IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 3289/05

In the matter between:

WOOLWORTHS (PTY) LTD	APPLICANT
AND	
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER KAUSHILLA GUNASE	2ND RESPONDENT
C MASOLENG	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction1

[1] This is an application to review and set aside the arbitration award of the second respondent (the commissioner) dated 29th August 2005 under case number GAJB4629-05. In terms of the arbitration award the commissioner found the dismissal of the third respondent (the employee) to have been substantively unfair and ordered that she be reinstated.

[2] The employee has applied for condonation for the late filing of her answering papers which the applicant opposed. Whilst, the reasons for the delay in filing the answering affidavit are not satisfactory I have been persuaded to grant the condonation because of the strong prospects of success which have compensated for weakness in explaining such a delay.

The parties

[3] The key parties in this matter are: the applicant Woolworths (Pty) Limited, a company registered and incorporated in terms of the company laws of South Africa and carries on business as a retailer. And the third respondent, Ms Christine Masoleng a former employee of the applicant who at the time of her dismissal was employed as a customer sales supervisor. At the time of her dismissal the third respondent had been the employ of the applicant for a period in excess of 22 (twenty two) years.

The background facts

[4] The employee was dismissed by the applicant for misconduct related to the alleged concealment of a dress and a belt at the work place. The incidents occurred on 18th and 19th January 2005, the employee was observed through a CCTV surveillance camera in the room behind the customer services allegedly concealing a white ladies top and a belt under her clothing. Arising from these incidences the employee was charged with following offence:

"Gross misconduct in that you concealed merchandise without paying for it, which resulted in a loss to the company. This occurred on 1910112005 / 1810112005."

[5] The employee was found guilty as charged and dismissed. Thereafter being unhappy with the outcome of the disciplinary hearing the employee referred a dispute to the CCMA for conciliation and that process having failed to produce the desired results failed the matter was arbitrated upon.

[6] The employee did not dispute the contents of the footage but explained that she had put the white cloth under the clothes she was wearing to absorb perspiration, as it was hot in the area in which she worked. The second incident which occurred on 19th January 2005 relates to the video footage showing the employee placing a belt beneath her clothing. In her defence, the employee explained that the belt belonged to her.

[7] The case of the employee in her defence was that she did not steal the items in question and as stated earlier that she had used the white top to absorb perspiration because she had not had any paper towels and that she had not been in a position to go to the cloakroom to get towels because she was not permitted to leave her workstation unattended. She further indicated that she had later removed the item and had left it where the wasted merchandise was kept.

[8] The employee testified during the arbitration hearing that it was her function to capture wasted items daily and that the white top she used had been captured by her as "waste" and that she had used the item because it had "no value." It is

common practice at the applicant's store that *"wasted'* items are normally sold to staff or donated to charity. The item was housed in a room behind the customer services department where the video footage had been captured.

[9] As concerning the incident, which occurred on 19th January 2005, the employee testified that the belt in question belonged to her and that on that day she had come to work wearing that particular belt but had to remove it because of the heat. After taking that belt off she left in the room where the video recording had been shot. She then before taking lunch went back to the room to retrieve a key and attached it to the belt. She then rolled up the belt and placed under her clothes in her breast with a paper towel over it because she did not want the belt buckle to cause any injury to her.

The arbitration award and the grounds for review

[10] The applicant challenges the arbitration award on the grounds that commissioner committed misconduct in relation to her duties as an arbitrator and gross irregularity in the manner in which she conducted of the proceedings. The further ground of review is based on the ground that the commissioner exceeded her powers.

[11] In analyzing the facts and considering the substantive fairness of the dismissal of the applicant the commissioner found the following:

(a) The third respondent did not deny that she had placed the top under her clothing but that she had provided a justification for doing so.

(b) The white top in question was the property of the applicant.

(c) The third respondent did not dispute that she had placed the belt under her clothing, but maintained that the belt was hers and that she had brought it to the enquiry in the event that the chairperson requested it.

(d) That it was not disputed that the belt belonged to the third respondent.

(e) That although the applicant markets similar belts to the one in question there was no evidence to substantiate the claim that the belt was part of the applicant's merchandise.

[12] It is apparent from the reading of the award that the commissioner rejected the version of the applicant that the belt in question was its property. In addition the commissioner found that the employee had been an honest witness and that her version had not been improbable. In this respect the commissioner says that the third respondent could not be found guilty for placing her belt under her cloths. The commissioner found that the applicant had failed to show that the employee was guilty of the alleged offence, which took place on 19th January 2005.

[13] In finding the dismissal of the employee to be substantively unfair and ordering the applicant to reinstate the employee, the commissioner reasoned that the charge against the employee related to the concealment of merchandise without having paid for it and that such an offence was not recorded in the applicant's disciplinary code. The commissioner further reasoned that even if she was to accept that such an offence exists given the fact that the list of transgressions in the applicant's disciplinary code:

"Concealment denotes an intention to hide or keep secret. In order to be guilty of this charge therefore, an employee must harbour a dishonest intent that, in all probability, would relate to pilfering."

[14] In applying the definition of concealment to the facts of the case the commissioner was not convinced that the conduct of the employee amounted to concealment in the circumstances of the case. After dealing with the definition and analysis of what constitutes concealment the commissioner concludes that it cannot be said that the employee was innocent. The commissioner then found in this respect that the conduct of the employee was akin to the unauthorized use of the applicant's property.

[15] The commissioner having concluded that the employee was not innocent then proceeded to deal with the appropriateness of the sanction. In this respect the commissioner acknowledged that the employers are entitled to set the standard of conduct expected of their employees and to determine the sanction to be imposed in an event of non compliance.

[16] The commissioner in relying on the authority of *County Fair Foods (Pty) Ltd v CCMA & others [1999] 11 BLLR 1117 (LC) and De Beers Consolidated Mines Ltd v CCMA & others [2000] 9 BLLR 995 (LCA),* held that interference with the sanction imposed by an employer would be justified if the decision was unreasonable and unfair.

[17] In considering the fairness of the sanction the commissioner had the following to say:

"The respondent presented no evidence that the (actual) charge leveled against the applicant attracted the sanction of dismissal in the first instance according to its disciplinary code. Nonetheless, I note that dismissal was an inappropriate penalty given the following pertinent aspects. Unlike the assumption of consumption of food, which the respondent repeatedly referred to, the applicant stated that she left the top/vest in the store. Thus whether the respondent did indeed suffer a loss is open to question. There was also nothing to indicate that the applicant harboured a dishonest intent. In this regard I note that the applicant was not found in possession of the item when she left work, which would have denoted a premeditated intention to deprive the respondent of its property thereby causing it to suffer a loss. Had this been the case then there could be no doubt that this would certainly have impacted adversely on the employment relationship. As noted in Toyota South Africa Motors (Pty) Ltd v Radebe and others [2000] 3 BLLR 243 (LAC), per Zondo AJP (as he then was) at para 15 to 16:

> *"Although a long period of service of an employee would usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are such a serious nature that no length of service can save an employee who is guilty of them from*

dismissal. To my mind one such clear act of misconduct is gross dishonesty."

[18] In addition to the above the commissioner also considered the provisions of the applicant's disciplinary code and observed as follows:

"… in this regard I note further that the said code notes that: 'the corrective measure or consequences listed … should be used as guidelines for fair and consistent discipline of employees. Persuasive mitigating and aggravating circumstances may lead to a more lenient or a harsher corrective measure or consequence being imposed.' The document record further that: 'serious or dismissable transgression … will attract final written warnings or dismissals following a formal disciplinary procedure. The penalty will depend on the seriousness of the transgression.' (P.33) Thus whilst I accept that the applicant did indeed misconduct herself (in the one instance) I am of the view that her unblemished disciplinary record, long service as well as the provisions of the respondent's disciplinary code militates against the sanction of dismissal in the first instance. Accordingly, I am drawn to the conclusion that the sanction was inappropriate and that the applicant's dismissal is therefore substantively unfair."

The test for review

[19] In the unreported case *Relyant Retail Limited t/a Bears Furnishers v The Commission for Conciliation, Mediation and Arbitration and others case*

number JR2841/06, this Court held that the function of the court in considering whether or not to interfere with the arbitration award on review is limited to those grounds provided for in terms of section 145 of the Labour relations Act 66 of 1995, as suffused by the constitutional standard of reasonableness. The reasonable standard entails the applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision maker could not reach. See *Bato Spar Fishing (PTY) v Minister of Environmental Affairs and Tourism 2004 (7) BCLR 687(CC), Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC).* In order to succeed in relying on the grounds set out in section 145 the applicant must show that the commissioner:

> *"(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;*
>
> *(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or*
>
> *(iii) exceeded the commissioner's powers."*

[20] The Court further held in that case that the issue of whether or not the commissioner committed a gross irregularity or failed to apply his or her mind entails a determination as to whether or not the complaining party was accorded a full and fair hearing by the commissioner. A fair and full hearing entails a determination of all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or

conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the arbitrator. See *Sidumo at 1179 A-C and 1180 A-C.* There is however authority that it is not every irregularity that would constitute gross-irregularity.

[21] In the *Bears Furniture's* case (supra) the court held that the judicial review powers given to the Labour Court is not for the purpose of necessarily weighing evidence which was presented during the arbitration hearing, upon which the commissioner acted upon in arriving at his or her conclusion. The enquiry which the court needs to conduct is whether or not there is the evidentiary basis for the conclusion reached by the commissioner. In other words the duty of the court in review is to determine whether the conclusion reached by the commissioner has its support in substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts. In my view, of course this inquiry may answer both the question of whether the commissioner committed gross irregularity or the reasonableness or otherwise of the award.

[22] In addition to what I have already stated above the general rule, as I understand it, is that the function of a reviewing Court in dealing with the complaint of gross irregularity is limited to determining whether or not a commissioner in exercising the powers given to him or her by the Labour Relations Act did so within the appropriate sphere of those powers and whether the conclusions reached in the exercise of those powers are grounded on the relevant principle of

law and supported by all the evidence and the material facts which were presented during the arbitration proceedings. I may hasten to also say if there is deviation from the facts or the law it must be of such a material nature, that it would amount to a denial of a fair hearing to the affected party, for that to warrant interference with the award by the Court.

[23] The question that arises from the above is whether the conclusion reached by the commissioner falls outside the range of reasonableness so as to attract interference with the award by the court. The standard to apply when determining whether or not a conclusion reached by a commissioner is reasonable or otherwise is that of a reasonable decision-maker. The question to ask in considering the reasonableness or otherwise of an award is to determine whether the conclusion of the commissioner is one which a reasonable decision-maker could not reach. See *Sidumo v Rustenburg Platinum Mines Limited (2007) 12 BLLR 1097 (CC).*

[24] This Court has previously observed that in addition to the general test applied in review cases the Constitutional Court in Sidumo also dealt with the approach which the CCMA commissioners should follow when determining the appropriateness of the sanction imposed by the employer. The approach adopted by Constitutional Court, confirmed two of the decisions of the Labour Appeal Court in the cases of *Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC)* and *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC).* In those cases the Labour Appeal Court held that

the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case. The commissioner is in terms of these decisions required to decide the issue of the appropriateness of the sanction in accordance with his or her own sense of fairness. (See Engen at par 117 at 1559 A, - par 119 at 1559 H-I; par 126 at 1562 C-D, par 147 and Sidumo at paras 75 and 76). The determination of the fairness or appropriateness of a dismissal is an issue to be left to the commissioner and not the employer or the reviewing Court. In this regard it was said in *Sidumo* (at para 75) that:

> *"Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."*

[25] In *Sidumo* the Court developed guidelines which commissioners could use in determining the fairness of the dismissal. The factors which a commissioner must take into account when weighing whether a dismissal is an appropriate sanction or otherwise, are stated in *Sidumo* (at para 78) as follows:

> *"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 basis of the employee's challenge to the dismissal; 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."

[26] 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.

[27] It is now generally accepted that the above, not being an exhaustive list, the commissioner would also, in terms of the decision in *Engine,* be required to consider the provisions of sections 188(1) and 192(2) of the Act, including Schedule 8 of the Code of Good Practice: Dismissal. Section 188(1) requires that the commissioner must take into account any relevant code of good practice issued in terms of the Act. And section 192 which provides that, the employer must prove that the dismissal is fair.

Evaluation

[28] Turning to the facts in the present instance, it is apparent that the commissioner in determining the fairness of the sanction was influenced by the factors mentioned is said in the above quotation from the arbitration award.

[29] The other factor which the commissioner took into account in his evaluation of the appropriateness of the sanction was the 23 (twenty eight) years of service

which the employee had with the applicant. This long period of service was accompanied by a clean disciplinary record. There is no suggestion from the facts and the circumstances of this case and in particular taking into account the length of the service and the clean record that the employee is likely to commit the same offence in the future and therefore should not be given a second chance but be given the most severe punishment of dismissal. I share the same view as that of the commissioner that for this reason alone the dismissal of the employee was unfair and accordingly the decision of the commissioner which is so well reasoned in as far as this aspect of then matter is concerned cannot be faulted.

[30] Accordingly, the applicant's review application stands to be dismissed. I see no reason why costs should not both in law and fairness follow the results.

[31] In the premises the following order is made:

(i) The third respondent's late filing of the answering affidavit is condoned.

(ii) The review application is dismissed with costs.

Molahlehi J

Date of Hearing : 15th September 2009

Date of Judgment : 14th December 2009

Appearances

For the Applicant : Adv A L Cook

Instructed by : Perrott Van Niekerk Woodhouse Matyolo Inc

For the Respondent: Adv D Selala

Instructed by : Kgotleng Attorneys