THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: D62/23

In the matter between:

Blue Falcon 188 Trading (Pty) Ltd t/a Side Step	**Applicant**
and	
Commission for Conciliation Mediation and Arbitration	**First Respondent**
Thobela Mqamelo N.O	**Second Respondent**
Shange & 4 Others	**Third Respondent**

Heard: **18 July 2024**
Delivered: **16 October 2024**

JUDGMENT

PILLAY, AJ

Introduction

[1] The applicant has instituted review proceedings in terms of section 145(2)(a)(i) of the Labour Relations Act[1] (LRA) where it challenges the arbitration award issued by the second respondent under case number KNNNC416-21. The arbitration award was given by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA). The review application was opposed by the third respondent.

[2] The arbitration proceedings and review application emanate from the dismissal of five employees, cited as the third respondent in these proceedings, whose services were terminated pursuant to a disciplinary enquiry which took place on 11 February 2022.

[3] The employees were subjected to the following charges:

1. work output in relation to the intentional loss/misuse of company property in that the said employees were directly responsible for a substantial stock loss of R23 434,61 during the period of 2 February 2021 to 24 February 2021 in the Side Step Murchison Store; and
2. gross negligence in that the said employees failed to look after the stock in the shop where they were stationed.

[4] The employees pleaded not guilty to the charges but were eventually found guilty and dismissed by the applicant on 1 April 2021. The employees challenged their dismissals as an unfair dismissal to the CCMA, and their dispute came before the second respondent for arbitration. At the conclusion of the arbitration proceedings, and in an arbitration award dated 2 May 2022, the second respondent found in favour of the employees and determined that the employees' dismissal by the applicant was procedurally fair but substantively unfair.

[5] The second respondent then ordered the applicant to pay the third respondents their respective backpay and ordered that they be reinstated on the

[1] Act 66 of 1995, as amended.

same terms and conditions no less favourable to them than those that governed the employment relationship immediately prior to their dismissals on 1 April 2021.

[6] The review application was timeously delivered to the third respondents. I will therefore now proceed to decide on this review application, by first setting out the relevant background facts.

Relevant background facts

[7] The applicant is an independent footwear and retail chain store based across Southern Africa. The employees were all employed by the applicant at the applicant's Side Step Murchison retail store with their relevant job descriptions being that of store manager, assistant manager and sales assistants.

[8] In terms of the third respondents' contracts of employment and the applicant's store policy and procedures, the employees assumed responsibility for all stock losses that took place within the store. The applicant's policy also requires that all employees are searched on every occasion on which they are required to leave the store. The store managers are required to ensure daily spot checks on stock items and that a minimum of 20 core stock items are counted by each staff member per day.

[9] The spot-check protocol formed part of the collective responsibility of each staff member, who was required to count the 20 line items, which included footwear.

[10] On 19 January 2021, the applicant conducted a stock take for the period of 8 September 2020 to 19 January 2021, "the first stock take". The results of this stock take disclosed a stock loss to the value of R60 085.17 for that period. The employees were not charged or subjected to any disciplinary hearing for the stock losses during this period in circumstances where they had contracted COVID and were not present at work as they were quarantined. The employees were however present at work between the period of 19 January 2021 to 2 February 2021.

[11] On 2 February 2021, a further stock take was conducted, “the second stock take”, where a stock loss of R4 480.52 was discovered.

[12] On 9 February 2021, the employees received final written warnings arising from the stock take conducted on 2 February 2021, coupled with an ultimatum that they should stop any conduct which caused stock losses and to provide information regarding those responsible for the losses.

[13] Between the period of 2 February 2021 and 24 February 2021, the employees were all on duty and participated in the further and most relevant stock take exercise, “the third stock take”. The results of this stock take disclosed a stock loss of R 23 434.61 at cost and R 46 869.22 at retail during the aforesaid period. The results of the stock take are reflected in a stock control sheet and a variance report, which show the specific items that were not accounted for.

[14] The stock loss is calculated by a stock controller employed by the applicant and the variance report is checked by the store manager and the stock controller. This is in accordance with the stock-take policies and procedures of the applicant. The policy also provides that once the store manager is satisfied with the variance report and discrepancies have been explained to all the staff, the report is signed by all staff who accept responsibility for the stock take in the store.

[15] The previous losses for the first stocktake, which was done on 19 January 2021 amounting to R60 085.17, were not carried over to the last stock take.

[16] The employees confirmed the results of the stock take, signed the stock controllers report and agreed with the variance in the stock found in the store.

[17] As a consequence of the third stock take and the excessive loss sustained by the applicant, the third respondents were all subjected to a disciplinary enquiry where they were found guilty of charges preferred against them. The respondent called one witness, that being Ms B Shange during the disciplinary hearing. No other employee testified at the disciplinary hearing.

[18] The chairperson of the disciplinary enquiry took into account that all footwear is stored in the storeroom and that no customers have access to the storeroom. He found that Shange was in possession of information which would enable the applicant to identify the perpetrators, and that she failed to meet the required standard to prevent the stock losses. He thus concluded that only the applicant's employees had access to the storeroom and that on a balance of probabilities, the third respondents were responsible for the stock losses.

[19] The third respondents then challenged their dismissals as an unfair dismissal dispute to the first respondent, which came before the second respondent for arbitration. The employees challenged their dismissals as being both substantively and procedurally unfair.

The arbitration proceedings

[20] The applicant called one witness, Thabang Mokate (Mokate), the area manager who testified regarding the applicant's store policies and procedures. The crux of his evidence disclosed *inter alia* that the applicant's policy required that every employee be searched every time they left the store, that the store managers were to ensure daily spot checks on stock items, and that the regional manager be informed of discrepancies so that investigations could be conducted to rectify stock losses.

[21] He confirmed that the employees in question did not report any stock losses to him during the period for which they were charged and that he was told that the stockroom was not correctly packed. Mokate testified that the stock take was the responsibility of every employee in the store and that employees were responsible for double-checking variances. He confirmed a detailed process with reference to the applicant's policy and that variance reports had to be checked by the store manager and stock controller.

[22] He confirmed that between 2 February 2021 and 24 February 2021, the employees were on duty and participated in the stock take where they confirmed the variances which they signed. He further pointed out that the shoes could not be

stolen since they only placed one left shoe on the display and the other was kept at the back room of the store, therefore customers could not steal one shoe.

[23] Mokate made reference to all the documentary evidence produced by the applicant and confirmed the stock loss on 19 January 2021 in the amount of R60 085.17, 2 February 2021 with a stock loss of R4 480.52, and 24 February 2021 with a stock loss of R23 434.61. He concluded his evidence by pointing out that the employees had signed the disciplinary code, which confirmed that gross negligence was dismissible on a first offence.

[24] Under cross-examination, Mokate disputed the issue of stock not being adjusted and also pointed out that he could not recall employees questioning him about stock not being adjusted. Mokate further disputed that the employees requested any spot-check document.

[25] The third respondent called two witnesses on their behalf. The first witness, Busisiwe Shange (Shange), a sales representative, confirmed that all employees were given a code of conduct and the applicant's policies. Her evidence was that the applicant was aware of the loss as they informed the regional manager. She also confirmed that it was not possible for customers to steal shoes.

[26] Shange further testified that the employees were not given an opportunity to request spot-check documents. Shange conceded that all employees are collectively responsible for all stock in the store during periods when they are present. She conceded that spot checks are undertaken every day, that no person was allowed to open the store by themselves, and that no person was allowed to leave the store without being searched.

[27] Shange's evidence under cross-examination was that the employees reported the stock loss which occurred in 2021 and that the stock loss for that period, being R60 000.00, was during a period when another manager had opened the shop alone. She however conceded that the employees were all present when the last stock take was done.

[28] The third respondent called its second and final witness, Hlengiwe Hlongwane (Hlongwane) who was also employed as the store manager at the applicant's store. She testified that after her return from quarantine in January 2021, the employees conducted a stock count under the supervision of Mokate. Mokate then gave the employees a written warning for the stock loss of R60 000.00.

[29] Hlongwane's evidence was that Mokate stated to them that the signing of the written warnings was *"just signing for our work, it's (sic) not that we will be dismissed",* and that they already told Mokate that the loss was not attributable to the employees as they left their stock in good order. She stated that she told him that the stock was not adjusted, and they began a final count. Before this final stock count, they found boxes under the shelf in the storeroom of the shop.

[30] Hlongwane then confirmed that the employees proceeded to conduct a third stock count, and they ascertained a stock loss of R23 000.00. Her version was that losses from January 2021 were carried over to February 2021. It was then put to her that the closing stock count becomes the opening stock of the next stock count and that losses are not rolled over. Her response was that the applicant conducts that exercise without reverting to the employees and that they are not shown how adjustments are made by the head office. She was questioned with regard to stock being short and how she had queried this with the Applicant's head office. Her response was that she lost her phone. She conceded under cross-examination that she was responsible for keeping the store clean and that she only discovered the empty boxes when she knelt down in the storeroom.

The award

[31] The second respondent first dealt with the issue of procedural fairness. He found that there were no procedural irregularities in circumstances where the applicant complied with codes 2(1) and (4) of the Code of Good Practice: Dismissal[2], and that the employees failed to furnish any evidence to suggest that their dismissals were procedurally unfair.

[2] Schedule 8 of the LRA.

[32] When dealing with the issue of substantive fairness, the second respondent proceeded at the outset to deal with the final written warnings received by the employees on 9 February 2021 and concluded that there was no reason to reject the final written warnings because the employees had signed the warnings and did not challenge the said warnings at the CCMA as constituting an unfair labour practice and accordingly, the said final written warnings stood unchallenged.

[33] The second respondent accepted that the applicants were charged and dismissed for the stock losses that occurred between 2 February 2021 to 24 February 2021 to the value of R23,434.61. He concluded that this stock take followed an initial stock take that was done on 19 January 2021 that disclosed a stock loss of R60,085.17, which occurred from 8 September 2020 to 19 January 2021.

[34] The second respondent further took into account that the applicant adduced documentary evidence that the employees were collectively responsible for any stock loss and that it was in line with the applicant's policy. The second respondent then accepted the arguments from the employees that the stock was not adjusted after the stock take of 19 January 2021 and that the stock was not continuously balancing. He found that the employees led evidence that the regional manager was informed of the errors in the system and the stock in the store.

[35] The second respondent then concluded that the applicant failed to prove that the stock in the system was adjusted to balance the stock on the floor and that there was no evidence led by the applicant to prove that there were no errors in the system.

[36] It is these latter findings and conclusions by the second respondent which form the basis of the present review application.

Grounds of review

[37] The applicant raised several detailed grounds of review in its founding affidavit. The Court has identified those material grounds of review arising from the applicant's founding affidavit with specific regard to the arbitration award.

[38] The applicant first contended that the second respondent erred and failed to take into account various aspects relevant to the third respondents misconduct more specifically, that the employees in question were collectively responsible based on the principle of derivative misconduct.

[39] The applicant then contended that the second respondent erred by not considering the second charge of gross negligence against the respondents which was equal in severity to the first charge.

[40] The applicant also alleged under its grounds of review that the second respondent erred by applying the laws and rules of evidence incorrectly and by ignoring important facts relevant to the matter.

[41] The applicant's additional ground of review is that the second respondent placed an unreasonable onus on the applicant and that he did not apply his mind properly to the matter and failed to consider the facts objectively. It was contended that a reasonable commissioner would have reached a conclusion which was different to that of the second respondent.

[42] The applicant filed a supplementary affidavit, which affidavit is required in circumstances where the applicant is given an opportunity to amplify its grounds of review.[3] Rule 37(20) and (21) of the New Rules of the Labour Court provide that:

> '(20) The applicant must within 5 days after the transcribed record has been filed either –
>
> (a) by delivery of a notice of amendment and supplementary affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

[3] Rule 7A(8)(A) of the Rules for the Conduct of Proceedings in the Labour Court GN 1665 of 1996 which has now been replaced by Rule 37(20) and (21) of the New Rules of the Labour Court GN 4775 of 3 May 2024.

(b) deliver a notice that the applicant stands by its notice of motion.

(21) A supplementary affidavit filed in terms of subrule (20) may do no more than supplement the grounds for review recorded in the founding affidavit or abandon any one or more of them. An applicant who abuses this subrule by including irrelevant or repetitive material in a supplementary affidavit risks an adverse order as to costs.'

[43] It is apparent from the applicant's supplementary affidavit that there are no supplemented or additional grounds of review, and that the supplementary affidavit seeks to refer to specific parts of the record which are already before this Court. The third respondent has not specifically responded to the supplementary affidavit, and the Court is therefore constrained to consider the specific grounds contained in the applicant's founding affidavit.

The test for review

[44] The test to be applied when reviewing a decision of a commissioner has been dealt with extensively in the decision of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*.[4] The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. Applying it will give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair.[5]

[45] The award in question will therefore have to be tested and examined on all the material facts placed before the arbitrator in order to determine whether the findings and conclusions arrived at are in accordance with the decision of a reasonable decision maker.[6]

[46] In order for the court on review to interfere with the conclusions reached by the arbitrator it is thus necessary to consider the material evidence from the record and the conclusions reached to determine the reasonableness of the outcome.

[4] [2007] ZACC 22;(2007) 28 ILJ 2405 (CC).
[5] Ibid at para 110.
[6] See: *Makuleni v Standard Bank of SA (Pty) Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).

[47] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[7], the Court held that:

> 'Material errors of fact, as well as the weight and relevance to be attached 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.'

[48] The approach to determining the reasonableness of the outcome has been consistently applied in a string of decisions over the years. In *Head of the Department of Education v Mofokeng*[8], the Labour Appeal Court correctly held that:

> '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 impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.'

Evaluation

[49] The evidence which the applicant sought to adduce to prove a fair dismissal of the third respondents was premised on the unchallenged evidence of its regional

[7] [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25.
[8] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at para 33.

manager, Mokate, and the common cause fact that the employees all signed the final written warnings and were present at the last stock count.

[50] From an examination of the broad grounds of review relied upon by the applicant, the most decisive of such grounds argued before me will be dealt with henceforth. They are the submissions that the second respondent committed a gross irregularity and came to a decision which a reasonable arbitrator could not have come to, for the reasons that –

1. the second respondent unreasonably accepted the third respondents' version that stock losses were carried over from the previous stocktake period;
2. the second respondent committed a gross irregularity by finding that there was no evidence by the applicant to prove that there were no errors on the system, which required the applicant to prove a negative; and
3. the erroneous finding by the second respondent that the third respondents furnished the store spot-checks to the regional manager for confirmation, when such was never proved by the third respondents.

[51] It is important to draw attention to the critical issue of the third respondents' version that the stock in the system was not adjusted to balance the stock on the floor, and that there was no evidence led by the applicant to prove that there were no errors on the system.

[52] It is apparent from the award, that the second respondent accepted that the applicant adduced evidence that the third respondent was collectively responsible for any stock loss and that it was in line with the company policy. The second respondent, however, then appears to accept the third respondents' version that the regional manager was informed of errors in the system and stock in the store.

[53] It is unclear on what basis these conclusions were arrived at when Hlongwane confirmed that variances were confirmed by the third respondents prior to a new stock take commencing. Her evidence was that there was no proof that she reported any issues regarding the existing stock to the regional manager. It is pertinent to point out that when signing the variance report, the employees expressly confirmed

that they were present throughout the stocktake exercise, that they were satisfied with the manner in which the stocktake was conducted and that they accepted the variances which appeared on the report.

[54] The applicant's primary challenge to the award relates to the second respondent's blanket acceptance of the third respondents' version. It is significant to point out that the second respondent records that the two employees who testified were credible and reliable in their evidence. The second respondent's reasoning appears to be premised on the basis that the employees led evidence that there were errors in the system and that this was reported to their regional manager, Mokate.

[55] There is no finding that Mokate was not a credible witness or that his version should be rejected. From an examination of the award, it is clear that Mokate's evidence in totality was not rejected, but rather appears to have been overlooked and ignored in the reasoning. The Court is left in the dark as to why his unchallenged evidence should not have been accepted.

[56] The further difficulty in the reasoning of the second respondent is the fact that he failed to take into account that the employees who testified had omitted to properly put the version that there were errors on the system to Mokate when he testified. This was a material issue pertaining to their version, yet it was only raised during the course of their version, which was highly speculative and unconvincing.

[57] The second respondent further completely ignored the fact that Mokate disputed the version put to him that adjustments were made prior to the stock count. This in itself was indicative of the fact that the second respondent had not conducted a balanced assessment of the parties' respective versions resulting in him having misconceived the nature of the enquiry leading to an unreasonable result.

[58] The third respondent's version was also premised on the version that another manager, one Mr Reuben, opened the store alone, at a time when the third respondents were not at the workplace. The second respondent's acceptance of this evidence clearly constituted inadmissible hearsay evidence, which was correctly

conceded by the third respondents' representative, Mr Ngcongo, at the hearing of this matter.

[59] In assessing the versions of the third respondent's witnesses, it was clear that they were present during the last stocktake, that they confirmed the results of the stocktake, and that they also would have, according to the applicant's processes, conducted daily spot checks, and most importantly, they signed the last variance reports. On this evidence alone it became common cause that the employees who were charged would have had actual knowledge of when the stock loss would have occurred, yet none of them had come forward or disclosed these losses to the applicant.

[60] Shange and Hlongwane's evidence pointed to speculative defences, which failed to deal with the critical issue, being the fact that the losses occurred during their watch. The second respondent also ignored the fact that none of the charged employees found it necessary to come forward and confirm that they had no knowledge of who was responsible for the loss. The absence of the majority of the charged employees testifying at the disciplinary and arbitration hearings is telling.

[61] The aforesaid issues were all factors which were material in determining the culpability of all five employees, which the second respondent completely ignored in his analysis of the dispute.

[62] The second respondent seemed to have been fixated on the applicant being required to disprove the version of the third respondent employees, when in fact, the charge against the third respondents related to their responsibility for a particular stock loss and gross negligence for a period when they were stationed at the store.

[63] Whilst the second respondent had accepted the versions of the two witnesses on the speculative assertion that there was a system error and that stock was not adjusted to balance the stock in the store, he failed to apply his mind to the fact that the applicant commences its stock take without recourse to historical losses. It would simply make no sense to consider previous losses. The second respondent therefore misconstrued this material piece of evidence and it really does not support his

conclusions in circumstances where what occurred was more probable in accordance with the common cause facts which disclosed that the third respondents were collectively responsible for any stock loss and that they failed in their duties to prevent such loss.

[64] The applicant adduced evidence that the third respondents were all stationed at the store during the particular period, that the stocktake was conducted without taking into account previous losses, and that the third respondents signed for the variances. The third respondents were all accordingly required to gainsay such evidence with credible and relevant evidence. The second respondent had however accepted speculative and inadmissible evidence.

[65] Importantly, the second respondent does not take into account the fact that, despite the employees all having to undertake a daily spot-check of 20 items a day, there was still a stock loss for the period during which they were employed and stationed in the store. The speculative attempts by Shange and Hlongwane to then lay blame on another manager and possible system errors was nothing but a red herring which simply obfuscated the issues before the second respondent.

[66] When Shange was asked directly as to whether she stated that Mr Reuben was the one who stole the stock her response was *"it could be him even though I cannot say that I saw him…"*. It was clear from the reasoning of the second respondent that he failed to apply his mind to the relevant issues before him and that his conclusions were based on a misconception of a critical aspect of the evidence placed before him. His findings that the applicant was obliged to disprove the employees' speculative claim that there was a system error amounted to a gross irregularity in the proceedings and consequently a misconception of the nature of the enquiry.

[67] The misconception of the enquiry together with the admission of speculative and inadmissible hearsay evidence is sufficient to constitute a material irregularity and a distorting effect, which renders the outcome of the award unreasonable and reviewable.

[68] The only reasonable finding on the evidence is that the probabilities are overwhelming that the third respondents were collectively responsible for the stock losses for the period within which they were stationed at the store and were grossly negligent during this period.

[69] The findings by the second respondent that the applicant ought to have proved that there were no errors on the system or that stock was adjusted to balance stock on the floor was not justifiable on the evidence and accordingly, such findings were not in accordance with the finding of a reasonable decision maker. These findings were material to the outcome, because the opposite finding would have led to a different outcome.

[70] I am accordingly of the considered view that the review application should succeed and that the award should be set aside and substituted with an award that the third respondents' dismissals were fair.

Costs

[71] In the circumstances, I have considered the parties' respective arguments on the issue of costs. I have accordingly taken into account the provisions as set out in section 162(1) of the LRA, and the fact that the Court has a wide discretion when considering the issue of costs. I have accordingly taken into account the principle relating to costs in employment disputes and the principles encapsulated in *Union for Police Security and Corrections Organization v SA Custodial Management (Pty) Ltd and Others.*[9]

[72] It is now trite that when determining the issue of costs in labour matters, the Court is required to consider that costs are not ordinarily awarded and that the principle of fairness takes precedence, together with the relative conduct of the parties in the respective approach to the dispute.

[9] [2021] ZACC 41; (2021) 42 ILJ 2371 (CC) at para 35.

[73] It is clear that both parties have not acted in any obstructive or unreasonable manner in either instituting the application or in the opposition of the application.

[74] I am satisfied that there is no reason to deviate from the principle that costs should not follow the result in the circumstances of this matter. I have also noted that the issue of costs was not persisted by any party when the matter was argued before me. I accordingly exercise my discretion regarding costs in this matter by making no order as to costs.

[75] In the result, I make the following order:

Order

1. The review application is consequently granted.
2. The award under case number KNNC416-21 dated 2 May 2022 is reviewed and set aside and substituted with an award that the third respondents' dismissal was both procedurally and substantively fair.
3. There is no order as to costs.

D Pillay
Acting Judge of the Labour Court of South Africa

Appearances:
For the Applicant: Mr DQ Berry representing the Guardian Employers Organization
For the Respondent:Mr BE Ngcongo of NEB Attorneys' Inc