



REPUBLIC OF SOUTH AFRICA

Not reportable  
Of interest to other judges

## THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

### JUDGMENT

Case no: C 59/2011

In the matter between:

**THE NEW DODGE WATERFRONT  
PARTNERSHIP t/a DODGE DINER**

**Applicant**

and

**CCMA**

**First Respondent**

**COMMISSIONER JJ KITSHOFF N.O.**

**Second Respondent**

**STEWARD MASHOKO**

**Third Respondent**

**Heard: 29 May 2012**

**Delivered: 25 July 2012**

**Summary:** Review – LRA s 145 – range of reasonable outcomes – not reviewable.

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### JUDGMENT

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STEENKAMP J

## Introduction

- 1] This is an application for review in terms of s 145 of the LRA.<sup>1</sup> The employee, Mr Steward Mashoko (third respondent) was dismissed for misconduct. A CCMA commissioner (second respondent) found that his dismissal was not for a fair reason. He ordered the applicant to reinstate the employee retrospectively. The applicant employer submits that the award is reviewable.
- 2] The applicant was initially represented by an attorney, Mr Brendan Guy. Its pleadings were drafted by the attorney. At the hearing of argument, though, the applicant was represented by its sole proprietor, Mr G Aquadro. The employee was represented by an attorney.

## Background facts

- 3] The applicant operates a takeaway restaurant at the V&A Waterfront in Cape Town. The employee worked as an ice cream maker from July 2007. He was dismissed for misconduct, comprising the alleged theft of money from a locked safe on 1 June 2010. At the time of his dismissal, he had a clear disciplinary record.
- 4] On 22 March 2010 the applicant's manager noticed that some R 20 000 had gone missing from a locked holding safe on the premises. Three employees (including Mashoko) were asked to submit to polygraph tests on 30 March 2010. The results were that the other two indicated no deception, whereas Mashoko did.
- 5] The employee was criminally charged with theft. The state withdrew charges on 14 May 2010. He returned to work.
- 6] A disciplinary hearing took place on 27 May 2010. The employee was accused of misconduct in these terms: "Removal of property without consent – cash". The chairperson, Ms Zarina Holmes, found that he had committed the misconduct and he was dismissed. This finding was confirmed in an internal appeal.

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<sup>1</sup> Labour Relations Act 66 of 1995.

The award

- 7] The award under review pertains to a second arbitration. The first award – in which a different arbitrator came to a similar finding – was rescinded because the employer party had not received proper notice.
- 8] At the second arbitration, the applicant was represented by its Labour Relations Manager, Ms Zarina Holmes. The employee represented himself. Ms Holmes produced a written document comprising eleven pages of prepared notes, including an opening statement. She testified and called a further two witnesses, viz Mr Zane Scheepers, a driver; and Mr Glenn Aquadro, the new partner in the applicant partnership who is now the sole proprietor and represented the applicant in these proceedings. The employee testified on his own behalf.
- 9] The arbitrator came to the conclusion that there was no fair reason for dismissal. He found that it was common cause that the employee arrived at the shop on 22 March 2010 and that he went to the counter area to retrieve papers that he needed to do his work. He further found that it was common cause that the safe and the file shelf are adjacent to each other and that the CCTV camera cannot film what happens below the level of the countertop and that the CCTV footage did not record the manager, Mohamed, placing the money bag into the safe or that the employee opened the safe and extracted the money bag. He found, therefore, that it was not necessary for him to view the CCTV footage on site.
- 10] The arbitrator then considered whether the employee had committed the misconduct on a balance of probability. He found that the applicant had not provided any proof that the employee had a key to the safe, or that he opened the safe, or that he had the missing money in his possession. The applicant did not subpoena the employee's banking account details in an effort to prove that he deposited an amount equal to the missing sum into his account. Without any such proof, the arbitrator could not arrive at a determination that the employee had, on a balance of probability, taken the money.

- 11] Having found that the applicant had not discharged its onus to prove that the employee had removed the money, the arbitrator found that there was no fair reason for dismissal and that reinstatement was the primary remedy.

#### Review grounds

- 12] The applicant raised four grounds of review:

12.1 The Commissioner "misapplied himself in respect of this arbitration award and committed gross irregularities and his decision is not one that a reasonable decision maker could have reached."

12.2 The Commissioner erred in finding that the applicant's case was based on supposition and failed to find that the applicant's circumstantial evidence was sufficient on a balance of probability to find the employee guilty on a balance of probability.

12.3 The Commissioner did not consider the applicant's complaint that it did not receive the employees CCMA form 7.11.

12.4 The Commissioner refused the applicant's request for an inspection in loco as the Commissioner did not think it was necessary.

#### Evaluation / Analysis

- 13] I shall consider each of the review grounds in turn.

#### *Ground 1: Reasonable decision?*

- 14] The first ground of review is clearly based on the test set out in *Sidumo*.<sup>2</sup>

- 15] The applicant did not set out any reasons in his affidavit why the finding of the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. It appears from the record that the arbitrator applied his mind to the evidence before him and, on a balance of

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<sup>2</sup> *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

probability, came to the conclusion that the applicant has not discharged the onus of showing that the employee had been dismissed for a fair reason. This finding is within a range of reasonable outcomes and is not reviewable.

*Second ground: circumstantial evidence*

- 16] The applicant submits that the arbitrator should have found that the circumstantial evidence was sufficient on a balance of probability to find that the employee had committed the misconduct. Specifically, the applicant submits that the employee had no reason for crouching down in front of safe; and that he was the only person during the relevant time frame with the opportunity to have committed the offence.
- 17] It is clear from the evidence at arbitration, and the arbitrator reasonably found, that the safe from which the money was removed is not visible on the CCTV footage. It is located under a counter. The employee kept his work file on a shelf under this counter. It was not possible to see whether the employee opened the safe when he retrieved his file; and there was no evidence that he had a key to the safe. It is common cause that he was not entitled to carry a key to the safe.
- 18] The primary reason for the applicant to have eliminated the other two suspects and to have focused on Mashoko was because his polygraph test had indicated deception. That does not constitute evidence of misconduct, as the arbitrator correctly found. The arbitrator's finding in this regard is not unreasonable.

*Third ground: Applicant not served with form 7.11*

- 19] There is no merit in this ground of review. The employee's legal representative served the referral form on the applicant's then legal representative in terms of the rules of the CCMA. The first arbitration award was rescinded. Both parties attended the second arbitration. There are no pleadings in the CCMA. It is clear from the record that the applicant knew exactly what the nature of the dispute was.

*Fourth ground: refusal to conduct an inspection in loco*

- 20] In my view, this is the only review ground that may, on the face of it, have some merit. One is tempted to conclude that the arbitrator should have made use of the best evidence available in the form of CCTV footage; and that the matter should be remitted for another arbitrator to make use of this opportunity.
- 21] However, on a close reading of the record and the award, it becomes apparent why the arbitrator did not deem it necessary to view the footage on site. He explained that everyone had agreed at the arbitration hearing that the CCTV footage did not show the door of the safe or whether the employee had a key in his hand when he bent down to retrieve his file. In these circumstances, it would have served no purpose for the parties to view the footage again in the presence of the arbitrator. When the arbitrator discussed this with the applicant's representative, Ms Holmes, in the arbitration hearing, she did not object.
- 22] I am satisfied that the decision of the arbitrator not to review the CCTV footage or to conduct an inspection in loco was not unreasonable and that it did not deprive the applicant of a fair hearing.

Conclusion

- 23] The application for review cannot succeed on any of the four grounds raised by the applicant. With regard to costs, I take into account that the employee – who earned R3 900 per month -- has had to incur legal costs to defend an arbitration award in his favour; and that the applicant filed its heads of argument late, after the employee had filed his heads. I have granted condonation for the late filing of the applicant's heads of argument, but the applicant should, in law and fairness, be ordered to pay the employee's costs.

Order

- 24] The application for review is dismissed with costs.

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Steenkamp J

APPLICANT: Mr G Aquadro (employer).

THIRD RESPONDENT: Ms L Macnab of Chennels Albertyn attorneys.