REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA6/2012

In the matter between:

MASSDISCOUNTERS T/A GAME **Appellant**

and

COMMISSIONER FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER JABULANI NGWANE N.O. **Second Respondent**

DARRYL KONDIAH **Third Respondent**

Heard: **19 September 2013**

Delivered: **13 February 2015**

Summary: Review of arbitration award- Employee dismissed for fraudulent misrepresentation- Commissioner finding that employee subjected to double jeopardy and that sanction too harsh- Labour Court upholding commissioner award. Appeal-review test restated- commissioner failing to consider gravity of misconduct; failing to apply his mind to evidence; arriving at unreasonable outcome- Commissioner committing gross irregularity that vitiates his award. Award failing the review test. Appeal upheld- employee's dismissal upheld.

Coram: Tlaletsi DJP, Dlodlo *et* Mokgoatlheng AJJA

JUDGMENT

MOKGOATLHENG AJA

Introduction

[1] This is an appeal against the judgment of the *court a quo* (Pather AJ) in terms whereof she upheld the arbitration award issued by the second respondent pursuant to which the latter held that:

(i) the dismissal of the third respondent was substantively unfair;

(ii) the third respondent be reinstated retrospectively from the date of his dismissal; and

(iii) the appellant must pay the third respondent three months' salary amounting to R10 500.00.

The Factual Matrix

[2] The appellant is a national retailer which conducts trade in electronic, visual and sound equipment. The appellant employed the third respondent on 29 October 2005 as a warranty consultant at its store at the Getaway Shopping Centre in Durban. The third respondent's duties encompassed amongst others the selling of extended warranties to purchasers of Sony Home Theatre Systems.

[3] Prior to May 2006 there was a nationwide practice by warranty consultants who misrepresented to customers who purchased a single Sony Home Theatre System unit, that a Sony DVD System Player and/or a Sony Digital Amplifier were constituent components thereof. Pursuant to this misrepresentation warranty consultants sold two extended warranties instead of one in respect of the sale of a single Sony Home Theatre System unit to customers who purchased same.

[4] It is common cause that the sale of two warranties in respect of a single Sony Home Theatre System unit was not in accordance with the Extended Price List which entitled warranty consultants who executed a sale of single Sony Home Theatre System unit to be paid a single sale pursuant to such sale.

However, the warranty consultants who sold a single Sony Home Theatre System unit by such misrepresentation earned double the commission they were entitled to.

[5] When the appellant discovered this wide spread irregular practice it conducted a national forensic inquiry and instructed its store managers to remedy same. There was however, no uniform policy adopted by the appellant's store managers in dealing with recalcitrant warranty consultants guilty of perpetrating this irregular practice.

[6] In May 2006 the third respondent was confronted by his manager Prithiral with regard to whether he also sold two extended warranties in respect of the sale of a single Sony Home Theatre System unit contrary to the dictates of the Extended Price List which depicted the Sony Home Theatre System as a single unit. The third respondent admitted his guilt in this regard. Prithiral advised him to stop this irregular practice as same constituted misconduct.

[7] In July 2006 after the conclusion the national forensic investigation into the irregular sale of extended warranties the third respondent was charged with: "*dishonesty in that he manipulated the Extended Warranty Price List on four occasions by splitting the Sony Home Theatre System into components and selling two warranties instead of one for (his) own financial gain."*

[8] The third respondent admitted selling two extended warranties contrary to the Extended Warranty Price List in respect of the sale of a single Sony Home Theatre System unit but contended that he did so due to a lack of training. This defence was rejected the third respondent was found guilty and was dismissed.

The Arbitration

[9] The third respondent referred the dispute to conciliation. After the unsuccessful conciliation, the dispute was referred to arbitration. At the arbitration the third respondent conceded that he had not correctly applied the Warranty Price List. The third respondent also conceded that the irregular conduct of selling two extended warranties in respect of the sale of a single

Sonny Home Theatre System unit had benefitted him as he had earned double commission he was entitled to contrary to.

[10] The second respondent found that the third respondent had clearly committed a reprehensible act taking into account that he was an experienced warranty consultant. The second respondent, however, concluded that the dismissal of the third respondent was not an appropriate sanction, consequently, he held that his dismissal by the appellant was substantively unfair.

[11] The second respondent found that despite the third respondent having been given the sanction of a warning by his manager Prithiral, two and a half months subsequent thereto the appellant preferred charges of dishonesty against the third respondent which resulted in his dismissal. According to the second respondent the appellant's conduct in preferring charges of dishonesty against the third respondent, after receiving warning from his manager Prithiral for the same misconduct, amounted to the third respondent being subjected to double jeopardy, consequently, the second respondent held that the third respondent's dismissal was irregular.

The Review

[12] The *court a quo* upheld the arbitration award. In dealing with the question of double jeopardy the *court-a-quo* held that:

> *'While I do not agree with the commissioner's conclusion that the subsequent disciplinary action against the employee amounted to double jeopardy, it cannot be said that the commissioner failed to consider all the evidence before him, having due regard to the applicable legal principles…*
>
> *It seems to me that having found that the employee had committed the misconduct, which in the words of the commissioner was 'a reprehensible act', in deciding whether the dismissal in all the circumstances was fair, he took issue with the sanction. Perhaps he concluded that dismissal in all the circumstances was harsh? The limited back-pay awarded to the employee indicates that the commissioner had fully applied his mind to the issue of an appropriate sanction for the misconduct. Therefore, although he eventually reached what in my view is a wrong conclusion in respect of the double*

jeopardy principle, there is no doubt that his decision is reasonable and justifiable based on the evidence that was presented before him.'

[13] The appellant's counsel correctly argued that it was erroneous for the second respondent to have concluded that the third respondent had been subjected to double jeopardy because he had merely been warned by his manager Prithiral to cease the irregular practise that no disciplinary was held preceding such warning.

[14] In reaching the above conclusion the second respondent clearly did not properly apply his mind to the evidence before him, consequently, he committed an irregularity by concluding that the third respondent had been subjected to double jeopardy. It is common cause that the appellant did not convene two different disciplinary enquiries which subjected the third respondent to the same offence. See *BMW SA (Pty) ltd v Van der Walt* (2000) 21 ILJ 113 (LAC) and *Branford v Metro Rail Services (Durban) and Others* (2003) 24 ILJ 2269 (LAC).

[15] Having regard to the second respondent's irregularity, it is patent that the *court-a-quo* misdirected itself in holding that it cannot be said that the second respondent failed to consider the totality of the evidence before him despite having found that the third respondent was subjected to double jeopardy. Because the second respondent did not even consider the gravity of the third respondent's transgression on the fact that dishonesty is a dismissible offence, his erroneous finding that the third respondent was subjected to double jeopardy is the *raison d'être* predicating his conclusion that the third respondent's dismissal was substantively unfair.

[16] The conclusion by the *court a quo* that irrespective of the second respondent having reached a wrong conclusion regarding the issue of double jeopardy, his decision was nonetheless reasonable is a misdirection because the learned Judge failed to take into consideration that the second respondent erroneously based his finding that the dismissal of the third respondent was not an appropriate sanction on the premise that the third respondent was subjected to double jeopardy.

[17] Because the second respondent conclusion that the third respondent was subjected to double jeopardy underpinned his decision that his dismissal was an inappropriate sanction, it cannot be said that the second respondent's award was a reasonable award a reasonable arbitrator could have made having regard to the evidential material before him, consequently, his award is flawed.

[18] The third respondent's counsel argued that although the appellant's contention was that the sale of two warranties in respect of the sale of a single Sony Home Theatre System unit constituted the misconduct of dishonesty which is a dismissable offence, the second respondent had correctly found that the dismissal of the third respondent was not the appropriate sanction having regard to the circumstances of this case. I demur.

[19] Regarding the seriousness of the offence, the conduct of the third respondent in fraudulently manipulating the Extended Warranty List, the bar codes and selling two extended warranties instead of one in respect of the sale of a single Sony Home Theatre System unit, the misrepresentation that a Sony DVD System Player and a Sony Digital Amplifier were components of a Sony Home Theatre System, and the fact that this fraudulent misconduct unlawfully benefit the third respondent to the prejudice of the appellant, were exigencies and factors not appreciated either by the second respondent or the *court-a-quo*. See *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 304 (LAC), *Woolworths (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 963 (LAC).

[20] This court revisited the question of dishonesty in the judgment of *Miyambo v CCMA and Others*[1] wherein Patel JA reiterated the fact that acts of dishonesty described as petty pilfering were simply not acceptable. The Learned judge rejected the distinction between theft and petty pilfering and upheld the dismissal of the employee as a valid operational prerogative of an employer.

[1] [2010] 10 BLLR 1017 (LAC).

[21] The question is whether the award the second respondent made is a reasonable award in accordance with the test enunciated in *Herholdt v Nedbank Ltd*[2]. In my view it cannot be for two reasons. Firstly, the second respondent committed a gross irregularity in his assessment that the third respondent was subjected to double jeopardy, this conclusion is the lynch pin of the reasoning predicating the award. Secondly, there was a complete lack of appreciation of the complex *modus operandi* of the dishonesty perpetrated by the third respondent in this particular case, and the fact tha the seriousness of the dishonesty merited to be visited with summary dismissal.

[22] In *Herholdt Nedbank Ltd,*[3] Wallis JA regarding the review of CCMA awards stated:

> *'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'*

[23] In other words the approach is to consider whether a material irregularity has occurred. If it did, the second part of the inquiry is, whether the outcome is unreasonable. This approach has been followed by Waglay JP in a recent judgment in the *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v The Commission Conciliation Mediation and Arbitration*[4] wherein at paragraph 14 the Learned Judge President states:

> *'Sidumo does not postulate a test that require a simple evaluation of the evidence presented to the arbitrator and based on that evaluation a determination of the reasonableness of the decision arrived at. The Court in*

[2] [2012] 33ILJ 1789 (LAC).
[3] [2013] 11 BBLR 1074 (SCA) at para 25.
[4] [2014] 35 ILJ 943 (LAC).

> *Sidumo was at pains to state that arbitration awards made under the Labour Relation Act continue to be determined under Section 145 of the LRA, but that the Constitution standard of reasonableness is" suffused" in the application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings and/or excess powers, will not lead automatically to the setting aside of the award if any of the above grounds are found to be present. In other words in a case such as present where a gross irregularity in the proceedings is alleged, the inquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was reasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in the band of decisions to which a reasonableness decision-maker could come on the available material."*[5]

[24] The Learned Judge President has elaborated further on what Wallis JA held in *Herholdt* (supra) and states at paragraph 16:

> '*In short, a review Court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion that is reasonable'*

[25] In distancing himself with a piecemeal approach to review, the learned Judge President says at paragraph 20 of the judgment states that:

> *'the award is open to be set aside where an arbitrator, fails to mention a material fact in his or her award: or, fails to deal in his award in some way with the issue which has some material bearing on the issue in dispute and/or commits an error in respect of the evaluation and consideration of facts presented at the arbitration…*

and at paragraph 21:

> *'Where the arbitrator fails to have regard to material facts, it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process, he or she may produce an unreasonable outcome.'*

[5] At para 14.

[26] In the award the second respondent in respect of the sanction clearly failed to take into account the dishonesty which was patent in the manipulation of the Extended Price List, and the barcodes, that the conduct was deliberate and fraudulent and was perpetrated for the benefit of the third respondent to the prejudice of the appellant. Although each fraudulent manipulation of the sale of a single Sony Home Theatre System unit did not amount to a considerable payment of the commission fraudulently earned, that is neither here nor there because it is the cumulative context in relation to which the perpetration of the fraudulent dishonesty is decisive when coupled with the fact that the appellant regarded the conduct of the third respondent as a gross violation of the employment and trust relationship.

[27] Consequently, in accordance with the *Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others*[6] test, on the totality of the facts before the second respondent the decision he reached is not a reasonable decision and is consequently susceptible to be set aside as enunciated in *Herholdt* supra and in Goldfields Mining (supra). In the present matter there is undoubtedly a gross irregularity in the reasoning of the second respondent in finding that the third respondent had been subject to double jeopardy, this gross irregularity resulted in an award that is unreasonable and which does not fall within the band of reasonable decisions a reasonable arbitrator would arrive at.

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

(i) The appeal is upheld;

(ii) The dismissal of the third respondent is fair;

(iii) There is no order as to costs.

[6] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).

_____

Mokgoatlheng AJA

The Deputy Judge President of the Labour Appeal Court of South Africa

Tlaletsi DJP and Dlodlo AJA concur in the judgment of Mokgoatlheng AJA

APPEARANCES:

FOR THE APPELLANT:	Adv G Van Niekerk SC
	Instructed by Messrs Shepstone & Wylie
FOR THE RESPONDENT:	Adv M Pillemer SC
	Instructed by Messrs Jafta Incorporated