THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 537/2016

In the matter between:

KLAAS SEBOTHOMA **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

THABE PHALANE N.O **Second Respondent**

CAMBRIDGE FOODS (MASSMART) (PTY) LTD **Third Respondent**

Enrolled: 6 May 2020

Delivered: 13 May 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 09h45 on 13 May 2020.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 8 February 2016 and issued under case number GATW 15065-15 wherein the Second Respondent (the arbitrator) found the Applicant's dismissal substantively fair and dismissed his case.

[2] The Third Respondent (Respondent) opposed the application.

[3] The matter was enrolled for hearing on 6 May 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. Both parties submitted supplementary heads of argument.

[4] I have considered the papers filed as well as the written heads of argument submitted.

<u>Material background facts:</u>

[5] The Applicant was employed by the Respondent on 6 June 2011 and at the time of his dismissal (13 November 2015) he was employed as the store manager at the Respondent's Bloed Street store.

[6] In October 2015, the Applicant was charged with two counts of misconduct and following a disciplinary hearing, he was dismissed.

[7] The Applicant referred an unfair dismissal dispute to the First Respondent and he challenged the fairness of his dismissal.

<u>The evidence adduced:</u>

[8] The issue to be decided by the arbitrator was whether the Applicant's dismissal was substantively fair. Procedural fairness was not in dispute.

[9] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charges that the Applicant was found guilty of and dismissed for.

[10] The Applicant faced two counts of misconduct namely:

1. Gross insubordination in that you have not ensured that the required stock takes for the Bloed Street store have been conducted as the schedule and / or as required. You have been aware that the integrity of the stock take figures are inaccurate and / or fictitious yet you have failed to take corrective action against the butchery manager and / or escalate the inaccurate stock take data to Cambridge Food management. You have failed to participate in the butchery stock takes when these were conducted by the Bloed Street butchery manager. Through this gross insubordination you have contributed to the financial prejudice suffered by Cambridge Food where a shrink of R 127 142,00 has been reported;

2. Gross dishonesty in that you have allowed fictitious and / or random stock count figures to be used for the identified stock item/s, as reflected in the stock take documents for the Bloed Street store. You have withheld the fact and / or failed to actively participate in the Bloed Street butchery stock take/s which in turn has negatively influenced the integrity of the Bloed Street butchery stock take data and caused a financial shrink of R 127 142,00.'

The Respondent's case

[11] The Respondent's witness, Mr Klopper, testified that he is a regional manager and that the Applicant reported directly to him. He explained that weekly stock takes are done in different departments in the business and that relevant to the Applicant's case was the stock take in the butchery at the Respondent's Bloed Street store. It was discovered that there was shrinkage of R 127 000 in the butchery and that resulted in an investigation.

[12] Mr Klopper testified that there was an instruction that the store manager has to be involved in all the stock takes in the store. The store manager is responsible and accountable for the entire store and as such, he had to be present with the butchery manager when the stock take was conducted. It became apparent that the butchery manager, Mr Johannes Nkoana, did the stock take for the butchery without the Applicant's involvement.

[13] Mr Klopper referred to the shrinkage report for the Bloed Street store and indicated that there was a shrinkage posted for every week at an average of R 3000 – R 3500, which could have been the allowed shrinkage due to losses or waste that are acceptable such as blood, bones etc that are not sold. In some weeks, no stock take was conducted, notwithstanding the fact that there was an instruction that stock take had to be done weekly. During September 2015 there was a shrinkage of R 127 000, which drew the Respondent's attention as it was exceptionally high.

[14] He explained the concept of rolling stock and in short; this happens when there is a variance or shortage after stock take and a fictitious number of stock is inserted in the system to get the same number of stock as the number which the system will be showing. Stock gets added to the system (and effectively to the store) when in fact that stock is not there.

[15] The shrinkage of R 127 000 was investigated and it was found that the rolling of stock was the main cause of the shrinkage as well as theft of stock, but Mr Klopper made it clear that theft could not be to the value of R 127 000 for the relevant period.

[16] Mr Klopper explained that the Applicant as the store manager was responsible and that he had to be accountable and had to ensure that stock take was conducted in accordance with the relevant prescripts.

[17] In cross-examination the Applicant's version was that he had signed the stock take report for the sake of compliance and that he had done so after the stock take. He disputed that there was a rule which required of the store manager to be present or involved when the stock take is done. His version was that he had to sign for the sake of compliance because a stock take was conducted and not because he was involved or counted the stock. He only became involved if there was a variance in the stock.

<u>The Applicant's case</u>

[18] The Applicant's version was that the charge of gross insubordination was misplaced because there was no verbal or written instruction given to him to perform a specific task on a specific date which he had failed to carry out. Further, he denied that he was aware that the stock take figures were

inaccurate and fixed and that the financial loss of R 127 000 occurred whilst he was on leave. In terms of the Respondent's standing operating procedures, the store manager must conduct a weekly stock take in the butchery, and in his absence, the regional operations manager will be required to conduct the stock take. The Applicant's version is that he was absent when the stock take was conducted and that the operations manager should have conducted the stock take in his absence, which he had failed to do. Instead, the operations manager was never charged for failure to conduct the stock take and this amounts to inconsistent application of discipline. He also referred to incidents at the Randburg branch, Newgate, Cosmo City and Nelspruit where there were shortages and variances but where the store managers are still working for the Respondent.

[19] The Applicant's case was that he was not guilty of the misconduct he was dismissed for.

[20] The Applicant testified that he pleaded guilty because he was the store manager and because of his areas of responsibility and accountability. He testified that he did not understand what it meant to admit guilt and to plead guilty to the charges and he did so because he wanted to be a team player.

[21] The Applicant testified that even if there was a rule that required of the store manager to conduct weekly stock takes, such a rule was not reasonable or practical in the sense that it was humanly impossible to conduct a weekly stock take.

[22] In cross-examination the Applicant conceded that there were a number of stock take reports that he did not sign, notwithstanding the fact that it was part of his duties and responsibilities as a store manager. The Applicant conceded that he did not perform his duty as he was expected to do.

[23] It is evident from the transcript that the Applicant had great difficulty in answering questions in cross-examination. It is further evident that the Applicant had no facts or reliable knowledge regarding the alleged inconsistency he had claimed existed at other stores and he conceded to the fact that he had no such evidence to place before the arbitrator.

<u>Analysis of the arbitrator's findings and the grounds for review</u>

<u>The test on review</u>

[24] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[25] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & Others*[2] affirmed the test to be applied in review proceedings and held that:

> In short: A reviewing 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 that is reasonable.

[26] The review Court must 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 based on the facts placed before him / her.

[27] The review test is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator arrived at an unreasonable result.

[28] In *Bestel v Astral Operations Ltd and Others*[3] the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

> '….the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care

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[1] 2007 28 ILJ 2405 (CC) at para 110.
[2] (2014) 35 ILJ 943 (LAC).
[3] [2011] 2 BLLR 129 (LAC) at par 18.

> must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[29] It is within this context that the application for review is to be considered.

The arbitrator's findings on substantive fairness

[30] In his analysis of the evidence, the arbitrator referred to Item 7 of the Code of Good Practice and the provision that in determining the fairness of a dismissal, consideration should be given to the question whether or not the employee contravened a rule or standard regulating conduct and if the rule or standard was contravened, whether the employee was aware of the rule or standard and whether the rule or standard had been consistently applied and ultimately, whether dismissal was an appropriate sanction.

[31] The arbitrator considered the fact that the Applicant pleaded guilty on the basis that he was responsible for the store as the store manager and according to the arbitrator, this accords with the Respondent's case that the Applicant was ultimately responsible for the loss and the shrinkage at the store where he was the store manager.

[32] The arbitrator held that the Applicant's plea presented an indefensible submission for him when he conceded that he was responsible but not guilty.

[33] The arbitrator found that on the facts before him, the Applicant admitted that there were stock takes in which he had to participate, he was aware of the fact that he had to participate in those stock takes because he would sign the stock take reports after the fact. The arbitrator accepted that the Respondent established that there was a rule in place that required of the Applicant to conduct a stock take, that the Applicant contravened the rule and that there was indeed a fair reason to dismiss him.

[34] The arbitrator found the Respondent's dismissal substantively fair.

Grounds for review

[35] The Applicant's main ground for review is that the arbitrator had been called to decide three issues and he had committed a gross irregularity in that he had failed to deal with the issues he was called on to decide.

[36] The three points that the arbitrator was called to decide were whether the Applicant had breached a rule, the issue of inconsistency and the harshness of the sanction. The Applicant's case is that the arbitrator failed to deal with the latter two issues.

[37] I will consider the issues raised in turn.

Did the Applicant breach a company rule

[38] The Applicant's case is that taking into account the charge of misconduct and the evidence presented, a reasonable decision maker would not have concluded that the Respondent had proved its case on a balance of probabilities. This is so because the Applicant's case was that he was on leave when the stock take was done and thus he could not have failed to do what the Respondent required him to do. His complaint is that the arbitrator failed to consider the evidence and it was held against him that he was unable to produce a leave form. The arbitrator's findings are unreasonable.

[39] In my view there is no merit in this ground for review.

[40] The first difficulty in the Applicant's case is the fact that he had pleaded guilty to the charges in his internal disciplinary hearing. The arbitrator considered this fact and the Applicant's own evidence that he pleaded guilty because as the store manager he was responsible for the store. The arbitrator found that the Applicant could not in the same breath accepted that he was responsible for the store and yet that he was not guilty.

[41] The second difficulty is the wording of the charge and the Applicant's admissions which he had made during the arbitration proceedings. The gist of the charge levelled against the Applicant was that he had failed to ensure that the required stock takes for the Bloed Street store have been conducted as required and that he had failed to participate in the butchery stock takes when these were conducted by the butchery manager. As a result, the Applicant contributed to the financial prejudice suffered by Respondent in that a shrinkage of R 127 142,00 has been reported.

[42] The Respondent's version was that stock take had to be done weekly and that the store manager was required to be involved in it. On the Applicant's own

version, he was not involved in the stock take and it was common cause that the stock take was not done weekly, as per the Respondent's business requirement. It is evident that during the arbitration proceedings, the Applicant admitted to the fact that he as the store manager was responsible in the event that something went wrong in his store, that he failed to sign certain stock take sheets and that he had signed others after the fact just for the sake of compliance.

[43] The Respondent's evidence was that the main cause of the shrinkage was the rolling of stock and that this happened because there was no consistency in stock takes, because the store manager not being present and involved with stock take, as was required, and because he was not taking responsibility to ensure that the stock take was conducted in the right manner and in accordance with the company's rules.

[44] The Applicant seeks to attach great significance to dates he was allegedly on leave and he wants to exonerate himself from any wrongdoing because he was on leave on a specific date when a stock take was done. A perusal of the charge the Applicant was found guilty on, showed that it was not limited to a specific date, but related to the fact that the Applicant failed to ensure compliance when stock takes were conducted.

[45] Considering the facts holistically, the Applicant's focus on a specific date that he was allegedly on leave, is misplaced. The evidence showed that the Applicant as the store manager was responsible to ensure compliance with the Respondent's procedures and his failure to do so over time, resulted in shrinkage. He adopted a myopic view in persisting that it related to a single stock take event, when he was allegedly not present and could therefore not be in the wrong.

[46] Considering the facts and the evidence placed before the arbitrator, I am not convinced that the arbitrator's findings that there was a rule in place and that the Applicant broke the rule by not participating in stock take and that the Respondent established a fair reason for dismissal, are unreasonable.

<u>Inconsistency</u>

[47] The Applicant's case is that he had presented evidence on the issue of inconsistency and that the arbitrator's conclusion that he had presented hearsay evidence is one that a reasonable decision maker would not have made, taking into account firstly that the Respondent did not dispute his version, but merely required evidence. Secondly, that the issue of inconsistency would always be based on what the other party has learned and the Respondent should have presented, counter evidence relating to the issue.

[48] There is no merit in this ground for review for a number of reasons.

[49] The first and most obvious is the legal principles applicable to the concept of inconsistency.

[50] In *NUM obo Botsane v Anglo Platinum Mine (Rustenburg Section)*[4] the LAC addressed the issue of consistency and held as follows:

> 'Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalized allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See *SACCAWU & others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC); (1999) 20 *ILJ* 2302 (LAC) at para 29; also see *Masubelele v Public Health & Social Development Bargaining Council & others* [2013] ZALCJHB JR2008/1151 which contains an extensive survey of the case law about the idea of inconsistency in employee discipline.)

[51] In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*[5] the Court said the following:

> 'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put

[4] (2014) 35 ILJ 2406 (LAC) at para 39.
[5] (2012) 33 ILJ 623 (LC) at para 10.

> sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.'

[52] The position is this: The Applicant had to raise the issue of inconsistency at the outset of the proceedings and he had to raise it in a concrete fashion to afford the Respondent an opportunity to deal with it. The Applicant failed to do so.

[53] Secondly, applying the relevant principles of law relating to inconsistency, it is important to determine what exactly the evidence was before the arbitrator with regard to the issue of inconsistency that he was required to determine.

[54] It is evident from the transcribed record that the issue of inconsistency was not raised with the Respondent's witness during his cross-examination and at the time when the Respondent presented its case. In fact, the issue of inconsistency was raised for the first time in the Applicant's testimony. Evidently, the Applicant failed in his duty to put any, let alone sufficient, information before the Respondent to afford it an opportunity to respond to the allegations of inconsistency. On this basis alone, the Applicant should not have been allowed to introduce a challenge to consistency which the Respondent was never afforded and opportunity to respond to.

[55] Be that as it may, in his evidence, the Applicant's case was that there was inconsistency in respect of Mr Klopper, and store managers at the Randburg, Newgate, Cosmo City and Nelspruit branches where there were shortages and variances but where the store managers are still employed by the Respondent.

[56] In cross-examination on the issue of inconsistency, the following transpired: The Applicant was asked for evidence to show that there was an inconsistent application of discipline and the Nelspruit branch, where disciplinary action was indeed taken against the relevant manager, and he conceded that he did not know and did not have any evidence.

[57] In respect of his other allegations regarding inconsistent application of discipline, the Applicant was cross-examined as follows, as is apparent from the relevant parts of the record:

> 'Mr Chrystal: Okay have you got any evidence in any of the other stores that disciplinary action wasn't taken against store management?
>
> Mr Sebothoma: Yes I don't know of any, because all I know is the store managers communicate, so we talk, we've got only 13 stores.
>
> Mr Chrystal: I need written proof, written documents. I need written documents for you to show the commissioner that there has been an inconsistent application of discipline.
>
> Mr Sebothoma: I don't have but can you provide me with the discipline for all these stores that there was disciplinary action taken against all the…
>
> Mr Chrystal: Okay let's just carry on. Do you or do you not have any evidence ….(unclear) inconsistent application of discipline?
>
> Mr Sebothoma: Discipline I don't have.'

[58] The fact of the matter is that not only was the Respondent not afforded an opportunity to respond to the allegations of inconsistency at the time that it presented its case, but there was no concrete evidence in this regard before the arbitrator.

[59] The LAC confirmed in *NUM obo Botsane v Anglo Platinum Mine (Rustenburg Section)*[6] that a generalized allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. *In casu,* there was no substantiating testimony, no supporting documents and a complete lack of particularity.

[60] The Applicant had the evidentiary burden to at least prove a *prima facie* case of inconsistency, which he failed to do. The only reference to inconsistency

[6] (2014) 35 ILJ 2406 (LAC).

before the arbitrator was no more than generalised allegations, supported by nothing more than knowledge which the Applicant had obtained because of the fact that 'store managers talk'.

[61] The arbitrator's conclusion that the Applicant had no evidence to support his claim for inconsistency and that what he had presented was hearsay, is a finding that is supported by the evidence and is a reasonable one based on the facts placed before the arbitrator.

[62] The Applicant is doing nothing but being opportunistic to persist with this ground for review in view of his own failure to present concrete evidence and to afford the Respondent a fair opportunity to respond thereto.

Harshness of the sanction

[63] In his further supplementary affidavit, the Applicant submitted that the arbitrator did not deal with an issue he had been called upon to decide, namely the harshness of the sanction. The Applicant made no further averments to support this ground for review, apart from an unsubstantiated statement that the arbitrator failed to consider an issue he was called upon to decide.

[64] It is evident from the transcript that the Applicant never called upon the arbitrator to decide the harshness of his sanction, but that he insisted that he was not guilty of misconduct, that the rule was not reasonable and that he should be reinstated as he was of the view that the charge levelled against him was misplaced.

[65] The Applicant at no point acknowledged wrongdoing (notwithstanding the admissions he made) for which he showed remorse and he established no basis to challenge the harshness of the sanction. In his review application, he did no more than to mention in passing that the arbitrator failed to consider an issue he was called upon to decide. The record shows otherwise.

[66] In its opposing papers, the Respondent submitted that it was common cause before the arbitrator that the Respondent had suffered a loss in excess of R 120 000,00, that he pleaded guilty to a charge that involved dishonesty and that as a store manager he was employed in a position of trust, and that based

on that evidence, it was reasonable to find the Applicant's dismissal fair and implied in that, was that the sanction was fair.

[67] The Applicant did not file a replying affidavit to dispute the Respondent's averments.

[68] In my view, there is no merit in this ground for review. It amounts to no more than an unsubstantiated ground for review that is not supported by the evidence or any averments in the Applicant's affidavit.

Conclusion

[69] I have to consider the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him.

[70] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. The arbitrator's findings on the fairness of the Applicant's dismissal fall within a band of reasonableness based on the evidence that was placed before him.

[71] The arbitrator's findings are reasonable and are not to be interfered with on review.

Costs

[72] This Court has a wide discretion in respect of costs. In my view the interest of justice will be best served by making no order as to cost.

[73] In the premises I make the following order:

Order

1. The application is dismissed;

2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Representatives:</u>

Applicant: Mabaso Attorneys

Third Respondent: Mervyn Taback Inc Attorneys