THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Not of interest to other judges

Case No: JR2711/12

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

LAWRENCE NOWOSENETZ *N.O* **Second Respondent**

JAMAFO obo QUEEN KLAAS **Third Respondent**

Heard: **14 October 2015**

Delivered: **6 November 2015**

Summary: **Review. Consumption of food items. Employee tried to deceive the Commission by attempting to introduce false evidence and showing no remorse. Application for review granted with costs.**

JUDGMENT

AC BASSON J.

[1] This is an application to review and set aside an award by the third respondent (hereinafter referred to as "the Commissioner") in terms of which the dismissal of the third respondent (Ms Klaas - hereinafter referred to as "the respondent") was found to be substantively and procedurally unfair. The commissioner ordered the respondent's reinstatement.

Brief exposition of the relevant facts

[2] At the time of her dismissal the respondent was employed as a Customer Services Manager, a position that she has held for the previous five years. The applicant's Northern region suffered a loss of approximately R9.6 million as a result of stock shrinkage for the period 1 September 2011 to 29 February 2012 (five months). The applicant's Irene Store (where the respondent was employed) suffered la loss of R 106 514.52 over the same period.

[3] The events leading to the respondent's dismissal can briefly be summarized as follows: As a result of extensive losses suffered by the applicant, video footage from closed circuit cameras in the applicant's Irene store was released to management in September 2010. The video footage was reviewed together with other footage received at the end of 2010 concerning possible disciplinary action against other employees. The video footage revealed an incident during which the respondent was seen eating a custard slice. From the video it can be seen that the food preparer – a certain Ms Komane - was cutting custard slices and putting them on a tray. The respondent approached her and removed with her finger a piece of the custard slice from a tray and licked her finger. Komane then cut a portion for the respondent which she then eats.

[4] The respondent's version at arbitration was that she tasted the custard slice following a complaint received by a customer. The respondent steadfastly maintained that it was her duty to ensure that customer complaints are handled appropriately and that included her tasting food if and when required. The respondent therefore maintained that she merely "tasted "the custard slice as opposed to consuming it.

[5] The respondent had, however, as required, not obtained permission from the store manager to taste the custard slice; the custard slice was not tasted within the designated food area and lastly, food safety procedures were not followed during the tasting exercise. In this regard the evidence of the applicant was that, in order to prevent pilferage and shrinkage, the applicant has strict rules in place with regard to the consumption of company food items. One of these rules is that no employee in the organisation has the right to take a product and consume the product without the authorisation of the store manager or, in the absence of the store manager, the assistant store manager. Breach of this rule is treated seriously and all employees found guilty of an authorised consumption of company property are dismissed. The applicant's version further was that the respondent's duties did not include tasting food.

[6] On 18 January 2011 the respondent was charged with dishonesty in consuming company property without paying for it or without authority; breaking company rules and not following's food safety rules. Following an internal disciplinary enquiry which took place on 30 May 2011 the respondent was found guilty of committing misconduct. She was dismissed on 6 June 2011. The respondent thereafter took the applicant's decision on appeal. The appeal hearing was heard on 27 June 2011 and the outcome was delivered on 15 July 2011. The decision to dismiss the respondent was upheld on appeal.

<u>The award</u>

[7] The Commissioner concluded on the evidence that the respondent did not "taste" the custard slice but that she in fact was "consuming". Having found the respondent guilty as charged, the Commissioner then proceeded to evaluate the fairness of the sanction of dismissal. In this regard the

Commissioner concluded that, notwithstanding the fact that consumption amounted to theft, every case had to be evaluated with reference to its own circumstances. The Commissioner concluded that dismissal was too harsh a sanction and that viable alternatives to dismissal were not considered by the applicant when it took the decision to dismiss the respondent. Furthermore, according to the Commissioner, the trust relationship has not irreparably broken down. In arriving at this decision the Commissioner took into account that the continued employment relationship was not intolerable in light of the fact that the respondent was not suspended pending the enquiry:

> "[37] ..In my view the Applicant has shown herself irresponsible and unworthy of managerial responsibilities, but this does not necessarily render her untrustworthy as an employee in a lower position. She deserves an opportunity to rehabilitate herself. This view is based on a clean record and seven years of service which is substantial. Demotion and a final written are more appropriate sanction is in my view. Commissioners frequently prescribe alternative sanctions in awards and curiously the courts have never rejected this practice even though there is no express statutory authority to do so. The Respondent is thus at liberty to reconsider the question of sanction *de novo* based merely on what should be regarded as a recommendation.
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> [38] In conclusion, having regard to all the circumstances including recent approaches to consumption cases both in the CCMA and by the courts, my finding is that the sanction was inappropriate and the dismissal was accordingly substantively unfair."

[8] In respect of procedural fairness, the Commissioner was of the view that the delay in convening the disciplinary enquiry was unreasonable in light of the fact that the respondent was charged seven months and seven days after the offence was committed.

The review.

[9] The applicant submitted that the Commissioner acted unreasonably by failing to apply his mind to a number of material relevant facts and if he had done so, the result of the arbitration award may have been different. More in particular it was contended that the Commissioner failed to apply his mind to

the materially relevant fact that the respondent was grossly dishonest and that she had not shown any remorse. In this regard the respondent testified that the customer had complained about the custard slice at approximately midday on the day where as it was clearly impossible as the video footage showed that the respondent had tasted the custard slice at 9H15 in the morning. Furthermore, the respondent's dishonesty went so far as her involving the manager of the Jeep store (in the same shopping complex) and requesting her to pretend to be the customer who laid a complaint about the custard slice. The respondent even went as far as to write an unsigned letter supposedly from the customer setting out the complaint which later was submitted as evidence at the disciplinary hearing but rejected as inadmissible as the so-called customer was not called in to testify. It was also submitted that the Commissioner failed to take into account that the applicant has clear house rules and a clear tasting policy which the respondent is well aware of. Despite the fact that the applicant was aware of the policies, she intentionally did not follow them.

[10] It was also submitted that the Commissioner reached an unreasonable decision by concluding that the dismissal of the respondent was too harsh.

Evaluation

[11] The only issue in contention in this review is the appropriateness of the sanction for the reasons contained in the applicant's grounds of review.

[12] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] confirmed that the test to be applied in applications for review is that of the "reasonable decision maker". The Labour Appal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[2] pointed out that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings. It is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker*

[1] (2007) 28 ILJ 2405 (CC).
[2] [2014] 1 BLLR 20 (LAC).

could come to on the available material'. In the recent of the Labour Appeal Court in *Head of the Department of Education v Mofokeng and others*[3] the Labour Appeal Court again emphasised the restrictive scope of a review:

> **"**[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
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> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests

[3] [2015] 1 BLLR 50 (LAC). Footnotes omitted.

impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[13] This decision was quoted with approval by the Labour Court in *Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration and others*[4] where Myburgh, AJ summarised the position regarding reviews as follows:

"[9] This *dictum* in *Mofokeng* says many important things about the review test. But for present purposes, consideration need only be given to the guidance that it provides for determining when the failure by a Commissioner to consider facts will be reviewable. The *dictum* provides for the following mode of analysis:

(a) the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the Commissioner to come to a different result;

(b) if this is established, the (objectively wrong) result arrived at by the Commissioner is *prima facie* unreasonable;

(c) a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and

(d) if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

[10] The shorthand for all of this is the following: where a Commissioner misdirects him or herself by ignoring material facts, the award will be

[4] [2015] 10 BLLR 1052 (LC).

reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable."

[14] It is in light of these decisions that the review court must consider whether the conclusion reached by the Commissioner "*falls outside the band of decisions to which a reasonable decision-maker could come to on the available material*". Before I turn to this exercise and because this review essentially turns on the appropriateness of the sanction, it is necessary, to briefly highlight what the Constitutional Court *in Sidumo*[5] held in respect of the duty of a Commissioner in imposing a sanction:

"[75] It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing 'discretions'. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.

[76] The view that if there was no deference afforded to the employer's sanction there would be a flood of cases to the CCMA is no more than supposition. As the Labour Appeal Court correctly stated in Engen Petroleum:

'[It] reveals a failure to appreciate the full rationale behind the creation of the CCMA. It is right and proper that as many disputes as possible that are not resolved amicably in the workplace, should be referred to the CCMA or bargaining councils and other mutually agreed fora for conciliation and, later, arbitration, irrespective of what any one may think of the merits or demerits of such disputes. The existence of the CCMA ... helps to channel, among others, workers' grievances to where they can be ventilated without any interruption and disruption of production - at least up to a point. It is also right and proper that unions should be encouraged and not discouraged to refer dismissal

[5] *Supra*

disputes with employers to the CCMA for arbitration if they feel aggrieved by such dismissals. In that way, they can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, decide whether the dismissal is fair or unfair. In that way, the workers would have less urge to resort to industrial action over dismissal disputes.'81

[77] Employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the state is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated.

[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."

<u>Did the Commissioner ignore facts that were material to the extent that had the Commissioner considered these facts, he would have come to a different result?</u>

[15] The applicant in its Heads of Argument refers to numerous facts that the Commissioner had failed to consider. I am in agreement that the following facts were not considered by the Commissioner and had he done so he would have arrived at a different conclusion:

(i) The Commissioner failed to consider the real problem of pilfering and theft that this particular employer faced particularly in the dairy and bakery sections of the Irene store. These losses with the substantial that it had resulted in the applicant dismissing 15 of its employees.

(ii) Although the Commissioner considered the fact that the applicant was employed in a managerial capacity and concluded that as a manager "*a higher standard of conduct is expected from her in conforming to the Respondent's policies and rules*". Having found this, the Commissioner nonetheless concluded that reinstatement was appropriate despite the fact that "*the Applicant has shown herself irresponsible and unworthy of managerial responsibilities."* The Commissioner therefore decided to reinstate the respondent into the same managerial position he has found her to be unworthy of. This, in my view, is irrational. Moreover, the Commissioner then makes the comment that the respondent "*is at liberty to reconsider the question of sanction de novo based merely on what should be regarded as recommendation*." This is likewise irrational: once reinstated the respondent is not at liberty to decide the question of sanction *de novo*. Furthermore, there is nothing in the award that constitutes a "recommendation".

(iii) The Commissioner failed to take into account the fact that the respondent was dishonest in that she went so far as to involve the manager of the Jeep store in the same shopping mall and requested her that she pretend to be the customer who had laid a complaint about the custard slice. The Commissioner also completely disregarded the fact that the respondent went as far as to write an unsigned letter supposedly from the customer sitting out the complaint and that she had admitted this letter as evidence at the disciplinary hearing. Had the Commissioner taken this into account, the Commissioner would not have arrived at the decision to reinstate the respondent. The Commissioner also failed to take into account the fact that respondent continued to lie to the applicant and the Commissioner throughout the arbitration to the extent that the

Commissioner himself found that her version was impossible and to the extent that the respondent was untruthful. In *Hulett Aluminium Pty Ltd v Bargaining Council for the Metal Industry*[6] the Court held that it would be unfair to expect of an employee to take back an employee when the employee has persisted with his or her denials and has not shown any remorse.

(iv) The Commissioner also failed to take into account that the respondent showed no remorse[7] but instead, as already pointed out, tried to deceive the applicant by involving the manager of another store to pretend that she was the customer who had laid a complaint. In this regard the court in *De Beers Consolidated Mines Ltd v CCMA and Others*[8] held as follows:

> "[25] It would in my view be difficult for an employer to re-employ an employee where shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a

[6] [2008] 3 BLLR 241 (LC).

[7] *Absa Bank Ltd v Naidu and others* (2015) 36 ILJ 602 (LAC): "[46] Obviously, the fact of a guilty plea per se or mere verbal expression of remorse is not necessarily a demonstration of genuine contrition. It could be nothing more than shedding crocodile tears. Therefore, the crucial question is whether it could be said that Ms Naidu's utterances empirically and objectively translated into real and genuine remorse. In *S v Matyityi*, the Supreme Court of Appeal remarked as follows on this issue:

> 'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

[8] (2000) 21 ILJ 1051 (LC).

recommitment to the employer's workplace values, any pre-cannot hope to re-establish the trust relationship which he himself has broken."

(v) According to the applicant the actions of the respondent were in breach of applicant's well-known rules and policies. An employer is entitled to regard all non-compliance with its rules severely. In this regard the context within which the respondent was dismissed by the applicant is important: She was in a managerial position and she clearly must have been aware of processes and policies regarding tasting of products.

(vi) The Commissioner held that there was no breakdown in the trust relationship because the applicant relied merely on the say-so of Van der Merwe (the previous manager) and because the chairman of the applicant's disciplinary hearing did not testify at all. I am in agreement with the submission that the say-so of Mr Van der Merwe is in fact material in light of the fact that he was the manager of the store at the time of the transgression. His evidence in this regard was not challenged and there was no basis for it to be rejected. Regarding the failure to call the chairman; it should be noted that there is no obligation for the chairman of the enquiry to testify. Furthermore the role of a chairman is merely to assess whether the manager's testimony that the relationship had broken down irretrievably stood up to scrutiny.

[16] The applicant further submitted that the Commissioner committed a gross irregularity and reached an unreasonable decision by making a material error of law in concluding that the dismissal of the respondent was too harsh. The applicant referred to the fact that it is settled law that in cases where an employee is found guilty of dishonesty, the dishonesty alone may be sufficient to warrant a dismissal, even in circumstances where the employee has a long service record particularly in cases where the employee shows no remorse. The applicant submitted that the Commissioner clearly did not consider and apply his mind to the law. I am in agreement with the submission: Not only is the respondent guilty of dishonesty, she also showed no remorse and refused

to take any responsibility for her actions. What compounds matters is the fact that the respondent tried to mislead the Commissioner when giving evidence.

Procedural fairness

[17] In respect of the procedural fairness the Commissioner held that the dismissal was procedurally unfair but declined to award any compensation in light of the applicant's "untruthful denial of any wrongdoing". There is no cross-review regarding this finding. I have nonetheless perused the findings in this regard and I am of the view that the finding in respect of procedural unfairness must stand. I am however, in agreement with the Commissioner that the respondent should not be awarded any compensation in respect of the procedural unfairness in light of the consideration that she had been untruthful and in fact tried to mislead the Commissioner as well as her employer.

Costs

[18] In respect of costs I can see no reason why costs should not follow the result.

Order

[19] In the event the following order is made:

19.1 The dismissal of the third respondent. Ms Queen Klaas was substantively fair but procedurally unfair.

19.2 I make no order in respect of the finding of procedural unfairness.

19.3 The third respondents are ordered to pay the costs.

AC BASSON

Judge of the Labour Court

Appearances:

For the applicant : Mr G Damant of Bowman Gilfillan Incorporated

For the respondent : Mr T. Moqechane of JAMAFO