



**THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not reportable

Case no: PR 128/16

In the matter between:

**CASHBUILD (PTY) LTD**

**Applicant**

and

**M MDLALANA N.O**

**First Respondent**

**THE COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**Second Respondent**

**SACCAWU obo N NOMPHELO**

**Third Respondent**

**Heard: 17 August 2017**

**Delivered: 14 September 2017**

**Summary: Review application. No merit in the grounds for review.  
Application dismissed**

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**JUDGMENT**

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**PRINSLOO J**

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 16 March 2016 wherein the First Respondent (the arbitrator) found Ms Nomphele

Nkonzombi's (the employee) dismissal unfair and ordered that she be reinstated.

- [2] The Third Respondent (Respondent or union) acting on behalf of Nkonzombi opposed the application.
- [3] The Applicant also applied for condonation for the late filing of the review application. I have considered the application for condonation as well as the opposition thereto. In my view a case has been made out for condonation and I grant condonation for the late filing of the review application.

#### Background facts

- [4] The background facts are as follows:
- [5] The employee was employed as a cashier at the Applicant's East London branch. On 26 November 2015 the employee was on duty as a relieving cashier. At the end of her shift the employee handed over to the next cashier who worked until the end of the day. When the final cash up was done at the end of the day, there was a negative balance of R 1 882,80 on the cash register. The next morning the employee was questioned about the shortage and she was able to remember a transaction with a specific customer. It turned out that the customer paid by card for a purchase of R 941,55 and when the employee processed the payment, she processed a refund instead of a sale. The customer left the store with the goods, without having paid for them and instead the customer was refunded in the amount of R 941,55.
- [6] On 4 December 2015 the employee was charged with gross dishonesty, alternatively gross negligence and a disciplinary hearing was held on 9 December 2015. The employee was found guilty of gross negligence and dismissed on 15 December 2015.
- [7] An unfair dismissal dispute was subsequently referred to the Second Respondent and the dispute was arbitrated in March 2016.

#### The evidence adduced:

- [8] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively fair as she did not challenge the procedural fairness of her dismissal.
- [9] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the evidence adduced.
- [10] The Applicant's assistant manager, Ryan, testified and he explained that there was a negative balance of R 941.55 for items that left the store but not paid for. The next day he asked the employee about the amount and she knew which customer it was. The customer came to the store two days later and said that she knew there would be an issue when she was not asked to enter her pin number when she paid for the goods. The employee instead made a refund and that led to the charge of gross negligence.
- [11] Ryan testified that employees are allowed to make mistakes, but in this instance the employee should have noticed that something was not right with the transaction and she should have asked somebody else for assistance.
- [12] Ryan testified that the employee was told that if the customer could not be traced, she would have to pay the R 941.55, which the employee paid on 27 November 2015 out of her own accord. Ryan conceded that the employee went to FNB and that she requested the manager at FNB to assist her to get hold of the customer and that is why the customer went back to the Applicant's store and paid the whole amount. Ryan's version is that the employee was negligent when she pushed the refund button instead of the sale button and carried on with the process without asking for assistance.
- [13] The employee testified that on 26 November 2015 she was relieving another cashier from 10:00 – 11:00 when she swiped the customer's card and punched all the buttons to perform the speed point procedure. She was waiting for the speed point to punch in the pin, but instead the transaction went through. The employee testified that she did not notice that the receipt from the speed point had a minus and she thought the customer had one of those cards that did not require a pin code, but instead requires a signature from the customer. The customer signed the receipt and queried why a pin

was not required and the employee explained to her that it might be a card that did not require a pin but a signature.

- [14] The next morning the employee was questioned about the fact that the till was short and after she was shown the invoice, she recognised the goods on the invoice and remembered the customer. The Applicant tried to get hold of the customer via their bank, but was not successful and Ryan told her that she should pay R 941.55. The employee made arrangements to pay the money through another cashier, but Ryan stopped her and the employee testified that Ryan stopped the payment as he wanted to make a case against her.
- [15] The employee went to FNB and with the assistance of the bank manager, traced the customer who subsequently went to the store and paid for the goods.
- [16] In cross-examination Ryan did not pose any material questions to the employee.

#### Analysis of the arbitrator's findings and grounds for review

- [17] The arbitrator considered the Code of Good Practice in Schedule 8 of the Labour Relations Act<sup>1</sup>(the Act) in determining the substantive fairness of the employee's dismissal. The arbitrator accepted that there is a rule or standard, that the employee was aware of the rule or standard, that it was reasonable and that the employee breached the rule or standard.
- [18] The only issue to be decided was whether or not dismissal was an appropriate sanction. The arbitrator held that the employee's concern for her actions showed that she made an honest mistake and her behaviour is not that of a person who is malicious, wilful and intent on bringing harm to the employer.
- [19] The arbitrator further held that the Applicant never raised the issue whether the trust relationship had broken down and became intolerable at the

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<sup>1</sup> Act 66 of 1995 as amended.

arbitration proceedings and adduced no evidence to show that the employee has a history of negligence or misconduct.

[20] The arbitrator concluded that although the employee has been negligent in the performance of her duties, dismissal was not warranted and progressive discipline in the form of a final written warning would have sufficed. The arbitrator ordered the reinstatement of the employee with no retrospective effect.

[21] The Applicant raised two main grounds for review. The first ground for review is that the arbitrator misinterpreted and misapplied the duty that rested on him to decide the issue of an appropriate sanction and the second ground for review is that the arbitrator committed a material irregularity with regard to the issue of relief.

[22] I have to deal with the merits of the review application within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>2</sup> as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[23] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*<sup>3</sup> affirmed the test to be applied in review proceedings and held that a piecemeal approach should not be followed. It held that:

'In short: A reviewing 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.'

[24] This Court, sitting as a review Court, should not follow a piecemeal approach but should consider whether the arbitrator dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was adduced.

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<sup>2</sup> (2007) 28 ILJ 2405 (CC) at para 110.

<sup>3</sup> (2014) 35 ILJ 943 (LAC).

- [25] It is in this context that the grounds for review raised by the Applicants must be decided.

Appropriateness of the sanction

- [26] The first ground for review is that the arbitrator misinterpreted and misapplied the duty that rested on him to decide the issue of an appropriate sanction in that he had to determine whether the employer acted fairly in dismissing the employee and not whether or not he would have dismissed the employee.
- [27] The factors to be considered in determining the fairness of the sanction were set out by the Constitutional Court in *Sidumo*<sup>4</sup> 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 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. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

- [28] In *Fidelity Cash Management Services v CCMA*<sup>5</sup> the Labour Appeal Court referred to the *Sidumo* factors to be considered in deciding the appropriateness of a sanction and held as follows:

'The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice:

<sup>4</sup> (2007) 28 ILJ 2405 (CC) at para 78 and 79.

<sup>5</sup> (2008) 29 ILJ 964 (LAC).

Dismissal and the relevant provisions of any applicable statute including the Act. In this regard ss 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.

Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable.'

- [29] The Applicant's case is that the arbitrator decided the issue of sanction as if he was the employer and it was not decided on the basis of whether what the Applicant did was fair. The Applicant also complains that the arbitrator ignored and failed to determine or consider most of the factors he was required to consider and determine when deciding the issue of the fairness of the sanction of dismissal.
- [30] It is evident from the arbitration award that the arbitrator considered that there was no evidence to show that the trust relationship was broken down and became intolerable, that there was no evidence to show that the employee has a negative disciplinary record, that the employer did not lose the money, that the employee was prepared to pay the loss suffered, that she went the extra mile to find and contact the customer, the facts showed that the employee made an honest mistake, she was not found guilty of gross dishonesty and progressive discipline would suffice.
- [31] In my view there is no merit in this ground for review. It is evident from the arbitration award that the arbitrator considered a number of relevant factors in deciding the appropriateness of the sanction of dismissal and the mere fact

that he did not consider all the factors the Applicant raised, does not render the award unreasonable or reviewable. The arbitrator indeed considered the relevant factors and all the relevant circumstances presented to him and made a finding that is reasonable based on the said factors and circumstances.

- [32] The Applicant further submitted that the arbitrator's finding that there was no evidence on the trust relationship is at odds with the evidence as this was specifically addressed in the disciplinary hearing, which was undisputed and confirmed by the written finding. The chairperson specifically dealt with this issue and made a finding on this, which was ignored by the arbitrator.
- [33] The transcribed record shows that there was no evidence adduced on the trust relationship. It is common cause that procedural fairness was not in dispute and no evidence was adduced on the findings of the chairperson of the disciplinary enquiry and it is opportunistic to accuse the arbitrator of ignoring evidence that was never adduced or placed before him.
- [34] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. *In casu* the Applicant seeks to cast the net wider than the evidence that was placed before the arbitrator and seeks to import the proceedings of the internal disciplinary hearing as if it was evidence before the arbitrator when it was not.

#### The relief

- [35] The arbitrator ordered the reinstatement of the employee with no retrospective effect.
- [36] The Applicant's second ground for review is that the arbitrator committed a material irregularity with regard to the issue of relief when he awarded reinstatement where the employee showed no remorse and where there is actual evidence about the breakdown of the employment relationship. The Applicant's case is that the arbitrator did not exercise any proper discretion in this regard in line with the principles of the Act.



- [37] Section 193(2) of the Act provides that the arbitrator 'must require the employer to reinstate or re-employ the employee' unless, as set out section 193(2)(a)-(d), the employee does not wish to be reinstated, the circumstances surrounding dismissal are such that a continued employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate or re-employ the employee or where the dismissal is unfair only because the employer did not follow a fair procedure.
- [38] I have already alluded to the fact that the Applicant has not in the arbitration proceedings adduced any evidence to show that the relationship was broken down or that reinstatement was not appropriate or not reasonably practicable.
- [39] *In casu* no facts or evidence were placed before the arbitrator, as provided for in section 193(2)(a)-(d) of the Act, to show that there was any justifiable reason not to award the primary remedy of reinstatement and the arbitrator's award of reinstatement is not unreasonable, more so where it is without retrospective effect.
- [40] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I am satisfied that the arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make.
- [41] The award and the findings contained therein are reasonable and are not to be interfered with on review.
- [42] This Court has a wide discretion in respect of costs and in my view this is a matter where the interests of justice will be best served by making no order as to costs.
- [43] In the premises I make the following order:

Order:

1. The late filing of the application for review is condoned;

2. The application is dismissed with no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S Snyman of Snyman Attorneys

For the Third Respondent: Mr L Poni - Union official of SACCAWU

LABOUR COURT