REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Reportable

Case no: D787/10

In the matter between

WOOLWORTHS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER LESTER SULLIVAN **Second Respondent**

YOGAMAGENDRIE PILLAY **Third Respondent**

Heard: **19 April 2013**

Delivered: **23 April 2013**

Summary: **Review of award – Test for review - Court to recognise that scrutiny of a decision based on reasonableness introduces a substantive ingredient into review proceedings - In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny - However, the distinction between appeals and reviews continues to be significant.**

JUDGMENT

CELE, J

Introduction

[1] This is an application in terms of section 145 of the Act[1] to review and set aside the arbitration award dated 26 July 2010, in this matter issued by the second respondent as a commissioner of the first respondent. The award was issued in favour of the third respondent as an erstwhile employee of the applicant. She did not oppose this application. The application was filed timeously.

Factual background

[2] At the times material to this matter the third respondent, Ms Pillay, had been in the employment of the applicant for a period of 18 years. She was posted at the Bluff Branch of the applicant but was transferred to the Musgrave Branch. Her first day at the Musgrave Branch was on 5 October 2009. She arrived at work carrying a bag, as ladies often do, in which she had her personal belongings. According to her version, these included four eyeliner pencils, two lip liner pencils, one pencil gel and a lipstick. The eyeliner, lip liner and gel pencils were all the size of a pencil and the lipstick was its normal size. In terms of a well known rule of the applicant, Ms Pillay was supposed to declare the contents of her bag to the security personnel at the shop. A tag would then be placed on the bag or goods as a means of showing that such goods were brought into the shop and were examined upon entry and before the commencement of work. Ms Pillay failed to declare her belongings in that morning of her first reporting at the Musgrave Branch.

[3] At the end of her working day, she presented her bag to the security personnel for inspection, as usually done at the applicant's shops. The four eyeliner pencils, two lip liner pencils, one pencil gel and a lipstick were found in her bag with no sign that they had been declared in the morning inspection. As would normally be done, these items were seized from her and the matter was reported to the Store Manager on duty, Ms Andrews.

[1] The Labour Relations Act Number 66 of 1995.

[4] On the following day, Ms Pillay reported for duty. She then approached the security personnel and asked for the seized items, requested that an inspection tag be affixed on them. The security officer she approached duly complied. In the afternoon of that day, after taking her lunch break and while attending to her duties at work, Ms Andrews called her in and asked her about the seized items. She then explained to Ms Andrews that she had forgotten to declare the items. She explained that while she was to come to work on her first day at Musgrave, her father, who was terminally ill with cancer had a relapse. She had also had difficulty with her 16 year old son who did not want to go to school on that morning. She had an eleven year old daughter who might have removed the Bluff stickers when playing with the new bag with the items in issue. As a single parent, she had to deal with those problems herself.

[5] In addition, she said that while travelling to her new employment she had missed the turnoff and was in a rush when she arrived at work. All these factors militated against her remembering to declare her items to the security personnel. She said that she had obtained all those items from the Woolworths Bluff Store six months earlier and that some of the items were so called “testers” and were not normally sold. She said that she was anxious about meeting new staff and about her new position but she knew that she would be searched and that everyone’s bag would normally be searched when leaving.

[6] She had also to account for her claiming of the items back with a sticker and her failure to approach the manager on her own to explain the whole situation. Her explanation was that she understood that she was required to take the items and explain the situation to Ms Andrews and so she collected the items from the security officer and attempted to see Ms Andrews on two or three occasions during the morning. She learnt that Ms Andrews was away in the morning and so Ms Pillay was not successful to report the incident. The matter was investigated upon and the applicant decided to charge Ms Pillay with gross misconduct which was described as:

'1. On the 5th October 2009 you failed to declare 8 Woolworths branded makeup products (eye/eyebrows pencils and lipstick) when entering the store thereby breaching company policy and procedures. In addition you were unable to produce proof of purchase when requested to do so.

On the 6th October 2009 you then requesting security guard to declare the items and return them to you even though you had been informed that these items were being retained as part of an investigation.'

[7] A disciplinary hearing was first set down for 15 October 2009 but was postponed on or rescheduled for several occasions, as on 28 October 2009, 9 November 2009, and 2 December 2009, due to the absence of Ms Pillay who was reportedly unwell. Medical reports were submitted from a specialist psychiatrist advising that the applicant was unable to attend the disciplinary hearing because of a major depressive disorder. In those reports, the psychiatrist extended an invitation to anyone who might seek clarification from him to indicate so.

[8] At the disciplinary hearing scheduled for 2 December 2009, Ms Pillay was again not in attendance and a medical certificate issued by a general practitioner was handed in stating that she would be fit for work on 7 December 2009. The earlier report of the psychiatrist indicated that she would be fit for work on 1 December 2009. Evidence of Ms Pillay was that she attempted to see her specialist psychiatrist but he was unavailable, as a result of which the applicant was obliged to be seen by her general practitioner who provided the medical certificate. The applicant decided to continue with the hearing in her absence as the certificate was not provided by the specialist psychiatrist. She was found guilty of the charges and on the next date of hearing a dismissal sanction was imposed on her.

[9] She referred an unfair dismissal dispute to the first respondent for conciliation and later for arbitration. The second respondent was appointed to arbitrate it. He issued an award in the following terms:

'32 The applicant was dismissed without a fair hearing and without a fair reason.

33 Woolworths (Pty) Limited is ordered to reinstate Yogamagendrie Pillay in its employment with retrospective effect as from the 14th December 2009, such employment to be on the same terms and conditions as the applicant was employed prior to her dismissal.

34 Woolworths (Pty) Limited is ordered to pay Yogamagendrie Pillay the sum of R92 109.66 in cash or by cheque and at Durban within two weeks of the date of receipt of this award.

35 Yogamagendrie Pillay is directed to return to work for the respondent within 3 days of receipt of this Award.'

[10] The chief findings of the second respondent in support of the award are that:

'1. Although the applicant was charged with gross misconduct in failing to declare the cosmetic goods and in obtaining the cosmetic goods from security after they had been held for investigation, it was relatively clear the respondent considered the applicant was dishonest in some form or another.

2. In particular the respondent considered the applicant was not honest in her version as to how she had originally obtained the items. It also considered she was dishonest in respect of the reason given by her as to why she had obtained the items from security after they had been confiscated from her.

3. Clearly if the applicant had not obtained the items honestly from the Bluff Store dismissal was a fair sanction. And equally clearly if she had attempted to deceive the respondent by obtaining the goods from Security after they had been confiscated dismissal would also be a fair sanction.

4. However, I find that on a balance of probabilities the evidence shows:

- the applicant genuinely forgot to declare the items on the 5th December

- she had obtained the items honestly

and

- she had no intention to deceive the respondent when taking the goods from Security.'

[11] Various reasons were proffered by the second respondent in paragraph 21 for the findings that he made. He, further, found that in respect of the first charge against Ms Pillay, that of failing to declare eight Woolworths branded makeup products, there was sufficient evidence to show that she had made an honest mistake. He found that dismissal was not a fair sanction. In respect of the second charge, he was satisfied that Ms Pillay acted honestly in every respect and was not guilty of any misconduct. He found that no fair hearing was held when a disciplinary hearing was conducted after the production of a valid medical certificate since that was clearly in breach of the respondent's duty to hold a fair hearing. He considered re-instatement and found that the distrust that Ms Andrew said she had of Ms Pillay was due to a misconception of what had occurred and that once Ms Andrew accepted the correct version of events there would have to be no trust issue. If it persisted, it would not be of Ms Pillay's making.

[12] In support of the review application, the applicant outlined a number of grounds for review both in the founding and supplementary affidavits. The submission was that the second respondent's decision to allow legal representation for Ms Pillay was unreasonable and reviewable as the matter was simple and Ms Pillay, as was the representative of the applicant, was a manager. She had no reason to feel intimidated by the proceedings.

[13] In respect of the first charge, it was contended that Ms Pillay's evidence was contradictory in many respects when the charge was simply that she failed to declare the items in her bag and had no reason to feel anxious on that day. It was contended that the second respondent failed to apply his mind to material evidence such as that of the security officer when confiscating the items from her told her that the items would be kept as exhibits and the matter would be reported to the Store Manager. In respect of the second charge, it was said that Ms Pillay, well knowing what the security officer had told her on the

previous day, she pretended to the other officer who had not been present on the previous day that she had just forgotten to take her things and attempted to remove the items from the shop without an explanation, when Ms Andrew had been at the shop from about 12h00 to 16h00. The second respondent was said to have therefore committed a gross irregularity.

Evaluation

[14] In setting out the standard of review court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Other*s,[2] stated that:

'The standard of review

'[105] ....

[106] The *Carephone* test, which was substantive and involved greater scrutiny that the rationality test set out in *Pharmaceutical Manufacturers* , was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.

[107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2) (h) of PAJA 3 of 2000, O`Regan J said the following: "(A) n administrative decision will be reviewable if, in Lord Cooke`s words, it is one that a reasonable decision-maker could not reach".

[108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.

[2] [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at paras 106 to 109.

> [109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge`s own opinions."This court in *Bato Star* recognised that danger. A judge`s task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[15] Section 145 of the Act, has now been suffused by the constitutional standard of reasonableness. That standard is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach.[3] In judging the decision of the second respondent for reasonableness, it will be impossible to separate the merits from scrutiny. However, the distinction between an appeal and a review will continue to be of significance.

[16] As regards the sufficiency of the evidence on the basis of which legal representation was granted, the supplementary affidavit of the applicant, clearly, shows, in my view, that the second respondent was entitled to the decision he took. In this case, granting legal representation was premised on the belief of the second respondent that the scales would tip against an anxious litigant who later in the evidence turned out to have been severely traumatised to the point of having had to be hospitalised for some days due to challenges in her life at the time. The applicant has cast doubt on the veracity of Ms Pillay's family problems by alleging that no proof of the assertions was produced. The second respondent was deeply involved in the trial and had an opportunity to assess witnesses. The applicant has failed to demonstrate how the second respondent, who had the authority to conduct the arbitration in a manner that the commissioner considered appropriate in order to determine

[3] Id at para 110.

the dispute fairly and quickly,[4] committed any defect in this regard. In my view, the decision he reached is among those which a reasonable decision maker could reach.

[17] In respect of the applicant's challenge to the findings of the second respondent, the applicant seems to want to create doubt as to the ownership of the items, apart from a failure to declare them to the security officer. Yet it appeared common cause that the goods did not belong to the Musgrave branch. The applicant said that the items were new but did not say they had identification tags of Musgrave store. Some of the items were so called "testers" and were said to be not normally sold. If the ownership of the goods is not in dispute, and it appears not to have been, whether the items were not sticky, as a sign that no Bluff tagging was done on them, becomes irrelevant and the second respondent was entitled not to waste time on irrelevant evidential material.

[18] Witnesses of the applicant, who testified about the events on the first count, were calm and collected on the day. They probably heard well what the security officer said when he confiscated the items. Ms Pillay was however, probably not as calm and collected, when considering her health status and the status of her family. To say that she had no reason to be anxious because she had been told before where to park her car, is rather speculative. The second respondent was faced with two versions, that of the applicant's witnesses and that of Ms Pillay. He applied his mind to the two versions and accepted that of Ms Pillay. Whether he was correct in doing so cannot be the probe of this application, which is a review and not an appeal. This ground must accordingly also fail.

[19] The next probe turns on the second charge. The removal of the goods and an instruction that they be tagged is subject to at least two interpretations. One is that she was attempting to eliminate the evidence against her as the security officer told her he would report the matter, in which case she was dishonest. The other is her version that she took them to present them to the Store Manager when she would be offering her explanation of what had happened.

[4] See section 138 (1) of the Act.

She said that she tried twice to find Ms Andrews but it was at the time she was not yet back to the office. An allegation was made that the decision reached by the second respondent was unreasonable, without a demonstration of what makes the decision unreasonable. The applicant simply wanted its version to be upheld because of the superiority on the number of witnesses it called. The second respondent applied his mind to this evidence and he sustained a version he considered to be favoured by the probabilities of the matter. Again, whether in doing so he was right or wrong has nothing to do with a review application as it relates to an appeal.

[20] The next consideration pertains to procedural fairness of the dismissal. The applicant appears to have taken the position that the credible medical report was that of the psychiatrist and not of the general practitioner. It is true that the applicant was faced with a dilemma when on numerous occasions the disciplinary hearing of Ms Pillay could not proceed. It remains the prerogative of an employer to discipline its employees when doing so becomes necessary. The applicant has not suggested why it could not lend credence to the medical report of the general practitioner, who was a qualified doctor and was within his right to issue the medical certificate. Ms Pillay explained at arbitration why she had to consult a general practitioner. The psychiatrist was not available at the time. No reason was advanced by the applicant why this version was not probable. Accordingly, this ground suffers the same fate as others.

[21] In the circumstances, the following order shall issue:

1. The review application in the matter is dismissed.

2. No costs order is made.

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Cele, J

Judge of the Labour Court.

APPEARANCES:

For the applicant: Mr B Macgregor of Macgregor Erasmus Attorneys, Durban.

For the respondent: No appearance