REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 339/13

In the matter between:

SHOPRITE CHECKERS (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER J LE F PIENAAR	**Second Respondent**
SACCAWU	**Third Respondent**
JACOBA WIGGINS	**Fourth Respondent**
THANDOKAZI TONTSI	**Sixth Respondent**
AMALIA VAN HARTE	**Seventh Respondent**

Heard: **23 March 2014**

Delivered: **16 April 2014**

Summary: Review – misconduct – arbitrator misconceived nature of enquiry – reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to have an arbitration award by the second respondent, Commissioner J le F Pienaar, reviewed and set aside. He found that the dismissals of the third to sixth respondents – Ms Jacoba Wiggins, Ms Thandokazi Tontsi, and Ms Amalia van Harte – were unfair. He ordered the applicant, Shoprite Checkers, to reinstate them retrospectively.

Background facts

[2] The three employees were al employed in Shoprite's cash office at the Middestad Mall in Bellville. They were dismissed for gross negligence. The allegation pertaining to all three of them was that they "caused the safe to be short with R 71 283, 35 which is a loss to the company, and you cannot give an account for." Ms Wiggins faced a further allegation that she "caused a shortage of SASSA money of R65 000, which is a loss to the company and you cannot give an account for".

[3] SASSA is the South African Social Security Agency. Shoprite Checkers, like some other retailers, is appointed by the state to pay out social grants on its behalf. Wiggins, employed as a cash office controller, was responsible for the administration of SASSA payouts. The applicant funds the SASSA payouts from its daily takings. It then reclaims the money paid out from SASSA. The store prepares the SASSA "float" days before the first day of the next month when payouts start. The SASSA float at the store is about R2 million per month. Money from the day's takings is placed in specially marked bags in 20 bundles of R100 000 each. Two employees have to check the amount. Each bag is sealed and a numbered seal is placed on the bag. The bag is then dropped into the "drop safe'. Two employees must be present when the bag is dropped, and again when the bag is taken from the drop safe and the seal is broken. The employees involved must fall in a drop safe control sheet to record the date of the drop, the sum that was dropped, and the seal number. Both employees must record the seal number.

[4] Money is stored in a vault at the store. The vault contains a drop safe, a time lock safe and a secure "cage" where the "main float" is kept. During the day the cash office staff member responsible for the main float keeps the key to the vault and the key to the main float. The manager responsible for locking up each evening takes the vault key. The cake and the vault must be locked when the cash office personnel are not present. Each time an employee hands over the key to a different member of the cash office staff, that employee must complete a formal and documented handover. In the period relevant to the incident that led to their dismissal, the three individual employees (third to sixth respondents) were responsible for the cash office. The admin manager was on sick leave at the time.

[5] The main float is the float from which the individual cashiers' floats for the day are prepared. The main float has a total daily amount of R 200 000 allocated to it. The responsible employees must count, check and balance it daily. The float is made up from the day's takings and it is kept in the cage.

[6] Tontsi and Van Harte were employed as cashing up clerks. Together with Wiggins, they were responsible for the daily cash ups, conducting pickups, assisting with drops and collections into and from the drop safe, ensuring that all paperwork was captured, and that the cashiers' floats and the main float balanced daily. If they discovered any discrepancies, they had to report it to management.

[7] Van Harte had been employed by Shoprite for about 12 years. Due to her seniority, she would act as the cash office controller in Wiggins's absence. It is not disputed that the employees knew and understood their responsibilities and the applicable policies and procedures.

[8] The dispute leading to the employees' dismissal arose in the week of 24 to 30 September 2012, when the responsible admin manager, Mr Denyssen, was on sick leave. The dispute relates to two issues:

8.1 the employees' alleged failure to comply with the main float cash handling procedures, leading to a loss of R71 283, 35; and

8.2 Wiggins's alleged failure to comply with the Sassa float cash handling procedures, leading to a loss of R 65 000.

[9] On 30 September 2012 the branch manager, Ms Jacobs, called the regional admin manager, Ms Marie Paddock, to the store to investigate certain discrepancies. She discovered the following:

9.1 The cashier cash up slips for the period 27 to 29 September had not been captured. The paperwork was strewn about the cash office.

9.2 The employees had not balanced the main float daily. They did not do so on 16, 19, 20, 23, and 26 to 29 September 2012.

9.3 Money collected on Saturday, 29 September 2012 had simply been left in the vault in float bags.

9.4 The employees had not done a formal handover of the cage key and had left the key in the cage for the next "holder" to collect.

9.5 The employees did not collect and cancel IOU's issued to the cashiers as a result of the transfer of money from the Sassa float bags to the main float.

9.6 There was a total shortage on the main float of R 71 283, 35.

9.7 Wiggins had not completed the Sassa drop safe sheet when she removed float bag number 19 from the drop safe. She also removed the bag on her own, and not in the presence of another employee. In fact, there was no record of bag 19 having been removed from the drop safe at all. The seal number that had been placed on the bag had been removed and the bag resealed with a different seal number, without any record of that seal number. Sassa bag 19 was R 65 000 short.

[10] All three employees attended a disciplinary enquiry in respect of the following allegation of misconduct:

> "Gross negligence – in that you have caused the safe to be short of R 71 283, 35 which is a loss to the company and you cannot give an account for."

[11] In addition, Wiggins face the following allegation:

> "Gross negligence – in that you have caused a shortage on the net one Sassa money of R 65 000, which is a loss to the company and you cannot give an account for."

[12] The outcome of the disciplinary hearing was that all three employees were dismissed.

The arbitration award

[13] The arbitrator proceeded from the following premise:

> "In both allegations raised against the [employees] the words "gross negligence" preface the allegations, but the grounds of negligence are not set out, and the [employees] cannot be found guilty of any specific instance of negligence, as they had not been appraised [*sic*] of these allegations."

[14] The arbitrator accepted that there was indeed a shortage of R 71 283, 35 in the main float, and a shortage of R 65 000 of Sassa money (despite Wiggins's denial).

[15] The arbitrator then considered the question of causation:

> "The further issue that has to be decided is one of causation, i.e. whether it can be said that the loss was *caused* by [Wiggins] in respect of allegation number 2 [SASSA], and in respect of allegation number 2 [*sic* – clearly a reference to the shortage in the main float] by the three [employees]. This is a legal issue, viz. whether factual causation as well as legal causation was established, as referred to in … *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E – 701A."

[16] The arbitrator went on to found that the employees could not be held responsible for the losses, "as anybody could have taken the money as anyone could go in and out of the cash office and have caused the loss. This situation arose not only because the applicants did not follow the rules, but also due to lack of supervision on the part of management (Ms Jacobs, the branch manager and Mr Denyssen, the admin manager) and instructions given to them at times to ignore the rules".

[17] The three employees could not give any explanation how the losses occurred on their watch, and maintained that there were no losses, despite the clear evidence to the contrary. The arbitrator found:

> "In this respect they are mistaken, but I accept their evidence that they do not know how the losses occurred."

[18] The arbitrator appeared to accept that it was the responsibility of the three employees to ensure that the work was done according to the prescribed procedures. However, he added:

> "But the branch manager also had a responsibility to oversee that the rules were complied with, as is evidenced by the fact that Ms Jacobs was charged with gross negligence by not ensuring that all the cashiers' cash-up slips had been captured and declared (the responsibility of management as stated by Ms Paddock), and given a final written warning."

[19] The arbitrator found that it had not been shown that, but for the gross negligence of the employees, the losses would not have occurred, "as the failures of management at the branch could just as well have caused the losses". He found that "factual causation has not been proved" and that the company had failed to show that the employees had caused the losses.

Review grounds

[20] The applicant submits that the arbitrator committed a gross irregularity in the conduct of the proceedings; and that his finding is not one that a reasonable arbitrator could reach on the evidence before him.

Evaluation / Analysis

[21] In finding that the employees could not be "found guilty" of any specific incident of negligence, as they had not been apprised of those allegations, the arbitrator misconceived the nature of the enquiry. The enquiry was simply whether they had committed misconduct in the form of gross negligence. The notices for the disciplinary hearings clearly set out what the nature of that allegation was, i.e. that all three of them had caused the safe to be short with R 71 283, 35; and that, in addition, Wiggins caused a shortage of Sassa money of R 65 000.

[22] The guidelines for a disciplinary enquiry are set out in the Code of Good Practice: Dismissal and the court in *Avril Elizabeth*[1] reminded us that:

> "...it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss".

[23] Van Niekerk J added that there is no place for formal disciplinary procedures that incorporate all the accoutrements of a criminal trial, including technical and complex 'charge sheets' and requests for particulars. It is difficult to see how the arbitrator could have found that the employees in this case "had not been appraised [*sic*] of" the allegations against them. The allegations were quite clear: they were responsible for the money; they did not follow the prescribed procedures; and that negligence caused a loss to the company.

[24] That is in accordance with Item 4(1) of the Code that simply requires that:

> "The employer should notify the employee of the allegation by using a form and language that the employee can reasonably understand."

[25] Disciplinary allegations are not intended to be a precise statement of the elements of the alleged offence. The allegations need only be sufficiently precise to allow the employees to identify the incident that forms the subject matter of the complaint to enable them to prepare their defence.[2] That is exactly what happened in this case. The employees knew exactly what the allegations pertaining to their alleged gross negligence were and they had a full opportunity to explore it further in the disciplinary inquiry and again in the arbitration. They did not complain that they did not know what it was about.

[26] As the LAC commented in *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO:*[3]

> "Granted, the charges as reflected in the notice of enquiry did not specify with any degree of certainty what it was that the [employee] was alleged to have done which supported the charges preferred against him. According

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[1] *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC).

[2] *Zeelie v Price Forbes (Northern Province)* (2001) 22 *ILJ* 2053 (LC) 2063 A-C.

[3] [2010] 5 BLLR 513 (LAC) para [41].

> to Binx, the charges were explained to the [employee] at the disciplinary hearing. In any event, it did appear from the nature of his defence and evidence ... that the [employee] fully understood the import of the charges against him and conducted his defence thereto reasonably well. The position was further better demonstrated during the arbitration proceedings, which was a hearing de novo of the dispute. Indeed, it could not be expected of a company official who was not legally trained to have drafted and formulated the charge sheet as, for example, was seen to be done in a court of law."

[27] The same holds true for this case. The arbitrator in this case gave the employees the benefit of an unarticulated defence. This is a material misdirection that directly affected his conclusion.[4] The employees' defence was that they did not commit any misconduct, not that they didn't understand the allegations. The arbitrator's findings in this regard amount to a gross irregularity that led to an unreasonable conclusion.[5]

[28] The next building block of the arbitrator's conclusion is his finding in respect of causation. But the authority he refers to deals with a damages claim founded in delict. The question before him was, quite simply, whether the employees had been grossly negligent, thus causing the (admitted) losses to the company. Although the allegations could have been more clearly drafted, it could not have been expected of the company to show that the employees intentionally caused the losses; indeed, that would have been contrary to the allegation of "gross negligence". The company did show that, on a balance of probabilities, the gross negligence of the employee led to the losses complained of. But for their negligence, it is improbable that the losses would have occurred.

[29] In applying the test of causation as it applies to damages in delict, the arbitrator misconceived the nature of the enquiry and applied the incorrect legal test. That led to an unreasonable result.

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[4] *Slagment (Pty) Ltd v BCAWU* (1994) 15 *ILJ* 979 (A) 989.

[5] *Herholdt v Nedbank Ltd* [2013] 1 BLLR 1074 (SCA).

[30] With regard to the specific allegation against Wiggins, that her gross negligence led to the loss of R65 000 of SASSA money, the arbitrator accepts that there was a shortage of R 65 000; yet he leaves it there.

[31] Wiggins provided contradictory versions at the disciplinary hearing and the arbitration with regard to the loss of the SASSA money. At the arbitration she said that she left R35 000 in the bag and issued a new seal. That is highly implausible, as she signed off on it as the second checker. She admitted that she was ultimately responsible; yet the arbitrator failed to deal with this aspect altogether. In this respect he prevented the company from having its allegations fully and fairly determined. This was a gross irregularity that led to an unreasonable result in respect of Wiggins.

[32] On the evidence as a whole, it is clear that the employees were aware of the proper procedures; that they did not follow those procedures; and that their gross negligence caused a loss to the company. The arbitrator's conclusion that the misconduct had not been proven is so unreasonable, in my view, that no other arbitrator could have come to the same conclusion.

Conclusion

[33] The award must be reviewed and set aside. It would serve little purpose to remit it. All the evidence is before the court. The three employees were in a position of trust. They committed gross misconduct that broke down the trust relationship between them and the employer. Their dismissal was fair.

[34] With regard to costs, I take into account that the employees had an award in their favour and they had little choice but to defend this application. I do not consider a costs award to be appropriate in law and fairness.

Order

[35] I therefore make the following order:

35.1 The arbitration award of the second respondent dated 15 April 2013 under case number WECT 18572-12 is reviewed and set aside.

35.2 The award is replaced with the following award: “The dismissal of the three employees, Ms Jacoba Wiggins; Ms Thandokazi Tontsi; and Ms Amalia van Harte, was fair.”

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Steenkamp J

APPEARANCES

APPLICANT:	José Jorge of Norton Rose Fulbright.
THIRD to SIXTH RESPONDENTS	Coen de Kock Instructed by Carelse Khan attorneys.