



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not Reportable

Case No JR 2152/2010

In the matter between:

**CONTINENTAL OIL MILLS (PTY) LTD**

Applicant

and

**COMMISSIONER M SINGH N.O.**

First Respondent

**THE COMMISSION FOR CONCILIATION,**

Second Respondent

**MEDIATION AND ARBITRATION**

**MPHO MOEKETSI**

Third Respondent

Heard: 11 January 2013

Delivered: 24 January 2013

**Summary: A dismissal for theft was challenged on the grounds that the employee had no knowledge of the item in her bag and that she was wrongfully found guilty of theft. Held that commissioner had failed to consider all the material facts. Her conduct was irregular. Award reviewed and set aside.**

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JUDGMENT

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SEEDAT AJ

Introduction

[1] Before me is an application to review and set aside the arbitration award issued by the first respondent (commissioner) on 8 June 2010 declaring the dismissal

of the third respondent (employee) by the applicant to be procedurally unfair and without a fair reason.

- [2] It is common cause that when the employee left the premises of the applicant on the afternoon of 8 April 2010, a bottle of mayonnaise was found in her bag by a security officer. She was suspended and subsequently dismissed on the charge of 'Unauthorised possession of 1 x 740g Conti Canola Mayonnaise – theft on 08/04/2010'
- [3] Effectively, at the arbitration hearing the employee denied knowledge of the bottle of mayonnaise in her bag.

#### *Condonation*

- [4] Both the application for review and the response to the review application were served out of time. At this hearing, Mr Boda, representing the applicant and Mr Hutchinson, on behalf of the employee, withdrew their respective opposition to the applications for condonation. Nonetheless, I still retain the discretion to grant or refuse the condonation (*Independent Municipal & Allied Trade Union on behalf of Zungu v SA Government Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 11; *SA Post Office Ltd v CCMA* (2011) 32 ILJ 2442 (LAC) at para 17)
- [5] The broad principles that underpin the determination of condonation draw their lineage from the seminal decision of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) and have authoritatively been restated by this court and the appeal court. These principles include the degree of delay, the reasons for the delay, the prospects of success, and the prejudice the parties will suffer if condonation is granted or refused. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10 the court said that these factors are interrelated and not individually decisive. What is needed is an objective conspectus of all the facts. (see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)) A further consideration is whether it is in the interest of justice to grant the condonation (*National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home* (2004) 25

ILJ 2195 at para 25; *SA Post Office Ltd v CCMA* (2011) 32 ILJ 2442 (LAC) at para 17)

- [6] The applicant submits that on receipt of the award from the second respondent, it was not legally represented and erroneously applied for a rescission of the award. Only on being informed by the second respondent that rescission was not the appropriate cause of action for it, did the applicant instruct attorneys who then launched the application for review eight days out of time. The delay is not substantial and the explanation though not overwhelming, is reasonable and acceptable. The prospects of success as will appear from the review application are favourable. In any event because the employee is not opposing the condonation application, the consideration of the prospects is nugatory. In the circumstances the application for condonation for the late referral of the review application is granted.
- [7] In her application for condonation, the employee who too, was unrepresented after her dismissal, says that she had opposed the application for rescission and assumed that she did not have to respond further to the review application. It was only with subsequent legal assistance that the answering affidavit was filed. Though the period of the delay is lengthy, in the circumstances it is not unreasonable. The prospects of success may not be promising, but again in the light of the withdrawal of the applicant's opposition to the condonation, does not warrant any consideration. However, it would be in the interest of justice that the employee be allowed a hearing in the review application. The late delivery of the answering affidavit is condoned.

#### Grounds of review

- [8] The review application is processed in terms of section 145 of the Labour Relations Act 66 of 1995 principally on two grounds. First, that the 'Arbitrator failed to apply her mind to material evidence and/or rendered conclusions which were so unreasonable that no reasonable Arbitrator would have made'. Secondly, that the sanction imposed is 'unbalanced, reflective of the fact that the Arbitrator did not appreciate the gravity of the offence and is so unreasonable that no reasonable Arbitrator could have made it'.

## The legal principles

- [9] In *Vodacom (Pty) Ltd v Byrne NO and Others* (2012) 33 ILJ 2705 (LC) at pages 2709ff Van Niekerk J canvassed the applicable law pertaining to reviews of commissioners' awards and concluded at para 12:

'In short: a commissioner is obliged to arrive at a result that is reasonable in the sense that it falls within a band of decisions to which reasonable decision makers could come on the available evidence. In doing so, the commissioner must act as a reasonable decision maker would, and in particular, must conduct him or herself in a manner that a reasonable commissioner would, so that the award is reasonable. This requires a commissioner to have regard to all of the relevant and material evidence, and to make a decision that can be reasonably justified having regard to the evidence. In relation to sanction, a commissioner may not substitute what he or she considers to be an appropriate sanction for that imposed by the employer. The commissioner must consider a catalogue of factors, intended to achieve a balance between employer and employee interests, and to which a commissioner must give impartial consideration.'

- [10] In its exposition of the principles applicable to a review application, the court in *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) found that an award will be reviewable 'if it suffers either from dialectical unreasonableness or is substantively unreasonable in its outcome' (para 33). The former is process related where the commissioner failed to consider all the material evidence while the latter is result based in that having considered all the material facts the enquiry is directed at how the commissioner evaluated the evidence in making the award. Relying on *Fidelity Cash Management Services v CCMA and Others* (2008) 29 ILJ 964 (LAC) the court remarked that whether an award is reasonable must be determined objectively having regard to all the evidence that was before the commissioner. It then held at para 39:

'One of the duties of a commissioner is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award or decision

or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.' The court continued at para 40:

'The court by necessity must scrutinize the reasons of the commissioner not to determine whether the result is correct; or for that matter substantively reasonable, but to determine whether there is a latent irregularity that has taken place within the mind of the commissioner, which will only be ascertainable from his or her reasons.'

#### Background

- [11] The employee was employed on the production line of the applicant.
- [12] On 8 April 2010, said the employee to the disciplinary enquiry, she took a bottle of mayonnaise for testing at the laboratory.
- [13] En route she met Ms Kekana, a laboratory analyst, to whom she was taking the mayonnaise. However, the two got talking on some union matter and they slipped into the change room to continue the discussion.
- [14] Ms Kekana who testified on behalf of the employee at the disciplinary enquiry, saw her place the bottle of mayonnaise on the locker. She did not take the bottle with her when they both left a little while later.
- [15] As they exited the door, the employee saw Mavis, a co-worker, go into the change room. When she returned shortly the bottle of mayonnaise was not where she had left it. She did not report the mayonnaise missing as she was required to do.

- [16] The employee was therefore very surprised when the security officer, Ms Fourie, found the bottle in her bag as she was leaving the applicant's premises.
- [17] She conceded that she alone had the key to her locker where her bag was stored.
- [18] Mavis Hlongwana, impliedly accused by the employee of having placed the bottle of mayonnaise in her bag, was called as a witness by the applicant at the disciplinary enquiry. No questions were put to her by the employee or her representative who instead sought to distance himself from the suggestion that she may have put the mayonnaise in the employee's bag.

#### Evaluation

- [19] In her analysis of the evidence, the commissioner identified what she believed to be the two issues she had to consider. The first is whether the employee had put the bottle of mayonnaise in her bag and second, if this amounted to theft or unauthorized possession.
- [20] At the arbitration, the evidence of the employee was:

'...when I was with this lady by the name of Mavis, when I washed then I was that side of the shower and on the other side I do not know what they did. Then I washed, then I finished, then I took my bag and left.'

The tenor of her evidence insinuates that Mavis, a co-worker, had placed the bottle of mayonnaise in her bag while she was in the shower just before she left – a version recounted by the employee for the first time at the arbitration.

- [21] She denied her previous testimony that she had taken a bottle of mayonnaise from the production line for testing at the laboratory. When confronted with the evidence given at the disciplinary enquiry by Ms Kekana, the employee's own witness, that she had seen her with the bottle of mayonnaise, the employee claimed that it was only a sample that she was taking to the laboratory. Ms Kekana had been emphatic that she was responsible for fetching the samples for testing from the factory. She also confirmed that the employee had placed the bottle of mayonnaise on top of the locker. The employee then left with Ms

Kekana and when she returned to the change room the mayonnaise was not on the locker. The employee did not report this to management. Nobody could have accessed her bag in the locker. She continued to challenge the correctness of the transcript of the disciplinary enquiry. Neither the employee nor her representative put any questions to Mavis Hlongwana at the disciplinary enquiry.

[22] I regard the overt suggestion of some conspiracy to malign the third respondent by placing a bottle of mayonnaise in her bag as lacking credence. In her evidence at the arbitration, the employee avers that she 'was not on good speaking terms' with Ms Fourie, the security officer who found the mayonnaise in her bag, 'and she wanted to fight with me, and also this girl is in love with our foreman'. She then claims that she has enemies in management and other members of her union. In her closing arguments she speaks of a shop steward as being 'always against me'. The commissioner makes no reference, let alone evaluates these contradictory remarks in the assessment of the employee's evidence.

[23] The commissioner did not refer to the testimony of the employee at the disciplinary enquiry which was put to her in cross-examination at the arbitration. Except for the finding of the chairperson of the disciplinary enquiry, she did not consider the evidence of the other witnesses called by the applicant in the arbitration.

[24] The commissioner also took issue with the charge formulated by the applicant. It may be useful to quote directly from the award:

'5.3 The [employee] has been charged with unauthorised possession/theft. The evidence suggests that the [applicant] does not distinguish the one from the other. As much as the onus in respect of such conduct is not as strict as in criminal cases there is clearly a distinction between the two. Unauthorized possession is not theft and if found guilty of the one does not mean [sic] that you are guilty of the other as suggested by the evidence of the [applicant]. This approach is highly irregular.

5.4 The evidence indicates that she was found in unauthorized possession of a bottle of mayonnaise. It is inconceivable how the chair could have arrived at any

other conclusion. As much as he indicates that they are separate charges he has treated them as one. Of concern is that he found the [employee] guilty of theft as well although he did not state it in his finding or inform the [employee] of same [sic] and he imposed the sanction of dismissal as a result. In terms of the code theft is a dismissible offence and not unauthorized possession.'

[25] The chairperson of the hearing, said the commissioner, had treated theft and unauthorised possession as a single offence, though the evidence suggests that she was found in possession of a bottle of mayonnaise which is not the same as theft and does not justify a dismissal.

[26] The commissioner was zealously preoccupied with the way in which the charge was drafted. Ndlovu JA in *Woolworths (Pty) Ltd v CCMA* (2011) 32 ILJ 2455 (LAC) wrote at para 32:

'...the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes...It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained.'

(See too, *National Union of Mineworkers and Others v CCMA and Others* (2011) 32 ILJ 956 (LC))

[27] Generically, theft and unauthorised possession belong to the same genus of dishonesty. Both are premised on conduct of an employee which deprives the employee of the ownership of a good. While theft has an element of intention, an employer is not 'required to prove charges of theft with the rigour expected of the state in criminal prosecutions – proof on a balance of probabilities suffices'. (John Grogan *Dismissal* (2010) Juta: Cape Town at 208). Unauthorised possession, in my view, dispenses with the requirement of intention and calls on the consideration of three elements: a good belonging to

the employer which is found in the possession of the employee and for which the employee has no authority to possess.

[28] The most probable inference is that the employee wrongfully concealed the bottle of mayonnaise in her bag with the object of depriving the applicant of its ownership. This could equally constitute theft or unauthorised possession. The commissioner totally ignores the assertion by Mr Swanepoel, the chairperson of the disciplinary hearing, in response to a question put by the commissioner herself, that 'theft was the major charge'.

[29] Our courts have placed persistent emphasis on the honesty and integrity of employees. Theft is so pernicious that it would annihilate the sustainability of the employment relationship. (See *Threewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division)* (2010) 31 ILJ 2475 (LC) at para 21)

[30] In *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC), the court held:

'In employment law a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded.'

[31] This is the refrain in many judgments. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) Molahlehi J remarked at para 42:

'...whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

[32] And in *Miyambo v CCMA and Others* (2010) 31 ILJ 2031 (LAC) at para 17 'our courts place a high premium on honesty in the workplace'.

[33] Indeed, I find it difficult to understand the reasonableness of the grounds on which the commissioner arrived at the conclusion that the employee's contention that she had no knowledge of the bottle of mayonnaise in her bag was honest and probable.

[34] In arbitrating a dispute, a commissioner must evaluate and analyse the evidence presented at the arbitration. It does not appear that she did so. I cannot discern any rational basis by which the commissioner could find the employee to be an honest and reliable witness who proffered a probable explanation for the possession of the bottle of mayonnaise.

[35] Because the commissioner arrived at her decision without considering all the evidence, her conclusion was not justifiable in relation to the evidence presented at the arbitration. Her decision was not only incorrect but unreasonable and one that a reasonable decision maker could not have reached.

[36] I am of the view that no purpose would be served in remitting this matter back to the second respondent.

[37] This is a matter where it will not be appropriate to make a cost order.

1. The application for condonation for the late delivery of the application for review by the applicant is granted.
2. The late service of the answering affidavit by the employee is condoned.
3. The commissioner's award is reviewed and set aside and substituted with an order that the dismissal of the employee by the applicant was not unfair.
4. There is no order as to costs.

APPEARANCES

APPLICANT:

Advocate FA Boda

Instructed by: Dasoo Attorneys

.RESPONDENT:

Advocate ES Hutchinson

Instructed by: Moodie & Robertson