REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no. DA 4/11

In the matter between:

SENZENI MBANJWA **Appellant**

and

SHOPRITE CHECKERS (PTY) LTD **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

JABULANI NGWANE N.O. **Third Respondent**

Summary: Appeal: Review of award: *Sidumo* test of constitutional reasonableness restated. Finding of guilt: Suspicion, however strong or reasonable, does not constitute misconduct. Distinction between reviews and appeals reiterated. Appeal allowed and award reinstated.

Heard: **29 August 2012**

Delivered: **29 August 2012**

Reasons: **7 November 2013**

CORAM: **Jappie JA et Ndlovu JA et Zondi AJA**

ORDER

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1. **The appeal is upheld with costs.**
2. **The cross appeal is dismissed.**
3. **The order of the Court a quo, save paragraph 1 thereof, is set aside and substituted with the following order:**

   'The review application is dismissed with costs.'
4. **The award issued by the commissioner on 8 November 2007 under case number KNPM 1647-06 is hereby reinstated.**

JUDGMENT

NDLOVU JA

Introduction

[1] On 29 August 2012, this appeal was argued before us and the abovementioned order was handed down forthwith. The Court reserved its reasons for judgment. I now furnish the reasons.

[2] The appellant was employed by the first respondent on 28 August 1997 and based at the first respondent's Cascade supermarket branch in Pietermaritzburg where she served as a cashier. On 28 April 2006, she was summoned to attend a disciplinary hearing scheduled for 4 May 2006, on a charge of "Gross misconduct, in that on the 28/04/06 whilst operating till 21 [she] attempted to under-ring items to the value of R24-97." She denied the charge. Notwithstanding, she was convicted as charged and summarily dismissed with effect from 16 May 2006.

[3] She referred an unfair dismissal dispute to the CCMA as she was not satisfied with the fairness of her dismissal. The parties attempted to resolve the dispute through conciliation, but were unsuccessful. A certificate of non-resolution was issued hence the dispute proceeded to arbitration before the third respondent (the commissioner).

The arbitration proceedings

[4] The issue for determination by the commissioner was whether the dismissal of the appellant was substantively fair.

[5] The first respondent's assistant manager, Ms Vino Pillay, testified that on the previous day, 27 April 2006, she had seen the appellant talking to one Ms Lindiwe Magoso outside the shop around the area where Magoso worked as a car guard. During the morning of the following day (28 April 2006) shortly after the store had opened (at 08h00), she said she saw Magoso again inside the shop carrying a few perishable items in her hand and a few other non-perishables already packed in a clear plastic roll-on-bag. The roll-on-bags were reserved for packaging fruits and vegetables in that department, or sometimes utilised to package milk at the till to avoid spillage in the traditional government carrier bags.

[6] According to Pillay, on 28 April 2006 there were two other tills open in the general bank of tills serving as a primary conduit of exit from the shop. The appellant was manning the till at the sweets and cigarettes counter (the kiosk) situated beyond the bank of tills. There were two ordinary tills available to serve – one with a few customers and the other with none. However, Magoso had proceeded beyond the bank of tills to the appellant's kiosk till.

[7] Pillay further testified that she had then seen the appellant proceeding to ring the loose items from Magoso's hands and then she moved around the till to the other tills to fetch a government carrier bag, placed the goods in the bag and completed the transaction, taking a R10 note from Magoso to pay for the rung items. When the appellant noticed that Pillay was watching her, she looked startled, at which point she took out the items from the roll-on-bag and rung them up. However, Magoso apparently did not have money to pay for the

other items. Magoso then ran out of the store. After about 10 minutes she returned and paid by a further R20 note. The first batch of perishable items amounted to R7,91 whilst the other non-perishable items in the roll-on-bag amounted to R24,97.

[8] According to Pillay, customers that purchased goods in the store would have to pay at the general bank of till points, but on busy days when there were long queues, some customers would be allowed to go through to the kiosk to pay there, just to get the queues going. However, on the day in question it was not busy at all and there were no long queues. Therefore, Magoso would ordinarily have had to pay at the main tills. Further, Magoso should have used a basket or a trolley provided by the store for customers and not have items in her hands to the till points. There was also no problem if a customer requested that the items be grouped and paid for separately. As a checkout controller, the appellant held a senior position in the store and should have known better. She had to ring up the total transaction of the purchased goods and then collect the money therefor, all at once.

[9] Under cross-examination, Pillay conceded that the whole case against the appellant was based on her suspicion in relation to what she had seen the appellant doing. She had further taken into account that on the previous day she had seen the appellant talking to Magoso. She further conceded that, at the end of the day, all the items were paid for.

[10] The appellant testified that Magoso had asked her to ring the items separately. The first batch of the items were perishables, including a 250 ml milk, an apple and a few chicken portions, which all added up to R7,91. Magoso had indicated that she would want to pay for the perishable items in coins of 5c and 10c pieces and further explained that she would use the perishable items for her lunch at work and would take home in the afternoon the other batch of non-perishables in the roll-on-bag. Magoso had further said she did not want to come back to the store after 17h00 because she was aware that by that time the store would be busy.

[11] As stated, the total amount of the perishable items was R7,91 which Magoso had originally wanted to pay for using 5c and 10c coins. However, when she reached for her purse, she took out a R10 note and tendered same for payment of those items. The appellant had then rung the second batch of items which totalled R24,97. Magoso then started counting her coin money and when she realised that it was short, she asked if she could go and collect more money from her bag outside the shop. She rushed outside and soon returned with a R20 note which she tendered. At the end of the day, there was then more money than required, as a result of which Magoso got some change back.

[12] The appellant confirmed that she knew Magoso as a car guard and frequent customer in the store. She continued with her work until about 12h30 when she had to go for lunch. At that stage she was approached by Pillay who asked her to write a statement explaining about what had happened earlier that morning. The appellant said she did not know at the time what Pillay was talking about.

[13] When asked, during cross-examination, what she had been discussing with Magoso on the previous day, the appellant stated that she could not remember because there were many people she had spoken to. She did not appear to deny that she might have spoken to Magoso the previous day but that, if she did so, she could not remember what it was that she spoke to her about.

[14] Magoso had testified for the appellant at the disciplinary hearing, but she was no longer available during the arbitration hearing because she had since passed away.

[15] After considering the evidential material presented to him, the commissioner concluded that the first respondent's case against the appellant was weak, and that this was a classic case of dismissal which was based on nothing but unfair reason. In part, the commissioner commented as follows:

> '6.6 … Her [the appellant's] evidence was that the shop was not busy at that time and when Lindiwe [Magoso] ran out of cash and asked to run

outside to get more money, she [the appellant] waited for her to come back with more money which she did, and that was also not in dispute.

6.7 It was actually corroborated by Vino [Pillay] who testified that it had also happened to her in the past that a customer did not have enough money to pay for items at the till and she had to wait for the customer to bring in more money for the items purchased. There was no rule against that conduct of waiting for the customer whilst getting more money.

6.8 Coming to the contravention of the employer's rules by Senzeni [the appellant], no evidence was led to show that Senzeni had broken any workplace rule in this arbitration. The nub of this dispute was premised on Vino's observation of Lindiwe and Senzeni talking on 27 April 2006 and on Lindiwe approaching Senzeni's till on 28 April 2006.

6.10 Without the contravention of any rule and without any reprehensible conduct by Senzeni on 27 April and 28 April 2006, we are left with Vino's substance of her suspicion on which she subjectively concluded that Senzeni attempted to under-ring the items brought to her till by Lindiwe.

6.19 It is my opinion that whereas, there might have been grounds to suspect Lindiwe's conduct on 28 April 2006, but to suspect that Senzeni was implicated in the attempt to under-ring the respondent's items was based on Vino's figment of imagination.'

[16] The commissioner accordingly, declared that the appellant's dismissal was substantively unfair and ordered the first respondent to reinstate her with retrospective effect from the date of her dismissal and without any loss to the rights and benefits that might have accrued to her during her period of dismissal.

[17] The first respondent took the matter up by way of review, in terms of section 145 of the Labour Relations Act[1], to the Labour Court.

[1] Act 66 of 1995

The Labour Court

[18] As its grounds of review, the respondent submitted that the commissioner committed reviewable irregularities in the following respects:

18.1 The finding that no evidence was led that the appellant had broken any rule applicable in the first respondent's workplace.

18.2 By finding that the appellant's conduct did not amount of misconduct.

18.3 By finding that the appellant's dismissal was substantively unfair and ordering the first respondent to reinstate the appellant retrospectively to the date of her dismissal.

[19] In its analysis and evaluation of the matter, the Court a quo remarked, in part, as follows[2]:

'[18] … It was an important issue that the goods were separated into two. This is simply because it might well be that the car guard intended to pay for the first group and to confuse everybody else who might have been watching her and might have wanted to walk away with the second group of items without paying for them, either in collaboration with the third respondent [the appellant] or confusing the third respondent as well so that she could walk away by stealing the said goods.

[19] That then brings us to the second aspect of the evidence, the discussion on the day before between the third respondent and the car guard. According to the commissioner, the third respondent firstly hesitated about that evidence, but what is clear, and I have been taken through the record on this, is that initially the third respondent denied having spoken to the car guard the day before. She was cross-examined on this. She then slowly began to capitulate. She then gave in to having taken part in a discussion with the car guard on the previous day. She then said that she could not remember what had been said. It is clear on the record that she had a recollection of the discussion that she had with the car guard. If she could recall this discussion during the arbitration hearing, she must have known about the discussion during the internal disciplinary hearing. It must follow that she must have lied in denying having had this discussion when the matter was first tried at the internal disciplinary hearing. The commission should have dealt with this evidence, because

[2] At paras 18, 19 and 22 of the court a quo's judgment

it was crucial, it was important. It affected the credibility, the belief that he would accord to the evidence of the third respondent. The commissioner failed to deal with this evidence properly. It is a contradiction that was material.

[22] … The behaviour of the car guard seen together with how the third respondent reacted when she saw Mrs Pillay around, all of this created some suspicion. It was then incumbent on the first respondent (the commissioner) to deal with this evidential material and to draw necessary conclusions. The commissioner did not actually do this. This is why the commissioner was not able to find any infringement of a rule of the applicant, because the commissioner did not do as was expected to weigh evidential material and to find whether or not such behaviour suggested that the third respondent was acting in cahoots with the car guard.'

[20] The Court a quo thus concluded that there had not been a full and fair trial of the issues that served before the commissioner. On this basis, the Court a quo issued an order in the following terms:

'1. I therefore grant condonation for the late filing of the review application.

2. The arbitration award dated 8 November 2007 by the first respondent, in this matter, is reviewed and set aside.

3. The matter is remitted to the second respondent for a *de novo* arbitration hearing before another Commissioner.

4. No costs order is made.'

It is against this order that the appellant has appealed to this Court, with the leave of the Court a quo.

The appeal

[21] The essential attack on the judgment is that the Court a quo erred in finding that there was sufficient circumstantial evidence that the appellant was guilty of the misconduct charged, a finding seemingly based on the fact that the appellant was seen on 27 April 2006 talking to Magoso (the customer) and the suspicious circumstances in relation to the shopping transactions between the appellant and Magoso on 28 April 2006.

[22] The first respondent's cross appeal is a somewhat unusual one. It seeks this Court to uphold the judgment of the Court a quo but for the reasons foreshadowed in the notice of cross appeal and not the reasons furnished by the Court a quo. I will deal with this aspect in due course.

[23] The grounds of cross appeal relates mainly to factual issues, such as the fact that the appellant admitted during the arbitration hearing that she had spoken to Magoso on the previous day whereas, at the disciplinary hearing she had denied having done so; the suspicious reasons given by Magoso (during her testimony at the disciplinary hearing) as to why she had split the goods; and the fact that Magoso had passed the ordinary bank of tills and proceeded to the kiosk till which was operated by the appellant.

[24] The first respondent submitted that the commissioner failed to apply his mind to these issues which clearly created suspicion of wrongdoing and complicity on the part of the appellant. On the other hand, the Court a quo ought to have found that the commissioner 'failed to fully and fairly determine the matter, [which] was a procedural irregularity and resulted in an award which a reasonable decision maker would not have made.''

Analysis and evaluation

[25] The issue here is not about whether the dismissal of the appellant was the appropriate sanction, but rather, whether the appellant was guilty of the misconduct charged, in the first place.

[26] It is trite that an employer bears the onus to prove, on a balance of probabilities, that the misconduct was indeed committed by an employee concerned. Where the employer is suspicious that the employee, through the latter's movements or conduct, may have some dishonest intentions, the employer cannot justifiably rely on that suspicion as a ground to dismiss the employee for misconduct because suspicion, however, strong or reasonable it may appear to be, remains a suspicion and does not constitute misconduct. There needs to be tangible and admissible evidence to sustain a conviction

for the misconduct in question. In *Dion Discount Centres v Rantlo*[3] the Court (*per* Joffee J) remarked as follows:

'It was argued by appellant's counsel with reference to *Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 6 LLC 15 (IC) and *EATWCSA v The Productions Casting Co (Pty) Ltd* (1988) 9 ILJ 702 (IC) that the termination of respondent's employment was fair as there was a strong suspicion that respondent had participated in the 4 transactions. The presiding officer in the *Moletsane* matter relied on the judgment in *EATWCSA v The Production Casting Co (Pty) Ltd* as authority for the finding that "it was not unfair for the respondent to dismiss the applicant in the particular circumstances of this case on a strong suspicion of diamond swopping". I do not find support for this view in the latter judgment. The test at all times remains one of balance of probabilities. Reasonable suspicion or strong suspicion is not adequate to terminate the employment relationship.'

[27] To my mind, whilst the respondent's so-called zero tolerance policy may be reasonably justifiable as an operational requirement and control measure against shrinkage and pilferage in large shopping businesses such as that of the respondent, the enquiry on the sustainability of the guilty finding against an employee dismissed for misconduct, remains the primary consideration. Recently, in *Matsekoleng v Shoprite Checkers (Pty) Ltd*[4], this Court stated as follows[5]:

'[50] In all the past decisions of this Court referred to above, the issue was whether the sanction of dismissal was fair and appropriate in the circumstances of each case. However, the determination of sanction can only follow upon a sustainable conviction for the misconduct charged. …

[63] However, I need to make myself clear on the following: In my view, this case had absolutely nothing to do with the shrinkage problem or the zero tolerance policy that reportedly existed at the respondent's workplace. The issue of sanction or the proportionality doctrine is thus of no relevance. The critical and crisp issue was the guilt or otherwise of the appellant of the misconduct charged, in the light of the particular facts of the case. In other words, the effect of this judgment is not intended

[3] [1995] 12 BLLR 16 (LAC) at 19D-F.
[4] [2013] 2 BLLR 130 (LAC); [2013] JOL 29789 (LAC)
[5] Ibid, at paras 50 and 63. See also: *Shoprite Checkers (Pty) Ltd v CCMA and others* [2008] 9 BLLR 838 (LAC) at par 19 (and the decisions cited therein).

to create any precedent which deviates from the established jurisprudence, discussed above, and which has been followed by this Court in relation to the issue of sanction where an employee is properly convicted of misconduct involving theft or misappropriation of property belonging to the employer. This Court understands and has thus far approved of the zero tolerance policy as a reasonable measure of eradicating shrinkage and pilferage experienced by these large shopping businesses such as the respondent. However, that issue pertains to sanction which can only be embarked upon after a sustainable conviction.'

[28] The high water mark in this case is nothing but mere suspicion on the part of Pillay that the appellant committed the misconduct charged. There was simply no shred of evidence to buttress or lend any credence to the allegation of the misconduct. It is beyond my comprehension why the appellant was charged for misconduct at all.

[29] It seems to me that the Court a quo, in its evaluation of the case as seen in its remarks, referred to above, tended to blur the distinction between reviews and appeals. The test in determining whether an arbitration award passes muster of judicial review under section 145 of the LRA is now trite – it is found in the question: 'Is the decision of the commissioner one that a reasonable decision-maker could not reach?'[6]

[30] On the totality of facts, I am of the view that the commissioner properly applied his mind to the material issues and evidence presented to him in this case and that the arbitration award issued by him constitutes a decision that any reasonable decision-maker could make in similar circumstances.

[31] The conclusion that the appellant was guilty of the misconduct charged was, to my mind, simply not the most probable inference to be drawn from the proven facts.[7] That being the case, the inference of her guilt for misconduct could not justifiably be drawn. Therefore, her dismissal was substantively

[6] *Sidumo and Another v Rustenburg Platinum Mines Limited* and Others (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) at para 110.

[7] *Cooper and another NNO v Merchant Trade Finance Ltd*. 2000 (3) SA 1009 (SCA) at para 7; See also *Law Society, Cape of Good Hope v Berrange* 2005 (5) SA 160 (C) at 171*; Macleod v Rens* 1997 (3) SA 1039 (E) at 1048D-E; *H Mohammed and Associates v Buyeye* 2005 (3) SA 122 (C) at 129D.

unfair. The appeal must, therefore, be upheld and the costs to follow the result.

[32] The first respondent purports to note a cross appeal against the reasons for judgment of the Court a quo, in a manner which is not permissible. An appeal or cross appeal can be noted only against the substantive order of a Court and not against the reasons for the order. In *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd*[8] the Appellate Division stated as follows[9]:

> '[I]t is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court. For instance, it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross- appeal … unless he desires a variation of the order." See *Municipal Council of Bulawayo v Bulawayo Waterworks, Ltd*. (1915 Ad 611 at pp. 625, 631, 632)'.

[33] In any event, the first respondent's reliance, in its purported cross appeal, on the appellant's alleged contradiction on the issue of her conversation with Magoso on the previous day, has no merit. I do not find anything wrong with the manner that the appellant explained herself on that issue. In proper context, all that she was saying was that she did not recall ever speaking to Magoso on the previous day because she had spoken to many people. But that if it was a fact that she did speak to Magoso on the previous day, then she would not remember what she spoke to her about, due to the same reason that she had spoken to many people. In other words, she would not remember every single person that she had spoken to on the previous day, including Magoso if it was factually true that she had spoken to her[10].

[34] I fail to appreciate the reason why the first respondent attacks the reasoning of the Court a quo in reviewing and setting aside the arbitration award. The reasoning of the Court a quo, in its conclusion is, in my view, basically or

[8] 1948 (3) SA 353 (A)
[9] *Western Johannesburg Rent Board*, at 355
[10] See Arbitration record, at 201 and 202 of the indexed papers

substantially the same as what the first respondent submits in its so-called grounds of cross appeal. All that it shows me, is simply that the first respondent might be realising the legal weakness in that reasoning, for the purpose of judicial review under section 145 of the LRA in the light of the *Sidumo* test. Unfortunately, the first respondent's grounds of cross appeal do not make its case any better. In my view, the cross appeal must, accordingly, be dismissed. As the cross appeal was not opposed, the issue of costs does not arise.

The order

[35] Hence the Court, on 29 August 2012, handed down the order referred to above, namely:

1. The appeal is upheld with costs.
2. The cross appeal is dismissed.
3. The order of the Court a quo, save paragraph 1 thereof, is set aside and substituted with the following order:
   'The review application is dismissed with costs.'
4. The award issued by the commissioner on 8 November 2007 under case number KNPM 1647-06 is hereby reinstated.

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Ndlovu JA

Jappie JA and Zondi AJA concur in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:	Advocate M Pillemer SC
INSTRUCTED BY:	Jafta Incorporated
FOR THE FIRST RESPONDENT:	Advocate CA Nel
INSTRUCTED BY:	Norton Rose SA