

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO:D 905/08

Reportable

In the matter between:

INDEPENDENT MUNICIPAL

ALLIED TRADE UNION (IMATU)

FIRST APPLICANT

NOLA GLOSS

SECOND APPLICANT

And

UMGENI MUNICIPALITY

FIRST RESPONDENT

SOUTH AFRICAN LOCAL BARGAINING

COUNCIL (SALGBC)

SECOND RESPONDENT

COMMISSIONER M B MASIPA *N.O.*

THIRD RESPONDENT

JUDGMENT

Conradie AJ

1. In this matter the Applicant seeks an order reviewing and setting aside an award made by the Third Respondent on 20 October 2008 under case number KPD100705.

Background

2. The Second Applicant was employed as an Enquiries Clerk with the First Respondent for seven (7) years.
3. The Second Applicant worked in the First Respondent's office in Hilton along with a fellow employee, Carol (Shange).
4. Part of the Second Applicant's functions was to check the money collected by Shange, the cashier, confirm its correctness, place it in a bag and seal it for collection by Fidelity Cash Management Services (Fidelity), which would transport the money to the offices of SBV, an agent for ABSA Bank, with whom the First Respondent banked.
5. Around 23 August 2006, a teller from SBV claimed that the bag collected from the First Respondent's offices was short by R5 000.00.
6. The Third Respondent appointed outside forensic investigators to investigate the matter as well as the disappearance of R24000 a month or so earlier.
7. The Second Applicant and Shange were charged as follows:

- *“You intentionally did not place cash in the amount of R5 000.00 into the Fidelity Guard Cash Management Services, ‘stoploss’ bag number D5 4910 772 prior to sealing it and handing it to Fidelity Cash Management Services for banking, alternatively;*
- *You were grossly negligent in failing to ensure that the total amount of R14 444.23 was placed into ‘stoploss’ bag number D5 4910 772 prior to sealing it and handing it to Fidelity Cash Management Services for banking.*

This amounts to serious misconduct and is a contravention of Paragraph 2(a),(b) and (d) of schedule 2 of the Municipal Systems Act and clauses 4.2.3 and 4.2.5 of the South African Local Government Collective Agreement: Disciplinary Code”

8. Following on a disciplinary hearing, the Second Applicant and Shange were found guilty of:

“having colluded, on or about 23 August 2006, in the removal of R5000.00 from the cash takings of the employer, the Umgeni Municipality and of having falsely represented to the employer that the full cash amount of R8 569.49 had been placed in the SBV stoploss bag”

9. The Second Applicant and Shange were subsequently dismissed on 31 July 2007.
10. The Second Applicant referred a dispute to the Second Respondent who appointed the Third Respondent to arbitrate the dispute after conciliation failed.

11. At the arbitration the First Respondent led the evidence of an independent forensic investigator, Govert Vetten and that of Leila Pillay, an assistant manager of SBV Pietermaritzburg. The Second Applicant testified on her own behalf and called Jeanette Hampson as a witness.

Arbitration Award

12. In her award the Third Respondent summarised the evidence of the witnesses as set out below.

13. Vetten's evidence in chief :

13.1 He was appointed to investigate the allegations against the Second Applicant.

13.2 During January 2006 he interviewed the Second Applicant at her home.

13.3 He went to SBV's premises on several occasions to view the facility and to meet with management.

13.4 He viewed the video of the incident at the premises and obtained a copy. He recounted what he had seen on the video. This included that the teller at SBV;

13.4.1 Counted the money;

13.4.2 Added it with a calculator and then realized there was R5000 short;

13.4.3 The teller placed the money on the note counting machine before “revisiting” the bag;

13.4.4 After recounting the money and recalculating it she activated a button calling a supervisor;

13.4.5 When the supervisor arrived in the cubicle the teller stood making sure that her hands were visible to the camera;

13.4.6 The teller went through the same procedure whereafter the shortage was “entered” and held up to the camera.

13.5 He inspected the stop loss bag relevant to the incident, which did not appear to have been tampered with. He established that the handwriting on the bag was that of the Second Applicant.

13.6 He checked the procedure on reporting shortages and viewed the original incident report and obtained copies thereof.

13.7 He testified about the final report which was compiled by the forensic company.

13.8 The forensic report concluded that both cashiers be held accountable.

13.9 He interviewed staff from Fidelity and SBV and concluded that the R5000 had not been placed in the bag.

13.10 In his experience people completed the deposit slip to create the impression that money was correct when it left the Third Respondent and then later imply that the receiver of the bag must have taken the money.

13.11 He testified about the procedure at the Hilton office where the Second Applicant worked.

13.12 He looked at all the steps *“in the process of the money and evidence available and came to conclusion that the only reasonable conclusion was that on a balance of probabilities, the missing money was never placed in the stop loss bags before they were sealed and both cashiers for the days of the incidents should be held responsible for the loss and should be held accountable.”*

13.13 He had three interviews with the Second Applicant who could not remember everything as she had memory lapses but he could not say that it was convenient.

14. Vetten's evidence under cross-examination:

14.1 He did not ask the Second Applicant questions about her finances but had looked at her clothes and house and did not think that she was battling and therefore saw no need to go into her personal finances. He also did not know if she had a need to steal R5000.

14.2 There was a similar matter where an amount of R24 000 went missing. Similar evidence was given at the disciplinary hearing and the employees were acquitted. He testified that this was due to the number of witnesses

called and the fact that witnesses from SBV and Fidelity were not called.

The R24000 was not accounted for and the cashiers were acquitted.

14.3 He believed that the SBV cashier could not have made a mistake as they are strip searched and everything is recorded on video and at the end of their shift the cubicles are “totalled” and balanced.

15. Pillay’s evidence in chief:

15.1 She oversees the running of the centre including branch security.

15.2 Money is received through a shoot by bank marshals.

15.3 The marshals enter the client code and verify receipts.

15.4 The money bags have a blue strip which tellers use to determine if the bag has been tampered with or not.

15.5 Tellers look at the serial number and inspect to see that the bag is not damaged.

15.6 SBV staff work under camera surveillance and there is about 100 cameras.

15.7 In the event of a shortage the teller looks at the security seal to see if it has been tampered with. She will enter the serial number and amount from the deposit slip. She will show the amount to the camera before (re-)opening the bag. She will show the amount to the camera and then re-open the bag. She will check the money on the counter, re-check it, show the shortage to

the camera and call a supervisor. A full count of all the cash is then done and a body search. Her cubicles and bin will be searched.

15.8 SBV's procedures were tight and audited every 6 month to ascertain if procedures were properly followed.

16. Pillay's evidence under cross-examination:

16.1 She conceded that SBV do not have serial numbers for Fidelity's bags.

16.2 If the bag is exchanged or replaced SBV would not know. They would only know this if the serial numbers on the receipt did not correlate with those on the bag. There is a form which is completed by Fidelity Guards with a collection date, the client code, serial number and the name of the guard.

16.3 She conceded that in terms of the number sequence, the bag in question dated 22 August 2006 had a number smaller than those from June to July 2006.

16.4 She conceded further that the bag could have been swopped but that she knew the Applicant's handwriting which appeared on the bag.

17. Third Respondent's evidence:

17.1 She was employed as an enquiries clerk in the Hilton office.

17.2 On the 22 August 2006 she counter-signed Shange's cash sheet indicating that an amount of R14 444. 23 had been received by the First Respondent.

17.3 On 23 August 2006 she was present when Shange's takings were placed in a stoploss bag for Fidelity and sealed for banking.

17.4 The procedure which they followed at Hilton is that they would cash up at 15h30. She would do the float and the cheques and at 16h00 she would do banking and lock the money in the safe. The next morning she would complete the deposit slips and leave them on her desk. She would check the money and deposits and then place them in the bag. The money would be counted in Shange's presence. Once the bag is sealed it is locked in the safe until it was given to fidelity later in the day. The Fidelity Guard records the receipt and the bag and furnish them with a receipt.

17.5 On the day in question she counted the money in Shange's presence and placed it into the bag. If she had left the R5000 on her desk she would have noticed it and would have to take another bag and redo the deposit.

17.6 After the incident on 22 August 2006 she continued to perform her duties until 7 March 2007. During this time the First Respondent's trusted her and Shange with the money. During December 2006 and January 2007 she handled more than Two Million Rand. She did not regard the trust relationship as having broken down.

17.7 She testified that the number on the fidelity bag was smaller, in the 700s, than the numbers for June/July 2006, in the 800's.

18. Second Applicant's evidence under cross-examination:

18.1 She was in Kokstad for nine years and seven years with the First Respondent.

18.2 She checked money, placed it in the bag and wrote on it.

18.3 If anyone was to change the bag they would have to rewrite the details on the new bag.

18.4 Fidelity Guards copy the information on the bag onto the receipt. Although her handwriting was on the bag she did not see the Fidelity Guard copy the bag number onto the receipt.

19. Hampson's evidence:

19.1 She is employed by the respondent and her duties involve bank conciliations, downloading bank statements and reconciling it with the First Respondent's system on what has been banked. If there is a discrepancy she questions it.

19.2 She followed up with the bank about the R24 000 shortfall. If she had not followed up it would have been written up as bank charges. She had not received a response on some of the monies and these were written off.

19.3 Since Shange and the Second Applicant were dismissed cameras have been installed.

20. After analysing the evidence the Third Respondent states that the evidence presented proved that the Second Applicant was the last person to handle the cash before it was placed in the stoploss bag. Further, the serial number on the bag and

the one received by SBV, and the handwriting on the bag, confirmed that the bag had not been changed or replaced. There was also no evidence of the bag having been tampered with when it was received by the SBV teller. As there was R5000 short, in the circumstances the only reasonable inference is that this amount was not placed in the bag by the Applicant. As a result she concludes on a balance of probabilities that the Applicant's dismissal was substantively unfair.

21. Mr Crampton, who appeared for the First Respondent, submitted that the Third Respondent's conclusions, which was reached through a process of inferential reasoning, was one which a reasonable commissioner could reach and that this was one of those cases in which different commissioners acting reasonably could come to different conclusions. He further argued that in light of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*¹ this is all that this court had to concern itself with. Further, even if it is found in this case that the Third Respondent's reasoning and treatment of the evidence is not what it should be, the question which remains is whether the decision reached based on the evidence before her is one that a reasonable decision maker could reach. If not, then this court is entitled to ask whether there is other evidence which was available to the Third Respondent, on which she did not rely, but which could support the decision that she reached. If so then this court can uphold the Third Respondent's decision.

22. Ms Reddy who appeared on behalf of the Second Applicant submitted that the Third Respondent does not indicate in her award which charges the Second Applicant is guilty of. She merely concludes that the Second Applicant's dismissal was

¹ (2007) 28 ILJ 2405 (CC).

substantively unfair. I agree with Ms Reddy that this poses a problem if one considers that in essence the charges against the Second Applicant was that of theft and in the alternative, gross negligence. The finding of the chairperson at the disciplinary hearing was that the Second Applicant had colluded with Shange in not placing the money in the stop loss bag and therefore was involved with the theft of the money. Throughout it's answering affidavits in this matter the First Respondent confirms that the Second Applicant has been dismissed for theft.

23. It is clear from the record that there is absolutely no evidence of theft or any type of dishonesty on the part of the Second Applicant. The onus was on the First Respondent to prove the fairness of the Second Applicant's dismissal and as such to put the necessary evidence before the Third Respondent in order to discharge this onus. It clearly failed to do so.

Inferential Reasoning

24. In reaching its finding at the disciplinary hearing that the Second Applicant was guilty of theft, the First Respondent used "inferential reasoning" to reach its decision. The same approach was followed by the Third Respondent at the arbitration. This involved accepting that if the employee had placed the money in the stop loss bag and it was not there when the SBV teller opened it then the Second Applicant must be held responsible. This required acceptance of the evidence that the theft could not have occurred on SBV's side. Evidence which I may add was given by Vetten, the forensic investigator who formed his views that it could not be SBV on the basis that he had watched the video of the incident in question and had spoken to management of SBV about their procedures. It was

also based on the evidence of Pillay who similarly sang the praises of SBV's procedures.

25. There was no evidence of any of the employees directly involved with the incident on the day. I pause to mention at this stage that Vetten testified that he reached the conclusion which he did after he had interviewed the Fidelity and SBV staff involved, watched the video and considered documentation relating to the incident. The Chairperson of the disciplinary hearing of his own accord summoned the SBV teller who was involved with the R5000 on the day in question to testify.

26. In the matter before the Third Respondent, the teller was not called as a witness. From my reading of the record it also appears that the video was not introduced into evidence but its content merely recounted by Vetten.

27. There was also no evidence to suggest that SBV had a perfect track record in that none of its employees had ever managed to steal of the money which they worked with. On the contrary, there was evidence to the effect that of the First Respondent's money had previously disappeared. Just shortly before the incident in question R24 000 had disappeared. SBV was also involved in this chain of events. Hampson's evidence was also to the effect that there were other losses which she had to follow up on.

28. In fact what appears from the record is that the forensic report was commissioned in respect of both the R24000 and the R5000 which was unaccounted for. These were two separate incidents which occurred on different dates at different offices of the First Respondent. The employees accused in respect of the amount of R24 000

also faced a disciplinary hearing but were acquitted. Common to both these incidents, however, was the involvement of Fidelity and SBV. It therefore appears that these losses may have been attributable to problems within the First Respondent or within SBV, or somewhere in the middle.

29. This leads me to the question of the absence of evidence from Fidelity. The First Applicant did not call anyone from Fidelity to testify. The Second Applicant in her evidence mentioned a possible discrepancy in the numbering of the Fidelity bags in that the numbers was in the 700s in August but in the 800's for June/July 2006. This evidence was not challenged during cross-examination nor by any other employee from the First respondent or by Fidelity itself. In the absence of a witness from Fidelity possible problems that could be attributed to Fidelity were tested with Pillay during cross-examination. From the record her evidence on this point can be summarized as follows:

29.1 SBV do not have any record of the serial numbers of Fidelity's bags before it arrives at SBV.

29.2 SBV would not know if a bag was swopped.

29.3 The bags could have been swopped because the number of the bag in question does not tie up with the bags which were issued by Fidelity for that period.

30. I am of the view that in circumstances such as in this matter, an employee can only be held responsible for an act of misconduct through a process of elimination, as it were, if all the probabilities are indeed eliminated. It cannot be fair to an employee

in the circumstances which the Second Applicant found herself, to hold that on a balance of probabilities that the employee must be guilty of theft when to begin with all probabilities have not been assessed.

Reasons Given For Dismissal

31. Even if the “inferential reasoning” approach as adopted by the First and Third Respondent’s were found to be acceptable, the First Respondent still failed to discharge the onus of proving that the Second Applicant was guilty of theft. At most this type of reasoning in the circumstances of this case could lead to the conclusion that the Second Applicant did not put the R5000 into the bag. However, this is not what the Second Applicant was found guilty of. According to the ruling of the chairman of the disciplinary hearing he found *“both employees guilty of having colluded, on or about 23 August 2006 in the removal of the amount of R5000,00 from the cash takings of their employer, the Umngeni Municipality and of having falsely represented to their employer that the cash amount of R8569,49 had been placed in the SBV stoploss bag”*. As these are the reasons which were given for the dismissal, the fairness of the dismissal had to be tested against these reasons. It is clear that the Third Respondent failed to do this and that the First Respondent led no evidence in support of these reasons. I am able to dispose of the matter on this basis as well.²

32. However, even if the case to be met was one of gross negligence the question to then be asked is whether dismissal was the appropriate sanction in the circumstances. I believe not. Relevant considerations to be taken into account

² Fidelity Cash Management Service v CCMA & Others [2008] 3 BLLR 197 LAC at 206.

include that there were clearly problems at the First Respondent in relation to its banking procedures. The First Respondent allowed the Second Applicant to continue working for almost seven months after the loss was discovered. At some point after the incident, as a result of both the Second Applicant and Shange having taken leave, there was approximately Two Million Rand in the vault at the Hilton office under the control of the Second Applicant. This clearly indicates that the trust relationship had not broken down. The Second Applicant worked for a total of 16 years in local government. It does not appear from the record that during the time that the Second Applicant performed the banking function that any money had disappeared. The Third Respondent did not consider any of these factors or any other relevant factors at all in confirming the First Respondent's decision.

33. For all the reasons stated above I am of the view that based on the evidence before her, the Third Respondent came to a decision which a reasonable decision maker could not reach.

34. I am also of the view that this is a matter in which I can substitute my decision for that of the Third Respondent.

35. In the circumstances I make the following order:

a. The award of the Third Respondent is reviewed and set aside.

b. The Award is substituted by the following:

1. "The dismissal of the Applicant is substantively unfair.

2. The Applicant is reinstated in her employment, without loss of remuneration or benefits, from the date of dismissal.”

c. The First Respondent is to pay the costs of this application.

Conadie AJ

Date: 15 December 2009

Appearances:

For the Applicant: Shanta Reddy – Shanta Reddy Attorneys

For the Respondent: Adv D Crampton instructed by Tomlinson Mnguni James