THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Not reportable

Case no: PA 13/2023

In the matter between:

MINISTER OF POLICE	**Appellant**
and	
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**First Respondent**
NEIL PAULSEN *N.O.*	**Second Respondent**
GB MGEBANE	**Third Respondent**
SOUTH AFRICAN POLICE UNION	**Fourth Respondent**

Heard: **25 February 2025**

Delivered: 4 March 2025

Coram: Van Niekerk JA, Nkutha-Nkontwana JA and Mooki AJA

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JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal against a judgment delivered by the Labour Court (per Msizi AJ) on 16 August 2022, when the Court dismissed an application to review and set aside an arbitration award issued by the second respondent (arbitrator). In his award, the arbitrator found that the third respondent (employee) had been unfairly dismissed and that he should be reinstated in the appellant's employ, with back pay equivalent to 12 months' remuneration. The appeal is with the leave of the Labour Court. The crisp question raised on appeal is whether the Labour Court was correct to conclude that the arbitrator's decision that the misconduct committed by the employee (an act of negligence) warranted a penalty less than dismissal, met the threshold of reasonableness.

Brief factual background

[2] The employee commenced employment in 1991. In 2016, he was appointed as an SAP 13 clerk, based at the Ngangelizwe police station. One of his responsibilities was to ensure that firearms kept at the police station were safely stored. The firearms were stored in a safe dedicated for that purpose, the safe itself situated in a strongroom. It was not in dispute that the employee kept the key to the strongroom and the safe in his office, in an unlocked steel cabinet. When he went off-duty, the employee locked his office door, with the safe key remaining in the unlocked cabinet. *This had been the system in place for some years*[1] and on 3 July 2017, an inspection revealed a shortage

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[1] This was not the case made to witnesses for the SAPS. No version was put to them about the steel cabinet. The keeping of the key in the steel cabinet was mentioned for the first time when the employee gave evidence.

of an unspecified number of weapons. It was discovered ultimately that 13 firearms were missing from the safe.

[3] The employee was charged with committing misconduct in the form of the intentional or negligent loss of state property by not exercising all reasonable precautionary measures to prevent theft and loss of state firearms. After a disciplinary hearing, the employee was dismissed on 28 December 2017.

The arbitrator's award

[4] At the arbitration hearing, Lt Col Madaza, the station commander, testified that he was ultimately responsible for all the inventory at the police station, but that the employee was responsible for the safekeeping of state-owned firearms at the police station. To this end, there were two strongrooms and two safes. State-owned firearms were stored in one safe, inside one of the strongrooms, The employee kept the keys to the strongroom and the safe. In terms of standing instructions, one person was to keep the keys to the safe, with a duplicate set kept by the station commander. Madaza testified that he did not have a duplicate key to the safe; he was not given a duplicate key when he assumed his post in 2014, and he had not changed the locks of the strongroom until after the theft of the firearms. Before the employee assumed his post, the safe key had been kept by WO Moltyisi, who had handed the key to the employee when he (i.e. WO Moltyisi) was transferred to crime prevention. The employee became responsible for the safekeeping of the firearms following the transfer of WO Moltyisi.

[5] The employee testified that he kept the key to the strongroom and safe in a steel cabinet in his office. The cabinet could not be locked. The employee locked the door to his office when he went off duty. The employee was not sure whether anyone else was aware of where the key to the safe was kept, but when it was requested, whoever requested the key would have seen him remove it from the steel cabinet. The employee also testified that he had never been given any specific instruction regarding where the key to the safe should be kept.

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[6] The arbitrator came to the following factual findings:

'60. It was common cause that there was only one safe key namely the one controlled by the Applicant. Madaza stated that he did not have a duplicate key. In this matter it was virtually impossible to determine whether the Applicant's key or the duplicate key was used to enter the firearm safe. If it was the key from the Applicant's office, it is not clear whether the perpetrator returned and replaced the key where it was kept. If that was the case, then obviously that person had a key to the Applicant's office. I concluded that it cannot be excluded that the key kept in the Applicants' office was used to open the firearms safe which led to the theft of the firearms.

61. When the Applicant was appointed, he simply continued to use the steel cabinet which was used by his forerunner. He was aware that he had to keep the key safe. He knew that anyone who wanted anything from the strongroom had to approach him to open for them. He should have been aware that there are others who knew where the key was kept. He stated that they saw from where he took the key. The reason why he locked his office when he left at the end of the day included considerations that the safe keys were kept there. He knew that Moltyisi used his office when he was not there. He knew that the steel cabinet could not lock. He should have known that the key could easily be removed from the cabinet. He should have foreseen that it would be risky to leave the key so easily accessible. There were no incidents from 2016 when he started as a SAP 13 clerk. It is possible that he did not think that anyone would take the key in his absence. I concluded that the applicant was aware of the importance of the key and that it had to be kept free of risk. There is no indication that he at any time made his superiors aware of the risk position that the key was kept. I concluded that there was a measure of negligence on his part in this regard…'

[7] The primary controversy raised on review (and in these proceedings) concerns the arbitrator's finding that the employee had been negligent, but not to a degree that warranted dismissal. This conclusion was based on the fact that the condition of the

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cabinet was not only the responsibility of the employee, that the employee trusted that his colleagues would not act in an unlawful manner and further, that there may have been complicity between a number of employees in the commission of the offence. The only omission on the part of the employee was not him informing his superiors about where the keys were kept. In short, the arbitrator found a general state of negligence to exist at the police station and considered that blame for the theft of the firearms could not be placed only on the employee's shoulders. Further, there was an element of inconsistency in the appellant's conduct. The arbitrator found that the conduct of Madaza, in particular, was wanting in a number of material respects. He knew as far back as September 2014 that the duplicate key was missing and should at that stage have conducted an investigation and changed the lock, which he did not do. Further, Madaza had never inquired where the safe key was kept, and ought to have seen that the steel cabinet in which it was stored was inadequate. As the arbitrator put it, as the station commander, *"the buck stopped with him"*. The dismissal was thus not an appropriate sanction for the misconduct that the employee was found to have committed. The employee had not been dishonest, and the employment relationship had not irretrievably broken down. The arbitrator accordingly reinstated the employee, but limited the amount of backpay to 12 months, in circumstances where a fully retrospective order would have afforded the employee the equivalent of 18 months' remuneration.

<u>The Labour Court's judgment</u>

[8] The review application was brought on four grounds. The appellant submitted that the arbitrator had committed a gross irregularity by failing correctly to assess the evidence that served before him, that he had exceeded his powers when he concluded that contemporaneous inconsistency was in issue, that he had irregularly placed reliance on the parity principle in determining the existence of negligence on the part of the employee and that in the result, he had reached a decision that no reasonable decision-maker could reach on the totality of the evidence before him.

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[9] In particular, the appellant contended that the arbitrator had ignored pertinent evidence relating to concessions that the employee had made when he testified at the arbitration hearing. These include the fact that he left the safe keys in his office in the unlocked steel cabinet, that he knew that Moltyisi had access to his office, that other employees similarly had access to his office, and that in the absence of visible evidence of a break-in, it was likely that the employee's key was used to commit the theft. All of this evidence indicated that the most probable inference was that the employee's actions constituted gross negligence, warranting his dismissal.

[10] The Labour Court conducted a review of the factual background and the principles to be applied in an application to review and set aside an arbitration award. The Court recorded that the arbitrator had dealt extensively with the evidence and concluded, correctly so, that it could not be said that there was any proof that the employee had been involved in the theft of the missing firearms. The arbitrator had also (correctly) found that there was a measure of contemporaneous inconsistency, given the fact that the employee was the only person to have been disciplined in relation to the theft of the firearms. In particular, Madaza had never conducted any investigation to establish the whereabouts of the key, and that he had known from 2014 that the duplicate key was missing. Further, he had never replaced the missing key, nor had he prescribed where the key used by the employee was to be kept. On this basis, the Court concluded that there was no defect to be found in the arbitrator's award and thus no basis for the court to interfere with the award.

Grounds for appeal

[11] The grounds for appeal largely reflect the grounds for review that were rejected by the Labour Court. The appellant contends that the Labor Court erred in that it failed to have proper regard to the evidence adduced and in particular, that the court failed to consider whether the arbitrator's conclusion that the employee's misconduct did not amount to gross negligence was reasonable. As such, the appellant submits that the employee had made concessions in respect of his leaving the key to the safe in an

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unlocked steel cabinet, knowing that a colleague, Moltyisi, had access to the office where the key was kept, that on the employee's own version, and a parade for offices was held every morning in the area where the key for the safe was kept (thus giving other employees access to the office) and despite these facts, the employee continued to keep the key in an unlocked steel cabinet. Further, the appellant submits that the Court erred by failing to consider whether the decision by the arbitrator in respect of negligence was reasonable. The appellant also attacks the Court's finding that the arbitrator had correctly found contemporaneous inconsistency, in that Madaza was not directly in charge of the safe on a day-to-day basis. Finally, the appellant contends that the Court misconceived the nature of the test to be applied on review, failed to consider the arbitrator's assessment of the evidence in totality and ought properly to have concluded that the arbitrator's award was unreasonable.

<u>Analysis</u>

[12] At the outset, the arbitrator clearly had regard to all the evidence that was adduced. There is no basis to suggest, as the appellant appears to do, that the arbitrator ignored relevant evidence or took into account evidence that was not relevant. The arbitrator had full regard for the employee's testimony and the concessions that he properly made in the course of his evidence. In essence, what the appellant seeks to do is to introduce what it claims to be misdirection on the part of the arbitrator to argue that the outcome of the proceedings failed to meet the test for reasonableness.

[13] In essence, the arbitrator concluded that on the evidence (which included the employee's testimony of the circumstances in which the theft of the firearms had taken place), the employee had been negligent by not exercising sufficient degree of care in respect of the safe key. Given the nature of the misconduct and the circumstances in which it occurred, the arbitrator considered that dismissal was too harsh a penalty and that the employee should thus be reinstated, but with some loss of backpay so as to account for the negligence found to exist.

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[14] The test on review comprises two stages. The first is to identify some reviewable irregularity or misdirection on the part of the arbitrator. The existence of some cognitive error or misdirection is not in itself a basis on which to review and set aside an award, the applicant must further establish that the outcome or result of the proceedings does not fall within a band of decisions to which a reasonable decision-maker could come. Put another way, the applicant must show that on the totality of the evidence, avoiding a piecemeal examination of the evidence, the outcome reached by the arbitrator was not one that could reasonably be reached.[2]

[15] The legal principles to be applied are well-established. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[3] *(Sidumo)* the Constitutional Court set out how an arbitrator is required to determine the fairness of the sanction of dismissal applied by the employer:

> '[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
>
> [79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[2] AT Myburgh 'Reasonableness Review – the Quest for Consistency' (2024) 45 ILJ 1380.
[3] (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

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[16] *Sidumo* acknowledges that the determination of whether a sanction of dismissal is fair entails the exercise of a value judgment, a matter over which reasonable decision-makers may well differ. *Sidumo* also set the threshold for review. As I have indicated, the question that the Labour Court was required to ask and answer is whether the arbitrator's decision is one that a reasonable decision-maker could reach, having regard to the available material. The material difference between a right of appeal and a right of review was recently affirmed by this Court in *Makuleni v Standard Bank of South Africa Ltd and Others*[4] where Sutherland JA said the following:[5]

> '… The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

[17] And further:

> 'To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.'[6]

[18] There is no basis to conclude that the arbitrator committed any material irregularity or misdirection in his assessment of the evidence. The arbitrator did not ignore the concessions made by the employee. On the contrary, it was these concessions that led the arbitrator to conclude that the employee had committed an act of negligence. The appellant's witnesses had not laid any basis for a finding to that effect. Indeed, one of the appellant's own witnesses, the head of human resources, would not commit to a view as to whether the employee had been negligent. In regard to consistency, the arbitrator correctly took into account the issue of consistency not as

[4] [2023] ZALAC 4; (2023) 44 *ILJ* 1005 (LAC).
[5] Ibid at para 4.
[6] Ibid at para 13.

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a factor determinative of the fairness of the employee's dismissal, but as a relevant factor to be taken into account, in a conspectus of all the evidence, in the determination of the existence of any misconduct and the assessment of an appropriate sanction.

[19] The arbitrator clearly had regard to the triad of factors ordinarily involved in the determination of sanction – the gravity of the misconduct, consistency, and both aggravating and mitigating circumstances.[7] While some might describe the sanction ultimately imposed by the arbitrator as lenient, it was not so lenient as to be unreasonable, having regard to all the circumstances. Dismissal could not have been the only reasonably appropriate sanction in circumstances where the employee was one of a number of employees engaged at the Ngangelizwe police station who can be said to be as negligent, if not more so, than the employee. While the theft of firearms from the police station's safe is, to say the least, an act that teems with the most serious consequences imaginable, the sense gained from the evidence is that the employee was the scapegoat for the clearly inadequate measures taken to safeguard the firearms stored at the police station.

[20] While other decision-makers may have come to a different conclusion on the facts and considered that the employee's conduct warranted the penalty of dismissal, as the Labour Court recognised, this is not a basis on which it was entitled to intervene in the proceedings under review. The Labour Court was correct to uphold the arbitrator's award. The appeal thus stands to be dismissed.

[21] Neither party sought an award of costs, and no order for costs will be made.

[22] I make the following order:

<u>Order</u>

1. The appeal is dismissed.

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[7] Myburgh & Bosch *Reviews in the Labour Courts* at 300.

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van Niekerk JA

Nkutha-Nkontwana JA and Mooki AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv L Ah Shene

Instructed by State Attorney

FOR THE 3rd and 4th RESPONDENT: Adv C van Eetveldt

Instructed by NB Makhanya Attorneys Inc.

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