She nonetheless failed to take heed of that warning. In these circumstances, surely SACCAWU should have reflected on the merits of this case, and realised the futility of persisting with this application.

[20] In the premises, the following order is made;

Order:

1. The application to review and set aside the arbitration award issued by the Second Respondent under case number TOKISO 3703 dated 19 March 2016 is dismissed with costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Leatha Marakalala, SACCAWU Official

For the Third Respondent: RJC Orton of Snyman Attorneys