IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO: JR 1238/09

In the matter between:

EDCON GROUP PTY (LTD)	Applicant
and	
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER JACKSON MTHUKWANE N.O	Second Respondent
ANNA THLOALE	Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 145 (1) of the Labour Relations Act, 66 of 1995 ("the LRA"), to review and set aside the arbitration award issued by the Second Respondent ("the Commissioner") dated 7 April 2009.

Factual background

[2] The third respondent (“the employee”) was employed by the applicant as a Retail Associate at its store in Pretoria North. On 17 June 2008 a security officer at the store, Emelda Tshikovhi, removed a jacket from among other staff clothes after noticing that the price tag was still affixed to it. The employee identified the jacket as hers. Tshikovhi removed the jacket and

informed the manager, Dudu Dlamini. She told the employee it would only be returned to her if she could produce proof of purchase. The employee contacted her husband to confirm that he had purchased the jacket, and when he arrived they proceeded to Dlamini's office. The employee asked Dlamini to use her staff card to verify the purchase on the system and explained that she had purchased it from the Wonderpark branch of the applicant. An altercation arose following which the employee and her husband left the store.

[3] The employee was charged with five counts of misconduct as follows:

Failure in your duty to demonstrate acceptable conduct in that:

1. *On the 17th of June 2008 at Edgars PTA North, you failed to adhere to company search procedure when you left the store without being searched.*
2. *On the 17th June 2008 at Edgars PTA North, you opened the backdoor to allow an outsider (husband) to enter the store whilst the store was closed without the permission of the Security Officers/Management.*
3. *On the 17th of June at 2008 at Edgars PTA North, you failed to adhere to Company Workplace Rules by not declaring merchandise that you brought into the store.*

Failure in your duty to demonstrate acceptable conduct in that:

4. *On the 17th of June 2008 at Edgars PTA North, you conducted yourself in an improper and disgraceful manner when you and your husband intimidated, harassed and attempted to assault the Security Officer.*
5. *On the 17th of June 2008 at Edgars PTA North, you removed merchandise from the store without authorization whilst in the presence of an outsider (husband).*

[4] Following a disciplinary enquiry she was found guilty and a sanction of dismissal was imposed for charges 2 and 4. She challenged only

the substantive fairness of her dismissal in a referral to the first respondent. An arbitration was held pursuant to which the Commissioner found her dismissal to have been substantively unfair and ordered the applicant to reinstate her with no loss of benefits and back pay.

Grounds of review

[5] The applicant relies on the following submissions to support of its application:

Finding in regard to "tacit permission"

[6] The Commissioner misdirected himself and committed a gross irregularity:
(a) when he found that the security officers in fact gave tacit permission to the employee to open the door and allow her husband in;
(b) by holding that the security officers failed to show their disapproval of the employee's breach of the security procedure.

[7] This finding is not supported by the evidence. The testimony tendered on behalf of the applicant's witness, Tshikovhi, was that she did not open the door to the employee's husband as she did not know him. Her evidence was that only persons whose identity is known to the security officers or who had an appointment were allowed to enter and that the breach occurred at closing time when the store was particularly vulnerable. Tshikovhi's evidence was corroborated by Marriam Dubezane, another security officer, who testified that they were not afforded the opportunity to search the employee's husband, and that she would not have opened the door to him.

[8] More importantly, it was not even the employee's version that her husband was granted tacit permission to enter without being subjected to a search. This moreover contradicts her version that the security officers opened the door to her husband at around 18:00. The undisputed evidence of all three security officers who testified at the arbitration was that the husband entered the store before closing time. This contradicted the employee's evidence that he arrived at 18:00. All three testified

that they were at the door when he entered and did not open the door to him nor did they search him. The applicant's evidence on the issue was not contradicted whilst further contradictions were apparent in the evidence of the employee and her husband regarding the details of his entry into the store.

Failure to provide reasons

[9] The Commissioner failed to provide reasons for his finding. This renders the award fatally defective and means that the applicant was denied a fair hearing.

[10] The Labour Court has deemed a review in such circumstances to be justified. In *Vodacom Service Provider Co (Pty) Ltd v Phala and others* it was held: [1]

> *"This brings me to the other grounds of review which are about how the Commissioner dealt with the evidence etc. It is trite law that the Commissioner is required to give brief reasons for the award that he or she has made. In giving those reasons a Commissioner must deal with the issues that arose and where there are conflicting versions, the Commissioner must deal with them and indicate in the award which version is acceptable and which version is rejected. The Commissioner must also give reasons for arriving at a specific conclusion…"*

[11] Similarly, in *Greater Letaba Local Municipality v Mankgabe NO & others* [2] the Labour Court held:

> *" The striking feature of the award …..is that virtually no reasons were given to underpin the decision reached. The conclusion was derived from a vacuum. The arbitrator merely and briefly recited the argument presented to him. He did not at all apply his mind to the argument in order to take the consumers of his arbitration award down the avenue of his reasoning process to the ultimate outcome of his mental digestion of the material available to him. There is no*

[1] (2007) 28 ILJ 1335 (LC) at para 20.

[2] [2008] 3 BLLR 229 (LC) at para 20.

objectively rational connection between the award he made and the legal argument presented to him. Stepping on the huge crack between the two extremes was no stroll in the park. Accordingly an award which cannot be rationally justified cannot be allowed to stand on review. In my view the Commissioner committed a gross reviewable irregularity".

[12] Taking the above principles into account Mr Kgokong, appearing for the applicant, submitted that the Commissioner had committed a gross irregularity in his analysis of the evidence and that the award stood to be set aside on this ground alone. In this regard he submitted that whilst the security officers did not request the employee's husband to subject himself to a search, they tendered an explanation for their conduct and this cannot be faulted. Dlamini's evidence on this issue was that the employee and her husband could not be searched for the following reasons:

"*It is because they were in fighting mode. The security could not stop them because they wanted to hit the same security officers and they are ladies and it was a man wanting to hit the ladies, so what the ladies were supposed to do because those were ladies and he was a man".*[3]

[13] In these circumstances it was not possible for the security officers to conduct a search, but the Commissioner disregarded this evidence.

Finding in regard to "threatening behaviour"

[14] The Commissioner's finding on this charge is not rational and cannot be justified on the material before him. His award is based on the ill-informed basis that Dlamini only witnessed the husband, Mr Thloale's attempted assault on Tshikovhi, although under cross-examination she confirmed that she had witnessed both the employee and her husband attempting to assault Tshikovhi. Her testimony was corroborated by Tshikovhi. Moreover, the attempt to distinguish between the conduct of the employee and her husband was immaterial in that they acted with a common purpose.

[3] Applicant's emphasis.

[15] The Commissioner's approach in this regard constitutes a misdirection. He should have had regard to the employee's admission in cross-examination that she and her husband argued with Tshikovhi after she insisted that the employee produces proof of purchase.

Reinstatement not appropriate

[16] The remedy of reinstatement was not justified on the material before the Commissioner. In exercising his discretion he should have taken into account the undisputed evidence regarding the employee's conduct threatening the safety and security of other employees at the store but instead he downplayed the seriousness of this conduct. The employee conceded in cross-examination that an argument ensued between her and Tshikovhi, and evidence was led that she had uttered verbal insults against the latter, in particular calling her a Venda, which was considered derogatory.

[17] The Commissioner failed to take into account that the harmonious working relationship between the parties was destroyed by the employee's conduct. He failed to attach any weight to the evidence led by the applicant that the employee and her husband were in a violent mood, and downplayed the seriousness of the misconduct, thereby committing a gross irregularity in the proceedings. The Commissioner committed misconduct in his duties in failing to apply his mind to the evidence, and no reasonable decision maker presented with the uncontested evidence would have reached the conclusion he did. He attached no weight to the fact that the policy regarding proof of purchase was well known to the employee, who had been employed by the applicant for seven years. On the contrary, he attached too much weight to the fact that the terminals were offline and the employee's request that the sale of the jacket could be verified from the transactions on her staff card was not addressed.

[18] Mr Kgokong, in amplification of his heads submitted in oral argument that the Commissioner further misdirected himself in putting leading questions to the

employee during her testimony when he should have remained neutral as an adjudicator. It was also submitted that he failed to apply his mind to the contradiction in the evidence of the employee that she left the store first and her husband followed while his evidence was that he was not searched as he left the store and was not aware of whether his wife had been searched because she was behind him.

Analysis and evaluation

[19] It is by now trite that the test on review is not whether the Commissioner was wrong or made an irrational decision, but whether his decision was so unreasonable that it could not have been made by a reasonable decision maker: *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others.*[4] Reasonableness is pertinent to both the outcome and process of the arbitration. In essence a review under section 145 (1) and (2) of the LRA requires that the outcome of arbitration proceedings must fall within a band of reasonableness, but if the process is tainted (for instance by the arbitrator failing to take material evidence into account, or having regard to irrelevant or inadmissible material, or commits another gross irregularity during the proceedings such as an error of law), the decision can be set aside regardless of the fact that the outcome is reasonable.

[20] In *Sidumo* Ngcobo J emphasized the role of reasonableness in relation to the process, and its impact on the outcome, in the following terms:

> *"It follows therefore that where a Commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the Commissioner fails to perform his or her mandate. In so doing…the Commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145 (2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the*

[4] (2007) 28 *ILJ* 2405 (CC).

result is wrong but because the Commissioner has committed a gross irregularity in the conduct of the arbitration proceedings". [5]

[21] The Commissioner's finding on the first charge in respect of which the sanction of dismissal was imposed was that they were expecting Mr Thloaele; that the security officers failed to exercise their powers and authority to stop him from entering; and that their failure to do so was tantamount to granting tacit permission for him to enter. In reaching this conclusion he relied on the evidence of one of the officers, Dubezane, who testified that *"the applicant had told them that her husband was coming to the store. She stated that when Mr Thloaele entered the store she knew it was the applicant's husband".* They did not show their disapproval of the employee's alleged conduct in opening the door by confronting her about the breach of security procedure. Indeed if the breach was as serious as was alleged they would have done so. Therefore, on the applicant's own evidence, the store was already closed and he was not a stranger.

[22] The Commissioner correctly was justified in accepting the employee's evidence that she saw her husband in the store immediately after 18:00 when the store was closed and after *"they were opening the door for him*". Dlamini's evidence was that when she confronted the security officers about who had let Mr Thloaele in they blamed the employee. However, on Dlamini's own evidence only security officers were authorised to open the back door and when the employee and her husband left they did not refuse to be searched nor did the security officers subject them to a search. Insofar as this conflicts with the version of the security officers, it is apparent from the award that the Commissioner rejected their evidence and accepted that of the employee and her husband on the probabilities. Mr Thloaele's evidence was that when he arrived at the store after his wife had called him to verify the purchase of the jacket, a security officer opened the door for him. The Commissioner cannot in the circumstances be said to have acted improperly or made a finding that could not have been made by a reasonable decision maker in the circumstances.

[5] Supra at para 268.

[23] In my view, based on the evidence before him, the Commissioner was justified in making the finding that the security officers "*want to pile all the blame for their dereliction of duty on the applicant when they did nothing to prevent the violation of security procedures".* This was based on the admission by Tshikovhi and Dubezane that they did not request Mr Thloaele to sign the attendance register when he came in, and that they did not inform him when he left that he needed to be searched. He was further similarly justified in rejecting the evidence of Dlamini that they failed to act because they were women and were afraid. Indeed if they seriously felt under threat this would have justified decisive action, including seeking police intervention, and in the circumstances it can only mean that there was not anything sufficiently threatening to warrant such action. Insofar as evidence was led about the *"fighting mood*" that prevailed there was no evidence that circumstances were so tense or violent that the employee and her husband could not have been subjected to a search or that their conduct was violent, intimidatory or threatening. It can hardly be disputed that the security officers as is implicit in their job descriptions had an obligation to act in the circumstances and cannot seek to blame the employee for their failure to do so. In my view therefore the finding on this issue was justified and cannot be said to have arisen as a result of a reviewable irregularity.

[24] In any event, even if the employee's misconduct in this regard is accepted, I agree with Mr Lekala, appearing for the third respondent, that in the circumstances (i.e. that the husband was not an employee; the employee had an unblemished service record of seven years; the applicant had an opportunity to confirm that the jacket had been purchased but refused to do so; and the employee subsequently proved ownership), dismissal was too severe a sanction.

[25] In regard to the second charge for which dismissal was held to be justified, the Commissioner had regard to the finding of the disciplinary enquiry that the applicant was only found guilty of attempted assault on **one** of the security officers. In fact, Dlamini's testimony was that she followed the employee and her husband to the back door as they left and she saw **him** attempting to assault Tshikovhi and heard the employee swearing. Tshikovhi's testimony was that the employee tried to slap her but she grabbed her hand, and thereafter another security officer grabbed

her from behind in order to restrain her. Dubezane, in cross examination also admitted that the employee and Tshikovhi just argued but "*did not engage in any physical fighting"*. Daphney Nkwe testified that she was present when Mr Thloaele entered the store and that at around 18:00 she heard people arguing and went to the back of the store. She saw Mr Thloaele carrying a jacket and followed by the employee and Dlamini. She heard the employee calling Tshikovhi a Venda and Mr Thloaele attempted to assault Tshikovhi but she pulled her out of his reach. The finding by the Commissioner in the light of these facts that Tshikovhi's version about the attempted assault was not corroborated by Dlamini, Nkwe or Dubezane was reasonable and justified and did not arise from a failure to apply his mind or any other gross irregularity. In these circumstances (even if Mr Kgokong is correct in submitting that the Commissioner erroneously referred to "corroboration" when the three witnesses were not at the incident simultaneously and could not have been expected to have corroborated one another's versions), there was no basis on which Tshikovhi's evidence should have been preferred. The Commissioner was justified in preferring the version of the employee and her husband to that of Tshikovhi and did not commit any irregularity or misconduct in doing so.

[26] The Commissioner appears moreover to have applied his mind to the fact that Dlamini had the opportunity to prevent the incident from escalating. She could have verified the purchase on the system but declined to do so. Even if it was not possible at the time she could have undertaken to do so the following day. In circumstances where it was common cause that the jacket in question was not available in the Pretoria North store and the employee explained that she purchased it at another store, Dlamini's conduct was inexplicable and exacerbated the conflict. In fact it appeared from the employee's evidence (although this was not referred to explicitly by the Commissioner) that a previous misunderstanding had arisen between the employee and Dlamini following which her husband had telephoned Dlamini to ask her to apologise. His evidence at the arbitration was that when he asked Dlamini to assist in verifying the purchase of the jacket from the system or calling a senior manager, she did nothing, prompting him to take the jacket and walk out of the store. His frustration as well as that of the employee must have been apparent to the

Commissioner from the drama that unfolded and which could easily have been prevented by Dlamini had she been prepared to co-operate.

[27] In regard to the derogatory utterances, the Commissioner had regard to both versions which he found to be equally balanced. This finding is unassailable.

[28] Having regard to the record the submission that the Commissioner led the witness and so influenced the proceedings in my view cannot be sustained on the facts. His approach reflected an attempt to clarify the facts and cannot constitute an irregularity.

[29] The applicant submitted that dismissal was appropriate for serious misconduct in the form of breach of its security procedures notwithstanding that this was the first offence. Moreover, the Commissioner paid no regard to the employee's lack of remorse in ordering her reinstatement. In evaluating the evidence on balance of probabilities a reasonable decision maker would have concluded that the employee committed serious misconduct and that her dismissal was therefore appropriate. I do not agree. In my view the Commissioner properly applied his mind to the evidence and submissions before him in reaching the conclusion that the dismissal was substantively unfair. In the circumstances it cannot be said that the decision to reinstate with back pay was so unreasonable that it could not have been made by a reasonable decision maker on the evidence presented to him.

[30] In applying the *Sidumo* test as set out above to the facts it is apparent from the award that the Commissioner applied his mind to all the material facts and cannot be said to have committed misconduct in the exercise of his duties or any gross irregularity that would have tainted the outcome or the process by which he reached his conclusion. He rendered a carefully considered and reasoned award in which he dealt with all the evidence presented to him, conducted a balancing exercise on the probabilities, and exercised his discretion to determine the outcome in a manner exemplified by fairness and the delivery of justice in line with his duties and obligations as a Commissioner. His award must therefore stand.

[31] In the premises, I make the following order:

The review application is dismissed with costs

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Bhoola J
Judge of the Labour Court of South Africa

Date of hearing: 28 October 2010
Date of judgment: 4 November 2010

Appearance:
For the Applicant: Mr M Kgokong, Kgokong Nameng Tumagole Inc.
For the Third Respondent: Mr N Lekala, Union Official.