

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN DURBAN**

**CASE NO: D140/07**

**REPORTABLE**

In the matter between:

**SIPHIWE MAKHOSONKE NGIDI**

**APPLICANT**

AND

**RELYANT TRADING (PTY) LTD**

t/a **BEARS STANGER**

**1<sup>ST</sup> RESPONDENT**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**2<sup>ND</sup> RESPONDENT**

**COMMISSIONER LOUIS EPSTEIN**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**MOLAHLEHI J**

**Introduction<sup>1</sup>**

[1] This is an application to review an arbitration award of the Third Respondent (the Commissioner) under case number KNDB1 1440/06 and dated 29<sup>th</sup> January 2007 (the award). In terms of the award the Commissioner found that the dismissal of the Applicant (the employee) by the First Respondent to have been both procedurally and substantively fair.

- [2] The Applicant applied for condonation for the late filing of his heads of argument. That application was not opposed and was accordingly granted.
- [3] The First Respondent has retail stores throughout South Africa. These include a chain of furniture and appliance stores trading under the name Bears Furnishers. The present matter involves Bears Stanger located in Stanger in KwaZulu Natal. The matter in particular involves the stock that went missing in the warehouse which is located underneath the store at Stanger.
- [4] The employee, who was prior to his dismissal employed by the First Respondent as a general assistant during August 2006, was charged with the following:

*“Unauthorised removal and/or assisting with the unauthorised removal of Company stock to the value of R16, 506.83 from the Stanger branch warehouse between 17 February 2006 and 18 July 2006.”*

- [5] The employee's duties, at the time of his dismissal, included the physical movement of stock, unloading new stock from delivery vehicles, assisting with deliveries from time to time, and assisting with cleaning and displaying goods in the store.
- [6] The disciplinary hearing which was chaired by Mr Phillip Enoch, the regional administration manager of the First Respondent's KwaZulu Natal region found the employee guilty and ordered that he be dismissed. It was subsequent to the dismissal that the employee referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The

Commissioner conducting the arbitration proceedings under the auspices of the CCMA found the employee guilty as charged and confirmed the dismissal.

- [7] The charges against the employee related to the discovery of certain missing stock from the First Respondent's warehouse. The stock that went missing included defy stove, a defy 240 litre fridge, a defy 255 litre fridge, four defy 305 litre fridges, two matrix entertainment units, a repair coffee table, a claudia coffee table, one LG 51cm television and one Tedelex 54cm television.
- [8] The person who was responsible for the safe keeping of the warehouse keys was Ms Valen, the store clerk. When confronted by Ms Mahomed the store's branch manager, who came to know about the missing stock during his leave, Ms Valen stated that she did not know how it happened but also indicated that she had previously and/or more than one occasion given the keys to the warehouse to the employee, Sagren Pillay, the store's driver, and Nicholas Mntambo ("Mntambo"), the general assistant.
- [9] Pursuant to the discovery of the missing stock Penny Crous ("Crous"), the regional manager, requested employees to undergo a polygraph test. A number of employees underwent the polygraph test including the employee. In fact the employee underwent two tests; the first one was conducted in English and the second one in his mother tongue, IsiZulu. The employees who agreed to undergo the test were, Mahomed, the employee, Velan, Pillay and Mntambo, including Krish Govender (Govender), and Bishnu Maharaj, both of whom worked on the shop floor as sales consultants. The trainee, Jonathan Govender

(the trainee), who worked in the store's dispatch office was also subjected to the polygraph test. The test was conducted by someone from outside.

[10] Whilst waiting the outcome of the polygraph test Crous handed over the investigation to Mr Peter West (West), the regional manager. He came to the conclusion in his initial investigation that there had not been a forced entry which could be blamed for the missing stock. He arrived at this conclusion on the basis of the reports which he received from the security company in charge of the property. He also concluded that the property must have disappeared between the 8<sup>th</sup> March 2006, the date of delivery and the date when it was discovered that the property was missing which is 14 July 2006. The various printouts obtained from the store's security company, had not shown any unauthorized entry into the warehouse after hours during this period. It was also for this reason that he concluded that the stock must have disappeared during the working hours.

[11] West testified during the arbitration proceedings that he interviewed and took statements from all relevant employees who worked in the store. He eliminated the branch manager Mahommed because she was away on leave during part of the period when the stock went missing. He also excluded her because she receives incentives based on the profit made by the First Respondent and was responsible for the security of the property of the First Respondent in general. Valen was excluded because she was the custodian of the keys and was responsible for the security and accounting of the stock. He testified that Valen knew that if stock was to go missing she could lose her job.

- [12] The other person who West excluded from the suspicion of involvement in the disappearance of the stock was the general assistance. He was excluded because according to West, Valen had told him that she never give the keys to the general assistance.
- [13] The trainee was interviewed because according to West even though he may not have been given the keys at any stage, he may have taken them from Valen's bag without her been aware. West further testified that looking at the size of the stock that went missing he came to the conclusion that more than one person must have been involved in the removal of each item. He also stated that he did not base his conclusion on the polygraph test but on his investigation.
- [14] The missing items had been removed over a period of time and not all at once. In this regard, everyone who had had access to the warehouse confirmed that if all the stock had disappeared at once, they would definitely have noticed as it would have left a very noticeable gap in the warehouse.
- [15] At least two employees had been involved in the unauthorized removal of the stock, as the nature of the items in question were such (for example, fridges and entertainment cabinets) that it would be impossible for one person to remove them unaided. Similarly, the items would have had to have been removed by a vehicle and not by hand.
- [16] At the time the polygraph test results were released West had already concluded his investigation in terms of which according to him, there was overwhelming evidence pointing the fact that Pillay and the employee were, the two people,

responsible for removing the stock from the ware house. The result of the test confirmed the suspicion of West that the employee was responsible for missing stock. The results of the polygraph test confirmed that the employee was lying when he said that he knew nothing about the missing property, according to West. It was pursuant to that investigation that the employee was charged.

### **Grounds for review and the arbitration award**

[17] The essence of the employee's complaint against the Commissioner's arbitration award is that in making the award he committed gross irregularity, misconduct and breached the employee's constitutional right to procedural administrative action. The employee further contends that the award is not justifiable and that the Commissioner placed undue reliance on the results of the polygraph tests.

[18] In dismissing the employee's claim the Commissioner accepted that West had conducted a comprehensive investigation into the missing stock and that he identified those who were responsible through the elimination process. He further found that the suspicion which West had was confirmed by the polygraph test.

### **The test for review**

[19] The broader test for review is set out in *Sidumo v Rustenburg Platinum Mines Ltd & others* (2007) 12 BLLR 1097 (CC), and it concerns an inquiry into whether or not the arbitration award is a decision which a reasonable decision maker could not reach. As concerning gross irregularity Ngcobo J in *Sidumo* held that:

*“It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his mandate. In so doing the commissioner’s action prevents the aggrieved party to have its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration... And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”*

[20] In the present instance the above test of determining whether or not there was an irregularity is applied in the context of determining the application of the legal principles relating to circumstantial evidence.

[21] The legal principles governing reliance on circumstantial received attention from this Court in the decisions of *National Union of Mine Workers & Others v Commission for Mediation, Conciliation and Arbitration* (2007) 28 ILJ 1614 (LC) and *National Union of Metal Workers & Another v Kia Motors* (2007) 28 ILJ 2283 (LC). In those decisions the Court in relying on the authority of Hoffman & Zeffert, SA Law of Evidence (5ed) at 93, held that the inference to be drawn from circumstantial evidence must be consistent with all the proven facts because if it is not then the inference cannot be drawn. In the *Kia Motor’s case* the Court, held that a distinction should be drawn between a permissible inference, a mere conjuncture and speculation. It was further held in that case that the onus is discharged if the inference advanced is the most readily apparent

and acceptable from a number of other possible inferences. See also *AA Onderlinge Assuransie- Assosiasie BPK v De Beer 1982 (2) SA 603 (A)*.

### **Evaluation of the award**

[22] It is clear that the case which the first respondent placed before the Commissioner was based on circumstantial evidence. The Commissioner drew the inference that the employee was guilty of theft of the missing stock on the evidence of West which was essentially based on his investigation. The question that then arises is whether the inference drawn that the employee was responsible for the disappearance of the stock excluded all other reasonable inference that could be drawn.

[23] In my view the inference drawn that the employee was guilty of theft of the missing stock is nothing but speculation not supported by objective facts. It is also my view that the evidence which was placed before the Commissioner was insufficient to form a basis upon which an inference of guilt on the part of the employee could be based. The web of circumstances in this case do not support the conclusion reached by the Commissioner.

[24] The First Respondent argued that there was no evidence that Mntambo, the trainee or the standby driver had unsupervised access to the ware house. It was the employee Pillay and Valan who had access to the warehouse. Mohammed was excluded as indicated earlier because she was the manager and was on leave during the period in question. The reason for excluding Valen was because she is the one who alerted the branch manager about the missing stock.



[25] The Commissioner in my view failed to appreciate the task before him and accordingly misconceived the application of the law relating circumstantial evidence. He relied on the evidence of West who indicated that he did not rely on the polygraph test but that it confirmed his suspicion. The suspicion which West had regarding the employee was based on what he was told by Velan. What Velan told him is that she had given the keys of the warehouse to a number of people including the employee during the period when it is estimated that the stock may have gone missing. There is no evidence indicating for what period of time the employee had possession of the keys. The answer to this question was important because it would have served as a factor pointing to the fact the employee had the opportunity to load the stock.

[26] The issue of allowing the employee access to the warehouse does not exclude that other people could not have had access even though unauthorized. Had the Commissioner applied his mind and had he appreciated that he was dealing with circumstantial evidence he ought to have weighed the possibility that some one could have had access to the keys even though he or she may have not received them from Valen. In this respect West testified that he did suspect that the trainee may have taken the keys out of Velan's hand bag when she left it unattended. This piece of evidence is important because not only does it indicate that Velan did not at all times make sure that the keys do not land in the hands of other people but also that the possibility exist that they may well have landed in the hands of such people who may have exploited the slackness on the on part of Velan.

[27] The exclusion of Valen, Mohamed and others, in my view, bares no logic and is unsustainable to support a view that the only reasonable inference is that the employee was responsible for the missing of the stock.

[28] In summary I find the Commissioner's inference to be nothing but speculation not supported by objective facts. Had he applied his mind and appreciated the task that confronted him he ought to have realized that the investigation of West was incomplete because he stopped investigating other possibilities as soon as he received the polygraph test which he says he did not rely on but that it confirmed his suspicion.

[29] In the light of the above I am of the view that the Commissioner's arbitration award stand to be review. I do not deem it necessary to remit the matter back to the CCMA for reconsideration, as in my view there is sufficient evidence on the record to assist this Court to make a determination.

[30] There is no reason in both law and fairness why the costs should not follow the results.

[31] In the premises the following order is made:

- (i) The dismissal of the employee is procedurally fair but substantively unfair
- (ii) The arbitration award issued by the Commissioner is amended to read as follow:

*“The dismissal of the Applicant, Mr Ngidi was procedurally fair but substantively unfair.*

*The First Respondent is order to reinstate the employee, Mr Ngidi into the position he occupied prior to his dismissal without loss of benefits and salary.”*

- (iii) The First Respondent is to pay costs of the Applicant.

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**Molahlehi J**

Date of Hearing : 4<sup>th</sup> November 2008

Date of Judgment : 18<sup>th</sup> May 2009

**Appearances**

For the Applicant : Mr Jafta of Jafta Incorporated

For the Respondent: Adv C Nel

Instructed by : Calitz Crockart & Associates/Bowman Gilfillan Incorporated