

**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Not Reportable

Case No: C 184/17

In the matter between:

**FUNDISWA MLOTHA**

**Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

**First Respondent**

**LAMEESAH JOOMA N. O**

**Second Respondent**

**WOOLWORTHS (PTY) LTD**

**Third Respondent**

**Heard: 17 October 2018**

**Delivered: 9 July 2019**

---

**JUDGMENT**

---

**TLHOTLHALEMAJE, J**

Introduction and background:

- [1] The applicant (Ms Fundiswa Mlotha) approached this Court for an order reviewing and setting aside the arbitration award dated 10 February 2017, which was issued by the second respondent (the Commissioner) acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA), under case number WECT 14598-16.
- [2] In the award, the Commissioner had found that the dismissal of Mlotha by the third respondent (Woolworths), was substantively fair. Woolworths has opposed the review application.
- [3] The arbitration award followed upon a referral of an alleged unfair dismissal dispute to the CCMA by Mlotha, subsequent to her dismissal by Woolworths on 31 August 2016, on the grounds of breach of company rules and policies.

- [4] Mlotha was before her dismissal, employed by Woolworths as a Human Resources Store Administrator at the Paddocks branch in Milnerton. She commenced her employment with Woolworths in March 2013. The allegations against Mlotha that she had *inter alia* breached Woolworths' *policy on honesty* emanated from an incident that took place on 29 July 2016. It was alleged that in breach of company policies, she had set aside and/or reserved a full priced item (a pack of beef meat) under the false pretence of a reservation on behalf of a customer, for the sole purpose of concealing it from other potential customers, and taking advantage of a reduced or discounted price that was to take place at a later period during that day.

The arbitration proceedings:

- [5] The evidence before the Commissioner as presented by Woolworths' Foods Department Manager (Jason Scott), was that;
- 5.1 Woolworths has an 'end of life promotion' document or policy, in terms of which every day at 14h00, certain products on its shelves including meat products, have their prices reduced to 30% for clearance. This practice is essentially intended that products that have reached their sell by date are purchased in order to reduce waste.
- 5.2 Woolworths also has a policy directed to its employees, in terms of which the reservation of any sales merchandise prior to, during, or after the sale periods, is regarded as a breach of the honesty code of practice to be met with instant dismissal. Furthermore, employees in accordance with policies are warned to desist from putting away stock for personal reasons in any unauthorised areas; from purchasing or placing expired merchandise in their shopping baskets before it was recorded, and or to set aside merchandise for the purposes of purchasing them at a later stage during the sale period.
- 5.3 Mlotha was charged with setting aside a full priced pack of meat under the pretence of a customer order. Woolworths has a policy that permits items to be set aside for customers upon their requests. Where this is done, the customer's contact details must be placed on the item before

it is removed from the shelves. The items would in turn be placed on the 'inter-active stand' in the cooler, and the customer would be given until the end of the business day to collect the item. If late in the day the item had not been collected, the customer would be contacted to establish whether he or she is still interested in purchasing the item.

- 5.4 It is further a practice that customers when making requests for items to be reserved, would ordinarily call the sale assistants to make such reservations. Mlotha was based in an office, and was accordingly not one of the sales assistants that dealt with customers.
- 5.5 At about between 08h00 and 9h00 on 29 July 2016, Mlotha was observed by Scott and Vincent Smit, the early Morning Controller, taking the pack of meat into the cooler. The pack, contrary to practice and procedure, did not have any details of a customer on it. When asked however, Mlotha had stated that the pack was reserved for a customer.
- 5.6 At about between 14h26, Mlotha had presented the meat pack at the tills for her own purchase. Ordinarily, the item would have cost R115.51, but Mlotha had bought it for R80.00, having had a 30% sticker placed on the item and further having benefitted from a staff discount. Scott in the course of his duties had signed off the transaction in line with procedures, where staff purchase items from the store.
- 5.7 Following the purchase, investigations including the viewing of CCTV surveillance footage had revealed that Mlotha had retrieved the meat pack from the cooler at about 14h00, and presented it to a replenisher ('Yanga') to affix a sticker on it with a marked-off of 30%. She then placed the pack in her shopping basket and proceeded to the till point to make payment.

- [6] David Jardine, Woolworths' Food Department Manager had investigated the misconduct in question, and his evidence before the Commissioner was essentially that;

6.1 He had interviewed Mlotha, Scott and other individuals in relation to the matter and obtained written statements from them. Interviews were conducted with Mlotha on 1 August 2016 and when she was asked of the customer's details, she did not initially have them. Mlotha was then suspended from duty on 4 August 2016 and had provided the customer's details, which she had retrieved from her personal mobile phone. Attempts at contacting the customer however proved unsuccessful, and there was no record that the customer had called to reserve the item or was called about when the item would be collected.

[7] Mlotha's testimony was as follows;

7.1 On 29 July 2016, she was the store manager on duty. A customer had called and asked her to reserve the pack of meat for her, and she had done so in line with her obligations to provide quality service to customers and responding to their needs. When the customer called in to make the reservation, she had asked for her details and enquired as to when the item would be collected. She then gave the customer a grace period of thirty minutes within which to collect the item. When the customer did not arrive, she then moved the item to the shelves/sales floor.

7.2 At some point she came across the replenisher who was busy with marking down items. She then gave him the item to mark down, and proceeded to the tills to make her purchase. The transaction was authorised by Scott.

7.3 She contended that her dismissal was unfair, as it was as a result of a trap by Scott, who did not even afford her an opportunity to state her side of the story on the day in question.

7.4 Under cross-examination;

7.4.1 Mlotha denied that she ever placed the meat pack aside, and that all that she did was to place it in the demarcated area. She insisted however that the customer had indeed called in the

morning and asked her to put the pack aside, which would be collected at or about 13h30, hence she placed it in the demarcation area in the cooler. She could not however recall at what time the customer had called.

7.4.2 She testified that she took the customer's details and wrote them on a piece of paper which she had placed in her personal handbag. She further could not give the customer's details immediately she was asked about them, as she felt intimidated and was not thinking straight.

7.4.3 She further testified that she had made the statement referred to in the proceedings under duress, and had merely signed it as she was concerned that she could be charged with insubordination. She disagreed with the contents of that statement, but however conceded that she was not threatened into making that statement.

7.4.4 She confirmed that she did not call the customer on 29 July 2016 to enquire as to when the meat pack would be collected, and her reasoning was that the customer had advised her that she would collect the item at a certain time, and also since she wanted to save telephone costs.

7.4.5 When the customer did not arrive, she then retrieved the meat pack from the cooler and gave it to the replenisher and told him that it was due for a markdown. She confirmed that she did not place the pack back on the shelves, but contended that the replenisher had affixed a markdown sticker on it and placed it on the shelves, from which she took it and proceeded to the tills.

7.4.6 She testified that if she had any bad intentions, she would have simply retrieved the pack from the cooler and proceeded to the till as it would have been scanned and marked down in any event.

The arbitration award:

[8] The Commissioner had regard to the provisions of Item 7 of Schedule 8, of the Code of Good Practice, and accepted that there was a duty on employees to act honestly in the execution of their duties and/or towards their employer. The Commissioner further observed that Woolworths had codified this general principle into a standard employment rule, and that Mlotha had contravened Woolworths' policy on honesty based on the following conclusions;

- 8.1 Mlotha had deliberately removed the item in question from the designated refrigerator with the sole intent of purchasing it at a reduced price at a later stage, which culminated in her unduly benefiting from her dishonest conduct.
- 8.2 Mlotha's contention that she had in fact returned the item to the designated refrigerator for the purpose of making it available for sale to the public and/or other employees of Woolworths ought to be rejected.
- 8.3 Contrary to Mlotha's evidence, the video evidence demonstrated that she had handed over the item to the replenisher for the purposes of implementing a price deduction of 30%, and thereafter placed the item into her shopping basket for her personal purchase.
- 8.4 Employees who conducted themselves in a manner that had the potential to breach the trust relationship between the employee and the employer left themselves exposed to a peril of corrective measures being taken against them. In this case, Mlotha had deliberately acted in a manner that resulted in Woolworths making a loss of R36.00 and further that she had benefited from her dishonest conduct.
- 8.5 Mlotha's refusal to accept responsibility for her conduct contributed to the break down in the trust relationship between her and Woolworths, and further that it was indicative of the absence of remorse on her part.

Grounds of review:

[9] In seeking to have the Commissioner's award reviewed and set aside, it was submitted on behalf of Mlotha that;

9.1 The Commissioner had committed an error in concluding that the procedural fairness of the dismissal was not an issue for determination owing to its omission in the referral form. The procedural fairness of the dismissal was at issue and further that its omission for the Commissioner's considerations culminated in the breach to her right to a fair trial of issues and therefore constituted a reviewable irregularity.

9.2 Aligned to the allegation that there was no fair trial of issues, it was submitted that Mlotha was denied an opportunity to cross-examine a witness viz Mr Vincent Smith who failed to make an appearance at the disciplinary hearing.

9.3 The charge preferred against Mlotha was sustained through hearsay evidence in view of Smith's absence from the disciplinary hearing, and the Commissioner placed reliance on the statement of Smith and unduly took into account hearsay evidence.

9.4 The Commissioner failed to take into account that the transaction in question was approved by Woolworths, making the dismissal on account of the same transaction irregular and unfair.

9.5 In the alternative Mlotha contends that the dismissal was an inappropriate sanction due to the failure of Woolworths to adduce evidence at the arbitration proceedings that continued employment was intolerable and/or that there was a breach of trust. In the end, Mlotha contends that dismissal was too harsh a sanction.

[10] Woolworths in opposing the review application contends that an analysis of the award reveals that the Commissioner;

a) appreciated the nature of the enquiry before her, which was whether Mlotha's dismissal was substantively fair.

- b) committed no material misdirection as regards her understanding of the evidence, and
- c) arrived at a reasonable decision

The test on review and evaluation:

- [11] Central to the determination of whether an arbitration award is reviewable is whether the decision arrived at by the Commissioner is one that a reasonable Commissioner could not reach in the light of the material placed before him or her<sup>1</sup>. An award would meet the requirement of reasonableness if there are reasons supporting it<sup>2</sup>. It is further trite that awards should not be easily interfered with, unless the decision arrived at by the Commissioner was entirely disconnected with the evidence, or is unsupported by any evidence and/or involves speculation on the part of the commissioner<sup>3</sup>.
- [12] Flowing from *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*<sup>4</sup>, it is not sufficient to rely solely on the allegation that there was a gross irregularity in the conduct of the arbitration proceedings. More is required in that the applicant seeking a review must establish that the ultimate result was unreasonable, in the sense that the decision arrived at by the Commissioner is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material.
- [13] Thus, the question remains whether despite the Commissioner's reasoning, it can be said that the result is in any event capable of justification in the light of the material placed before the Commissioner. Allegations that the Commissioner committed material errors of fact, or placed little or too much weight and relevance to particular facts, or failed to have regard to particular facts, are not in themselves sufficient to sustain a review, unless it is

<sup>1</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) at para 110

<sup>2</sup> *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at para 43

<sup>3</sup> *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at 2802 para 13; *DRS Dietrich, Voigt & MIA v Bennet CM N.O and Others* (CA14/2016) [2019] ZALAC 2 (27 February 2019)

<sup>4</sup>[2014] 1 BLLR 20 (LAC),



demonstrable that the errors complained of rendered the final outcome unreasonable.

- [14] It has further been restated that in determining whether the Commissioner's award is reviewable, the substantive fairness of the applicant's dismissal ought to be looked at, and regard must be had to what the essence of the charges proffered against the applicant entailed, and which rules or policies are alleged to have been breached<sup>5</sup>.
- [15] In this case, and as evident from the record, Woolworths had rules, policies and procedures in place in regards to reserving items for customers. These were elaborated upon by Scott in his evidence before the Commissioner which Mlotha could not dispute. Her only contention was that these policies or rules were only applicable in the clothing department, which contention was not or could not be substantiated.
- [16] It was apparent from the formulation of those policies and rules that they were applicable to all the departments in Woolworths. They were well-known; were reasonable; and were put in place for operational reasons, which included setting of high standards of integrity and honesty, in pursuance of customer service. Mlotha had conceded at the arbitration proceedings that she was fully aware of the consequences of breach of these policies.
- [17] From the evidence, there is something that does not add up with Mlotha's defences. She did not deny that she had indeed removed the pack from the shelves and taken it to the cooler. The first issue is that the contact details of the customer were not placed on the item contrary to standing procedures. As to the reason Mlotha would have secured those details from the customer and however placed them in her personal handbag is unknown nor explained. On that score alone, there was a clear breach of policies.
- [18] A second consideration is that there was no evidence that this customer was called before the item could be retrieved from the cooler storage. When

---

<sup>5</sup> *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC) at para 57

confronted, Mlotha did not have the details of the customer, and it was only after the fact that she had produced them. Even then, on the evidence of Jardine on behalf of Woolworths, the alleged customer could not be reached on the contact details provided by Mlotha.

- [19] Despite the fact that the alleged customer undertook to collect the item at 13h30, Mlotha did not call her prior to removing the item from the cooler storage, and again contrary to standing policies. Her explanation for not calling the customer is clearly unconvincing. If Woolworths has a policy that customers must be contacted to remind them of their reservations, I fail to appreciate the reason Mlotha would suddenly be concerned with saving telephone costs.
- [20] Mlotha had then decided to retrieve the beef pack from the cooler storage. There is a dispute as to whether she had placed it back on the sales shelves or not. Her version is that having retrieved the pack, she then gave it to the replenisher and told him that it was due for a markdown. She also confirmed that she did not place the pack back on the shelves, but contended that the replenisher had affixed a markdown sticker on it and placed it on the shelves, from which she took and proceeded to the tills.
- [21] Irrespective of the sequence of events, the most probable conclusion to be reached as the Commissioner had done, was that having reserved the meat pack for herself, she had then retrieved it from the cooler at 14h00 at the time that she knew items would be marked down, and proceeded to find the replenisher and told him that the item was due for a markdown. The replenisher having duly affixed the mark down sticker on the item, whether Mlotha had placed the item back on the sales shelf is immaterial, as she had immediately thereafter, proceeded to the sales tills to pay for it. The contention made on behalf of Mlotha that once the item was placed back on the sales shelf, then anyone could buy it misses the point. Mlotha had clearly contrary to standing policies and procedures, engineered the circumstances which enabled her to buy the item at the discounted price.

- [22] In the light of the above circumstances, and in line with what was stated in *Goldfields*<sup>6</sup>, there is no basis to conclude that the process that the Commissioner employed did not give the parties a full opportunity to have their say in respect of the dispute. The submissions made on behalf of Mlotha that the Commissioner did not afford the parties a fair trial of issues on the basis that she was denied an opportunity to cross-examine Mr Vincent Smith of Woolworths as he had failed to make an appearance at the disciplinary hearing does not take her case any further. It is trite that proceedings before the CCMA are *de novo*, and if Mlotha wanted to have Smith cross-examined, nothing prevented her from having him subpoenaed. Furthermore, it is not known what value Smith's evidence would have added to her case.
- [23] The further submission made on behalf of Mlotha that the Commissioner did not afford her a fair trial of the issues as she did not deal with her allegations of procedural unfairness are equally without merit. If an allegation is made in the CCMA referral forms that a dismissal was procedurally unfair, evidence in that regard needs to be placed before the Commissioner. In the absence of such evidence, I fail to see how it can be said that the Commissioner committed an irregularity by not considering the issue.
- [24] Further having had regard to the analysis and conclusions in the award, I am satisfied that the Commissioner properly identified and understood the nature of the dispute she was required to arbitrate, and dealt with the substantial merits of the dispute. The Commissioner gave reasons that supported her decision and there is no basis for any conclusion to be reached that her

---

<sup>6</sup> At para 20, where it was stated that;

"Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

conclusions were disconnected with the evidence, or unsupported by any evidence and/or involved speculation on her part.

- [25] The Commissioner having had regard to the misconduct in question as against the rules and policies breached, also had regard to whether the sanction of dismissal was appropriate in the circumstances. She placed emphasis on a trust relationship between an employer and employee, and pointed out that Mlotha knowingly took the risks to her detriment with her conduct. She also had regard to Mlotha's failure to take responsibility for her actions or to show some form of contrition. In these circumstances, I fail to appreciate the reason that it can be said that the Commissioner's award is reviewable, where a senior employee, knowingly breached company rules related to honesty and integrity, failed to show any form of contrition, and still pleaded victimhood. Flowing from Mlotha's own conduct, that was sufficient for a conclusion to be made that the trust relationship could not be restored. There was no need for further evidence demonstrating that the trust relationship was broken down<sup>7</sup>. In the end, it ought to be concluded that the decision arrived at by the Commissioner in the light of the material placed before her, is a decision that falls within a band of reasonableness, and it follows that the review application should be dismissed.
- [26] I have further had regard to the requirements of law and fairness, and accordingly hold the view that a costs order is not warranted in this case.
- [27] In conclusion, it needs to be mentioned that upon judgment of this matter being reserved on 17 October 2018, the Court's file which was despatched to Johannesburg via courier never found its way to my chambers. Despite a search and enquiries by the Office of the Registrar with the appointed courier service provider, the file could not be found. The Court extends its gratitude to

---

<sup>7</sup> See *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC) at para 15, where it was held that;

"Also in *Absa Bank Limited v Naidu* and others, it was stated that "there are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts on whether a decision to dismiss an offending employee is a reasonable one. Generally, however, a sanction of dismissal is justifiable and, indeed, warranted where dishonesty involved is of a gross nature." This signifies that the nature of the misconduct may well determine the fairness of the sanction. It must therefore be implied from the gravity of the misconduct that the trust relationship had broken down and that dismissal is the appropriate sanction."

the Office of the Registrar and the parties in this matter in ensuring that a duplicate file was reconstructed, and further apologises to the parties for the delay in the delivery of this judgment.

Order:

[28] In the premises, the following order is made;

1. The applicant's application to review and set aside the arbitration award issued by the second respondent under case number WECT 14595-16 dated 10 February 2017 is dismissed.
2. There is no order as to costs.

---

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Ntloko of M.P Ntloko Attorneys

For the Third Respondent:

E Geldenhuys of Macgregor and Erasmus Attorneys