INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA38/15

WOOLWORTHS (PTY) LTD **Appellant**

and

SOUTH AFRICAN COMMERCIAL CATERING

AND ALLIED WORKERS UNION **First Respondent**

K MOHLAFUNO **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

COMMISSIONER J D SELLO NO **Fourth Respondent**

Heard: 26 May 2016

Delivered: 27 July 2016

Summary: Review of arbitration award – arbitrator finding that employee's dismissal for misconduct too harsh a sanction – employer's disciplinary policy providing dismissal as sanction for any employee found to have till discrepancies-. In *casu* employee candidate for dismissal when her till takings was over by a particular amount. In light of such clear policy arbitrator

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committing a reviewable irregularity by interfering with the employer's sanction. Labour Court erring in upholding arbitrator's award. Appeal upheld.

Coram: Tlaletsi AJP, Ndlovu et Sutherland JJA

JUDGMENT

TLALETSI AJP

[1] This is an appeal against the judgment of the Labour Court (Snider AJ) wherein it dismissed the appellant's review application to set aside the arbitration award issued by the fourth respondent, Jacob Daniel Sello (the arbitrator), a commissioner acting under the auspices of the third respondent (the CCMA). The subject of the award was a dispute of unfair dismissal referred to the CCMA by the third respondent (the union) on behalf of its member, the second respondent[1] (the employee) against her employer, the appellant. The appellant is in this Court with leave of the court *a quo*.

[2] The facts giving rise to this dispute are largely common cause. The employee was employed by the appellant as a till operator from about August 2009 until her dismissal for misconduct on 7 December 2010. At the time of her dismissal, she was working at the appellant's store at Maponya Mall in Soweto earning a shocking monthly salary of R2090.21.

[3] On 02 November 2010, it was found that the employee's till takings were in excess by an amount of R628.78. On 15 November 2010, she was handed a notice to appear at a disciplinary enquiry to answer to a charge of misconduct that reads:

> *'Misconduct in that on the 02/11/2010 your till was over with R628.78 in cash which is against company Policy and Procedure*.'

[1] In order to avoid confusion, the citation of the parties has been rearranged to provide a true reflection of the real parties involved in the dispute. Although the CCMA was cited as the first respondent, as it appears to be the case in most instances, it neither opposed the review application nor the appeal.

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Following a disciplinary enquiry held on 25 November 2010, she was found guilty of what the chairperson described as gross misconduct and was dismissed.

[4] After unsuccessful conciliation, the arbitration was convened on 1 June 2010 and the award was issued on 13 June 2010. Appellant tendered the evidence of Ms Puleng Mohale (Store Admin Manager), as well as Ms Jane Skweyiya (Visual Department Manager). The employee testified in her defence.

[5] Ms Mohale testified about the procedures for handling cash. The till operator is allocated her float for the day and will alone, operate the till allocated to her for the shift. At the end of the shift, she has to place her day's takings in a sealed bag which she will drop into a "Drop Save". A security company contracted for that purpose collects all the bags and transports them to Standard Bank Cash Counter. At the bank, the bags are opened and the contents counted under surveillance cameras. The bank would thereafter issue a Worksheet Control that would indicate whether the money corresponds with what was collected at a particular till.

[6] It was at this stage that it was discovered that the employee was in excess by R628.78. In terms of the appellant's policy, shortages and excesses that were R500.00 and over attracted an enquiry accompanied by a sanction of dismissal. Ms Mohale testified that they were unable to trace what caused the employee to be in excess. According to the till report she appeared to have followed all the required procedures and they could not trace any irregularities.

[7] Ms Skweyiya testified that she investigated the employee's transactions and did not find any missing transaction. Upon completion of her investigations, she called the employee and showed her all the evidence she had gathered. The employee confirmed that her till was in order on the day of incident. She also played the bank's CCTV footage for the employee.

[8] The employee confirmed all the till and money handling procedures presented through the appellant's witnesses. She confirmed that her till was functioning well on the day and could not trace what caused the excess. Although she

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testified that it was the first time she had a till discrepancy, she conceded under cross-examination that she did have discrepancies before. She confirmed further that she never requested to view the appellant's CCTV footage as she had claimed in her evidence in chief that she requested and was denied the opportunity.

[9] The arbitrator found that the dismissal of the employee was substantively unfair on the basis that the sanction of dismissal was too harsh under the circumstances. The arbitrator also found that the employee's till takings discrepancy was not the result of any negligence on her part because the appellant could not find irregularities on the transactions of the employee. The arbitrator further found that there was no evidence that the employee was dishonest towards the appellant or that she intended benefitting from the surplus of the till. He further held that the appellant did not suffer any loss; that it was the first time that the employee had an excess. The arbitrator based this conclusion on his finding that the appellant did not challenge the employee's allegation that she previously never had any till discrepancy by tendering evidence to support the concessions extracted from the employee during cross-examination about her previous till discrepancies. In addition, he held, no evidence was presented on the quantum of such alleged previous discrepancies or whether the employee was warned for such. He concluded that a warning would have sufficed to correct the employee's conduct. The arbitrator then ordered the reinstatement of the employee with back pay amounting to R14 631.47.

[10] Dissatisfied with this outcome, the appellant sought the review of the award on the basis that the arbitrator committed a gross irregularity in failing to apply his mind to the totality of the evidence placed before him; he failed to cumulatively consider and place relevance in the employee's previous till discrepancies; was not entitled to impose his own views concerning the appellant's policies and measures of applicable discipline; finding that the employee was not negligent; that these "process-related" reviewable defects committed by the arbitrator calls for the award to be set aside. The appellant contended that the only appropriate sanction to be imposed was dismissal.

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[11] The Labour Court found two respects in which the award fell short of the review test set out by this Court in *Gold Fields Mining SA (Pty) Limited (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others.*[2] The first is the failure to find that the discrepancy in the till takings could not have been committed other than by the negligence on the part of the employee; and secondly that the arbitrator misunderstood the evidence of the appellant that no irregularity could be found in the transactions of the employee. Having identified the said discrepancies, the court *a quo* enquired whether despite these irregularities, the award still met the reasonableness test standard. It concluded that the award was one that a reasonable decision-maker could come to. In the Labour Court's view, an arbitrator who found negligence might nevertheless find that the sanction of dismissal was too harsh in circumstances where no dishonesty was shown and a previous incident of an "under" does not appear to have attracted a formal sanction. The effect of the Labour Court's finding is that it upheld the appellant's review in so far as the complaint concerning the unreasonableness of the arbitrator's finding regarding the absence of negligence on the part of the employee which had resulted in the "over", but did not uphold the challenges to the reasonableness of the award concerning the appropriate sanction.

[12] It is this finding of the court *a quo* that the appellant seeks to overturn on appeal. Ms Nel who appeared on behalf of the appellant contended that the Labour Court erred in finding that the decision of the arbitrator that the sanction of dismissal was unfair was still within the band of decisions a reasonable decision-maker could reach in that this finding was based on the two aspects the arbitrator had relied on and which did not accord with the evidence. She argued that the arbitrator ignored the evidence that the employee had in fact four prior shortages before the fifth infraction for which she was dismissed. She further submitted that the arbitrator approached the adjudication of the fairness of the sanction as one of the review of the decision of the disciplinary chairperson as opposed to determining the fairness of the sanction on the basis of the evidence before him and as an arbitrator determining the matter *de novo*.

[2] (2014) 35 ILJ 943 (LAC).

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[13] On behalf of the respondent, Mr Dockrat submitted that the challenge by the appellant to the findings of the arbitrator is based primarily on matters that were not placed before the arbitrator or are in substance, matters that do not support the allegation that the award was unreasonable. He contended that the appellant did not lead any evidence that the employee was disciplined for the past till discrepancies other than what was put to the employee during cross-examination that there were previous till discrepancies. Mr Dockrat submitted that it would appear that the document titled 'Day-To-Day-Discussion' was not referred to during the arbitration proceedings and that it is dated 15 November 2010, 13 days after the incident for which the employee was charged and dismissed; that the record does not reveal any evidence being led on the consistent imposition of dismissals for till discrepancies; and that no evidence was led to show that the appellant suffered prejudice.

[14] It is trite that an arbitrator is tasked to objectively, impartially and fairly determine whether a sanction of dismissal in the circumstances of the material placed before her/him is fair. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] the Constitutional Court held that:

> '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.'[4]

[15] In this matter, the arbitrator found that the employee's dismissal was extremely harsh because of the unchallenged evidence that it was the first time that she had an over. The arbitrator also took into account the fact that

[3] 2008 (2) SA 24 (CC).
[4] At para 78.

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the appellant did not lead evidence that the shortage or any previous warning were the determining factors when the sanction of dismissal was considered.

[16] According to the appellant's policy and procedure on progressive discipline in respect of till related misconduct, till shortages or overs per se constituted misconduct. Discrepancies of amounts ranging from R30.00 to R200.00 attracted informal disciplinary process. Discrepancies of over R200.00 to R250.00 per shift for a first offence required that an informal disciplinary hearing be held and if found guilty a written warning valid for six months is to be imposed. Any subsequent incident of discrepancy regardless of the amount will progress to the next level of discipline. The next level is for amounts ranging from R250.00 to R500.00 which for the first misconduct a final written warning valid for 12 months is imposed and any subsequent incident irrespective of the amount will progress to the next level. The next level which is for discrepancy of over R500.00 dismissal is to be imposed for the first misconduct.

[17] It was common cause at both the disciplinary inquiry and at the arbitration that the employee contravened the rule by having an over in excess of R500.00 and as a result she was a candidate for dismissal. The reasonableness, fairness and validity of the rule was not challenged. In his opening statement, the employee's representative acknowledged *inter alia*, the existence of the rule and its implications. He, however, challenged the dismissal as being harsh because it was never the employee's intention to defraud the appellant or act dishonestly, but a mistake on her part and wanted the appellant to investigate how the mistake happened.

[18] There is therefore no dispute that the employee was charged and disciplined in terms of the appellant's disciplinary policies and procedures. Having an "over" or an "under" is in itself a misconduct and the rule places an *onus* on the till operator to explain why such a situation occurred when the till was found to be operating properly and as expected. Whether the employee was aware of what the cause of the over or under was is irrelevant to the determination and adjudication of the fairness of the sanction. The employee conceded under cross-examination that it was her responsibility to know of the

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till discrepancy especially that she had singed that the float issued to her was correct. The Labour Court was therefore correct in finding that the arbitrator got it wrong by not finding that the discrepancy in the till takings could not have been occasioned other than by negligence on the part of the employee; and that he misunderstood the evidence of the appellant that it did not find any irregularities on the transactions of the employee.

[19] In her reasoning why the sanction of dismissal is unfair, the arbitrator laid much emphasis on *inter alia*, the fact that it was the first time that the employee had an over. This finding misses the rationale of the disciplinary code that there should be no distinction between a till over and under. Because of the adverse consequences of either of the two situations, they are treated the same. Either the employer or the customers may become victims of either till discrepancy by suffering loss. It was also unreasonable to conclude that the employee did not act dishonestly or did not intend to benefit herself from the till excess when it should only be herself to know what happened. It was accepted that for as long as the till operated accurately there would not be any discrepancies. Any discrepancy would only be occasioned by human intervention or error.

[20] The arbitrator also based her conclusion that the sanction of dismissal was unfair on the incorrect factual finding that the appellant failed to lead any evidence on the quantum of the previous shortage and that no evidence was led on whether the employee was issued with any warning or whether it was considered in determining the appropriate sanction. In the first place, the arbitrator failed to appreciate that the disciplinary code decrees that for the first incident of a discrepancy of over R500.00, the sanction of dismissal is to be imposed irrespective of whether there was a prior warning. The existence of a warning is only relevant to escalate other incidents short of dismissal (which would in any case be R500.00 and under) to the next level of penalty. Since dismissal is the ultimate penalty it would be illogical to interpret the code to require a warning in till discrepancies in excess of R500.00 for which dismissal is specifically provided for the first incident to require that there must always be prior warning.

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[21] The conclusion that the appellant failed to lead evidence on the previous discrepancies is not supported by the evidence on record. The record of the employee's previous till discrepancies was part of the bundle of documents which was submitted to the arbitration by the appellant and was marked "Annexure A". The arbitrator recorded that the respondents did not submit any document and accepted the documents of the appellant for what they purported to be. The respondents further agreed to use the appellant's documents. As pointed out already, the employee had indicated, during the disciplinary inquiry and at the arbitration that she did not have previous till discrepancies. This was obviously false and dishonest on her part. When confronted during cross-examination, she conceded that she had discrepancies of less than R50.00 or R100.00 and not one similar to the one that is the subject of this appeal. She conceded that it was not the first time that she had a till discrepancy of over. She was referred to a document titled "TDC Management Process for Progressive Shorts Under R200.00" which related to incidents at Brightwater for 2010, where she worked. She acknowledged the discrepancy which was later rectified as it was discovered that it was a mistake. She further agreed to the document containing further till discrepancies she had in the past. Her representative intervened and confirmed that she had already accepted previous discrepancies and that their contention was that she did not have a previous discrepancy similar to the one forming the subject of the inquiry. His intervention was to render further probing of previous discrepancies unnecessary.

[21] It can therefore not be disputed that the employee had five previous till discrepancies and was on a final written warning on the last one. The discrepancies occurred in the months of May, August and September 2010 in the amounts of R90.13, R35.95 and R200 respectively and R50 on 2 October 2010. The last one for which she was given a written warning happened only a month before the 2nd of November 2010. These infractions were committed in the six months preceding the infraction for which she was dismissed. She knew of the existence of these infractions and she signed for them. She did not challenge them at the time.

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[22] The Labour Court's conclusion that the sanction imposed by the arbitrator was one that a reasonable commissioner could come to is solely based on the finding that no dishonesty was found and that the previous incident of "under" does not appear to have attracted a formal sanction. This is a misdirection on the part of the Labour Court. I have already shown that the type of misconduct in question does not require dishonesty to be proven. Neither does it require that there be a formal sanction on the previous incidents of discrepancies. Failure to warn the employee when the cumulative total of the discrepancies within a six months period equalled an amount of R200.00 or more is not a bar to imposing a sanction of dismissal where the code so provides.

[23] In terms of the Code of Good Practice: Dismissal, an employer must in addition to the gravity of the misconduct consider factors such as the employee's circumstances including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself. In terms of article 5, employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

[24] In this case, the appellant kept all the records of the previous transgressions which were brought to the employee's attention. She was warned of the discrepancy of 2 October 2010 that should her behaviour continue she "will be dealt with progressive discipline. If further discrepancies occurred, the employee will be disciplined". The employee was employed on August 7, 2009 and was dismissed on December 7, 2010, amounting to about 16 month's service.

[25] The task of an arbitrator, as expounded in *Sidumo* is to determine whether the sanction imposed by the employer is fair and not to impose a sanction afresh. It is evident that the arbitrator failed to appreciate the nature and importance of the rule breached; failed to consider the reason the appellant imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; whether the employee was likely to repeat the misconduct and the short

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service record of the employee vis- à- vis the misconduct and sanction of dismissal.

[26] Mr Dockrat submitted that the appellant failed to present evidence to show that the sanction was consistently applied. There is no merit on this submission. At no stage during the arbitration and even at the disciplinary inquiry did the respondents allege that the sanction of dismissal for this type of misconduct was not consistently applied by the appellant. In the absence of such a challenge, it would be unfair to expect the appellant to present such evidence. More importantly, during the opening statement at the arbitration, the appellant's representative indicated, among others, that the appellant will show that the type of misconduct committed by the employee was viewed seriously and that the sanction was consistently applied for similar transgressions. In response, the respondents' representative indicated that what had been said was not in dispute except that the employee was not aware of the discrepancy until it was brought to her attention the following day when she reported for duty; and that she never intended to defraud or steal from the appellant.

[27] For the reasons outlined above, I am of the view that the decision of the arbitrator is not one that a reasonable decision-maker could, on the material on record, arrive at. The appeal should therefore be upheld and the order of the Labour Court falls to be set aside. It would be in accordance with the requirements of the law and fairness that each party carries its costs both in the Labour Court and this Court.

[28] In the result, the following order is made:

1. The appeal succeeds and the order of the Labour Court is set aside and substituted with the following:

    a) The award issued by Commissioner JD SELLO under case number GAJB1648-11 dated 13 June 2011 is reviewed and set aside.

    b) The dismissal of the employee is found to have been substantively fair.

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c) Each party is to carry its costs of the review application.

2. Each party is to carry its costs on appeal.

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Tlaletsi AJP

Ndlovu *et* Sutherland JJA concur in the judgment of Tlaletsi AJP.

APPEARANCE:

FOR THE APPELLANT: C A Nel of Macgregor Erasmus Attorneys.

FOR THE RESPONDENTS: Y Dockrat of Dockrat inc.

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