

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 137/09

In the matter between:

PICK ‘N PAY (PTY) LTD

Applicant

and

BUTI ZWANE, N.O.

1st Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2nd Respondent

ELIZABETH T MORE

3rd Respondent

JUDGMENT

LAGRANGE,AJ

Introduction

1. This is an unopposed review application in which the applicant, Pick ‘n Pay seeks to set aside the award of the first respondent, and substitute it with a determination that the dismissal of the third respondent was substantively fair.
2. The charges leading to the dismissal of the third respondent were as follows:
 - 2.1. Gross dishonesty in that you allowed employees to leave with company goods without a declared sticker. This was not reported to management.
 - 2.2. Breach of company policy and procedure in that you allowed employees to leave the company premises with goods without a declared sticker for the goods they had in their possession.

3. The commissioner found that the applicant had failed to discharge the onus of proving the third respondent was guilty of the alleged misconduct and accordingly found her dismissal to be substantively unfair. The commissioner found that no procedural unfairness had occurred. The applicant was ordered to reinstate the third respondent with retrospective effect.
4. The record of the arbitration proceedings was incomplete as only one tape had been transcribed and the other could not be located.
5. The charges related to the discovery of a theft of two DVD machines taken from the applicant's premises by staff which had had been wrapped in gift wrap paper and removed from the premises on 10 December 2007.
6. At the security point which staff passed through on their way out of the store the parcels were queried but not examined by the security officer on duty, a Mr J Nyathi. The staff member carrying the parcels, one Walter, claimed to be carrying them for another staff member, referred to as Gladys. Gladys explained to Nyathi that the parcels were bed sheets and that the third respondent, who sometimes worked in a security staff capacity and sometimes as a cashier, had witnessed the parcels being wrapped. The third respondent was then summonsed and confirmed Gladys' version to the security guard, on the strength of which he apparently decided there was no reason to examine the parcels more closely.
7. It was only later when another employee saw the two staff members opening the parcels outside the store and revealing the DVD machines that the theft became known.

The Award

8. It appears that the applicant's case rested partly on the foundation that the third respondent had misled Nyathi when she confirmed she had witnessed Gladys

wrapping sheets. The commissioner found that there was no evidence that the third respondent witnessed the DVD machines being wrapped and therefore no basis for concluding that she misled Nyathi.

9. There was some dispute about whether sheets brought into the store, as the third respondent apparently testified she was advised by Gladys, would have been checked and issued with a clearance sticker, which would have been placed on the parcels when they were taken out of the store again. The commissioner's evaluation of the evidence led him to conclude that it was not the third respondent's responsibility to have issued stickers for declaring the items brought into the store as those ought to have been provided by the security officer who vetted staff when they entered the premises. Accordingly, he also found that it was not the third respondent's responsibility to have declared the sheets. As such she was not responsible for issuing a sticker which should have been attached to the parcels when they left the store.
10. The commissioner also noted that there was no evidence the parcels were not tampered with between the time the third respondent saw the parcels being wrapped and the time when they were taken out the store, which was a period of about three hours.
11. The arbitrator decided it was Mr Nyathi, not the third respondent, who permitted the two employees to leave the store with the parcels.

Grounds of review

12. The grounds of review advanced by the applicant may be summarised as follows:

- 12.1. The commissioner's conclusion that there was no evidence before him that the items wrapped in front of the third respondent were DVDs and not sheets is in fact at odds with the evidence before him, and in even considering this question, he entertained an issue that was not before him. The applicant further appears to suggest that given that the DVD

machines were seen in the parcels when they were unwrapped and this was not disputed, that it was therefore not an issue in dispute that the parcels contained DVDs and not bed sheets.

- 12.2. The applicant claims that the commissioner's finding that there was no evidence the parcel could have been tampered with was an issue that was never canvassed but is one that he raised *mero motu*.
- 12.3. The applicant further alleges that on the day in question the third respondent was working as a cashier and therefore could not have been performing a security function on that day. Presumably this point is raised to suggest that the commissioner took no account of this evidence.
- 12.4. The alleged bed sheets would not have been in Gladys' locker unless they had been declared and the third respondent ought to have established that the goods had been authorised when they were brought into the store. Again I assume the point the applicant wishes to make is that this was evidence ignored by the commissioner.
- 12.5. The finding that Nyathi was the party responsible for authorising the removal of the parcels from the premises is attacked as unreasonable and illogical given that the third respondent confirmed the goods were in order.
- 12.6. The commissioner failed to deal with the outcome of a polygraph test.
- 12.7. The commissioner relied on evidence of the third respondent which consisted of a bare denial.
- 12.8. The commissioner failed to motivate his award of retrospective reinstatement of the third respondent indicating he did not apply his mind to this issue.

The Record

13. As mentioned above, the record which has been made available to the court is incomplete. The only transcribed portion of the hearing which is available consists of testimony of Mr Masina, Ms Sandamela and Mr Nyathi. It appears that evidence of Mr K Heisi who according to the commissioner also testified for the applicant is part of the missing portion of the record of the proceedings as is the evidence of the third respondent herself.
14. On examination of the transcribed portion of the record it is also clear that there is no record of the cross-examination of Mr Masina or the evidence in chief of Ms Sandamela, but merely an unexplained gap on page 25 of the transcript (page 65 of the review bundle).
15. The court is faced with a situation in which there is a record with substantial portions of the recorded oral testimony missing and the grounds of review are based mainly on the commissioner's evaluation of the evidence. There is insufficient evidentiary basis on which to evaluate the grounds of review raised by the applicant.
16. The applicant did bring an application to compel the CCMA to produce the missing part of the recorded proceedings but without success. The CCMA also advised that the commissioner's contract with the CCMA had terminated and consequently it would be difficult to assist with the reconstruction of the record. However, the applicant did not take any further steps to attempt to reconstruct the record with the third respondent and her representatives, and when I queried this at the hearing of this matter the applicant's representative could do no more than refer me to the steps taken with the CCMA to obtain a more comprehensive record.
17. By mid-April 2009 the applicant knew of the unsatisfactory state of the record and the inability of the CCMA to assist further in reconstructing it, yet no further steps were taken to reconstruct the missing portion by other means. No explanation for

the failure to take further steps has been forthcoming. Were it not for one ground of review raised by the applicant I would be inclined to dismiss the matter.

18. The only ground of review that I can assess which does not appear to depend on the availability of a full record is the complaint is the commissioner's conclusion that it was Nyathi who was responsible for permitting the parcels to leave the premises unexamined. By implication, the third respondent was blameless in this respect. This appears to have been a material consideration in the arbitrator reaching his conclusion that there was no evidence implicating the third respondent in approving the removal of the goods from the store.
19. I accept that the commissioner might have had some reason to believe that Nyathi should have shouldered some of the responsibility for allowing the goods to pass undetected from the store. However, it does not follow as a matter of logic that if Nyathi accepted the third respondent's word that the wrapped goods were in order that Nyathi is therefore the blameworthy party in allowing the theft to go undetected. The extent to which the blame ought to have been shared or the extent to which the third respondent's representation to Nyathi was *bona fide* are matters that can only be evaluated in the light of a complete record. In reaching his conclusion on Nyathi's culpability there is nothing to indicate that the commissioner considered whether or not the third respondent had fulfilled all her responsibilities which would have enabled her to confirm the status of the parcels.
20. It is true the commissioner found that the third respondent had not made a misrepresentation when she confirmed what she had seen wrapped, but his conclusion that she was blameless appears to have strongly influenced by his conclusion that Nyathi ought to have searched the goods notwithstanding the third respondent's representation.
21. The commissioner appears to have decided on the strength of this finding that the question of any culpability on the third respondent's part was finally disposed of, whereas he ought also to have considered the evidence of what the third respondent's duties were in relation to the vetting and storage of the packaged

goods. It is also clear that the essence of the charge was that the third respondent failed to properly clear the goods, even if some blame might be attributable to Nyathi.

22. In the circumstances, I believe the way in which the commissioner considered this issue sufficiently taints the reasonableness of his overall findings on the applicant's lack of guilt and renders that conclusion irrational, because he ignored the fact that Nyathi relied on the third respondent's representation. To the extent that he believed that shouldering Nyathi with the blame relieved the third respondent of any he unreasonably failed to consider other alternatives on who was ultimately to blame for the goods leaving the premises.

Order

23. In the circumstances, I make the following order:

- 23.1. The award of the first respondent dated 10 October 2008 in CCMA case number GAJB 249-08 applicant's is reviewed and set aside.
- 23.2. The second respondent is directed to set the matter down for a fresh hearing before another commissioner.
- 23.3. No award is made as to costs.



ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 23 February 2010

Date of judgment: 22 March 2010

Appearances:

For the applicant: Ms A Groenewald of Snyman Attorneys