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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR260/2013

In the matter between:

COMPASS GROUP SA (PTY) LTD

Applicant

and

CHRIS VAN TONDER

First Respondent

COMMISSIONER D T LYNCH, N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 14 March 2023

Delivered: 12 April 2023

JUDGMENT

VOYI, AJ

- [1] This is an application launched by Compass Group (Pty) Ltd (Compass), seeking to review and set aside an arbitration award that was issued by the second respondent, Commissioner D T Lynch (Commissioner Lynch) on 14 September 2012 under case number GAJB16972-12.

- [2] The application for review was launched on 05 December 2012. It is opposed only by the first respondent, Mr Chris Van Tonder (Van Tonder).
- [3] It is not necessary to traverse, in detail, the litigation history of the matter. In view of the fact that the review application was only heard by this Court some 10 years after the award was issued, it is necessary to briefly allude to how this delay came about. The delay of over 10 years can be attributed to the fact that the arbitration award was, in the year 2016, found to have prescribed. A judgment in this regard was handed down by this Court on 02 March 2016. On appeal, the Labour Appeal Court, in an *ex tempore* judgment handed down on 01 June 2017, set aside the order of this Court declaring the arbitration award to have prescribed.
- [4] Another contributor to the delay was an application launched by Compass, under rule 11 of the Rules for the conduct of proceedings in the Labour Court, for an order *inter alia* directing the parties as to the proceedings in this matter where the Labour Court file has been destroyed. The rule 11 application was launched on 20 December 2019. The rule 11 application was dismissed with costs by this Court on 29 July 2021.
- [5] In relation to the review itself, Compass assails the award by Commissioner Lynch in which he found that the dismissal of Van Tonder was substantively unfair and that he should, as a consequence, be paid compensation equivalent to four months' salary.
- [6] The grounds for review revolve around Commissioner Lynch's evaluation of the probabilities. What had to be determined at arbitration was the substantive and procedural fairness of Van Tonder's dismissal on account of an alleged misconduct.
- [7] The dismissal of Van Tonder had to do with the disappearance of an amount of R18 100.00 from the employer's safe. As a result of this money having

vanished, Van Tonder was charged with dishonesty and gross negligence. The misconduct charges were framed as follows:

- a) Dishonesty – While you were in possession of the Safe Key an amount of R18 100.00 went missing from the safe.
- b) Gross Negligence – In that you gave the safe key to Thuli Busani, without following the proper handover procedures.

[8] At arbitration, Compass called four witnesses in its endeavour to prove the fairness of Van Tonder's dismissal. The first witness was Mr Jaco-Pierre Ehlers (Ehlers). He testified with reference to an investigation report he had prepared in relation to the money that went missing, it being the R18 100.00. In his report, which formed part of the bundle of documents presented by Compass, he provided the background as follows:

An Incident occurred between the 4th of May 2012 and the 7th May 2012 whereby Restaurant Associates collect money from their Cash loader machines on different floors in Absa Tower West and take it to their offices in Absa Towers West Block B Mezzanine to be counted and thereafter placed in their safe until G4S comes to pick up the money.

On Monday the restaurant Manager Mr Chris Van Tonder informed the Building General Manager Mr Winston Pandaram that there is an amount of R 18 100 missing from their safe.

Fidelity Security Services Senior Management requested that the Absa Towers West Dayshift Security Manager Mr Jaco Ehlers Tel: [...] investigate the incident with regards to money that went missing from a locked safe.

[9] As part of his investigation, Ehlers inspected the office where the safe was located and also viewed the CCTV footage of the area concerned. He remarked in his report that it is '*...unknown how the money went missing from*

a locked safe with no spare key.' After having made certain recommendations, Ehlers concluded as follows:

As this is not the first time money went missing from this Company, this is a management and control issue over the way money is countered and stored.

[10] When asked during the arbitration hearing about the conclusion he arrived at following his investigation, Ehlers testified thus:

MR SCHABORT: So, from your investigation, what could your conclude?

MR EHLERS: That the monies is either not handled correctly or counted correctly from the management or from the people involved in counting as there was no tampering, break-in or anything wrong with the safe.

MR SCHABORT: Okay.

COMMISSIONER: Just for clarification now, it's R18 000, how do you maintain it wasn't countered correctly? I mean, that's quite a miscount isn't it?

MR EHLERS: It must be.¹

[11] Under cross-examination, the conclusion reached by Ehlers were re-visited and he testified as follows:

MR McADAM: Just take me through your findings again, what did you conclude after your investigation?

MR EHLERS: That it might have been that they miscounted or wrongfully counted the monies that they received and pick up themselves from the cash office.

¹ Transcript p 13.

MR McADAM: So, would I summarise your evidence that your opinion is, at best, a mistake had been made?

MR EHLERS: Form their side, yes.²

[12] As can be seen from what is quoted above, there was no evidence from Ehlers to establish the alleged misconduct of dishonesty on the part of Van Tonder.

[13] The second witness to testify for Compass was Mr Jonathan Chatikobo (Chatikobo). This witness did not provide any direct evidence pointing to Van Tonder having taken the money in question. Quite to the contrary, he absolved Van Tonder when he presented the following testimony:

MR McADAM: How long have you known Chris for?

MR CHATIKOBO: Four years.

MR McADAM: Four years?

MR CHATIKOBO: Yes.

MR McADAM: You guys worked closely together. Deep down, if you had to be honest and taking into consideration that you are under oath now, do you believe he stole the money?

MR CHATIKOBO: Deep down, no.³

[14] The third witness for Compass was Mr Gregory Bishop (Bishop), who was its Sector General Manager. His evidence also did not point to Van Tonder having taken the money that went missing. In his testimony, he made it clear that he does not know the merits of the case in detail.⁴ The last witness for Compass was Ms Lethukuthula Busani (Busani), who testified briefly with regard to the second charge of gross negligence. In my view, the evidence of both these witnesses did not establish that Van Tonder had committed the misconduct for which he was charged and ultimately dismissed.

² Transcript p 14.

³ Transcript p 47.

⁴ Transcript p 53.

- [15] It was evident from the onset at arbitration that Compass had no proof of Van Tonder having committed the alleged misconduct. What Compass was working with were the probabilities. On the charge of dishonesty, the representative for Compass during arbitration mentioned that it was “..an issue of probabilities, whether [Van Tonder] had actually removed the cash or not.”⁵
- [16] What was heavily relied upon to support the probabilities of Van Tonder having taken the money was the fact that there was only one key to the safe and that, except for a brief period when he gave same to Busani, he was at all material times the only person who had possession of this key. It seems to be clear to me that Compass was relying on circumstantial evidence to establish that Van Tonder had actually committed the alleged misconduct. Certainly, there was no direct evidence of him having taken the money that went missing.
- [17] I accept that the evidence points to Van Tonder being the only person with the sole key to the safe. The allegations around there having been a second key were mere conjecture which was not established by the evidence. In my judgment, the inference that Compass insisted should be drawn from *inter alia* the specifically proven fact of there having been only one key is certainly not the most probable inference. That inference is that Van Tonder, at some point in time, used the key he had to remove the money from the safe.
- [18] Much to Compass’ disadvantage, this inference is even dispelled by the witnesses it called to prove its case. Ehlers’ conclusion was that there was a miscount and he therefore did not attribute the alleged disappearance of the money to Van Tonder. For his part, Chatikobo not only stated that he did not believe Van Tonder had stolen the money but he also testified that he would be comfortable working with Van Tonder despite what he was accused of.

⁵ Transcript p 5.

- [19] It was submitted before Commissioner Lynch, by Compass' representative in his heads of argument, that the alleged theft of the money occurred between 4 May 2012 and 7 May 2012. It was further submitted that Ehlers had '*... confirmed via video footage submitted over the period of 4 May to 7 May 2012, that [Busani] had not been seen entering the office containing the safe within the mezzanine level in that period...*'. If the money disappearance from the safe between 4 and 7 May 2012 and that a video footage over this period was viewed, it would have shown Van Tonder taking the money if indeed that is what occurred. This is a rather strange case where a litigant was arguing against the exculpatory evidence of its own witnesses, labelling such as mere opinions which ought not to have influenced the decision of the arbitrator.
- [20] These being review proceedings, the test for interference with the decision of a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) is constricted. Recently in *Makuleni v Standard Bank of South Africa Ltd and Others*,⁶ the Labour Appeal Court restated the test for reviewing an award of the CCMA as follows:
- “[2] The test for reviewing and setting aside an award of the CCMA is whether the decision reached by the commissioner is one that no reasonable person could have reached. The proposition has been articulated so often that it is now trite.”
- [21] All things considered, I cannot find any basis to conclude that Commissioner Lynch's decision that the dismissal was substantively unfair is one that no reasonable commissioner could have reached. To contend that Commissioner Lynch's award is unreasonable ignores the patently evident fact that his decision is justified by the evidence which served before him.
- [22] In the first place, he relied on Ehler's conclusion that there was a miscount. His conclusion that there was 'an existing cartel' was an elaborate finding based on the evidence that the incident in question was not the first time money went missing at Compass, which was a management and control

⁶ (JA125/2021) [2023] ZALAC 4 (8 February 2023),

issue. Van Tonder himself testified about a long standing problem of money disappearing. The decision by Commissioner Lynch is eminently reasonable. Even if this matter was to be arbitrated by another commissioner, the same result could be reached in the light of the facts and the evidence which I have taken the effort to articulate at the outset in this judgment. In these circumstances, it is my finding that Compass has failed to make out a case for the award to be set aside on review.

[23] As for costs, I do not find it warranted that a costs order should be made against the losing party. My considerations of the law and fairness lead me to the conclusion that there should be no order as to costs in this matter.

[24] The following order is accordingly made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Jonathan Jones of MacGregor Erasmus Attorneys

For the First Respondent: Advocate A J Nel

Instructed by: Lee and McAdam Attorneys