REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN)

JUDGMENT

(Reportable)

Case No: D441/11

In the matter between

TRUE BLUE FOODS (PTY) LTD T/A

KENTUCKY FRIED CHICKEN (KFC) **Applicant**

and

THE COMMISSION FOR CONCILIATION, **First Respondent**

MEDIATION AND ARBITRATION

(“CCMA”)

COMMISSIONER A.DEYZEL N.O. **Second Respondent**

SELLO NHLABISENG AND OTHERS **Third Respondent**

Heard: 29 May 2014

Delivered: 28 November 2014

Summary:

JUDGEMENT

SHAI AJ

Introduction

[1] This is an application by the Applicant which seeks to review and set aside the award of the Second Respondent issued under case number KNDB8398-10, under the auspices of the First Respondent; and further that the said award be substituted with a finding that the dismissal of the Third Respondents was both procedurally and substantively fair.

[2] The Third Respondents has not filed an answering affidavit and the opposition is made purely on the point of law. The Third Respondents did not lead evidence at the arbitration hearing and argued its case on the Applicant's own version.

The facts

[3] The Applicant employed the Third Respondents with effect from 1 December 2009 in various capacities, namely as cooks, expeditors and cashiers. The Applicant alleged that during the period of 27-30 May 2010 various items of stock were removed from the store at astonishing amounts.

[4] Third Respondents worked for the Applicant and during the period in question were all working and doing evening shift that started at 15h00 and finished at 22h00.

[5] The stock loss was experienced in the store since when it was bought by the Applicant in December 2009. As a result of the stock loss, the Applicant improved its security measures at the store by *inter alia* changing locks and locking the freezer, storeroom, fridges, the interlinking door at the drive-thru section and walk in coolers.

[6] In addition there was also a security guard who patrolled the store and searched employees, including the Third Respondents, when they leave the store. This search is not body search but searching of their bags.

There were also CCTV cameras focussing mainly at the:

- cashiers section, dining room, cooking station,

- one at each drive-thru window and expedite section.

[7] The Applicant had also installed Alona system, a computer system that captures all activities at every till in the store and further captures the time of the activity.

[8] Generally, purchases at the store will be rung up by the cashier in her till. It will appear on a bump screen at the expedite section. The Expeditors will prepare the order and hand it to the cashiers for dispatch as per bumper screen. Some orders will be rung up and prepared by the cashier themselves. Some orders will be called verbally by cashiers by shouting loud to the expeditors to prepare.

[9] Cooks will cook as per the daily targets given to them by the manager.

[10] Regarding the shrinkage the employer communicated with all the employees and their Trade Union/shop steward representative about zero tolerance attitude of the Applicant towards theft and misappropriation of stock.

[11] The Applicant had made it clear to the employees that it was part of their duties and responsibilities to avoid stock losses and to report any such acts of misappropriation and shrinkage to the Applicant.

[12] The Applicant contended that the said shrinkage constituted a loss in the region of R80,000-R120,000 per month. This however, did not include possible profit that would have been derived from the sale of the lost stock.

[13] Additional to measures taken to cap the shrinkage, the Applicant implemented the following:

- Changed management and supervising staff at the end of April 2010.

- Staff was consistently informed of the shrinkage and that this was intolerable.

- Stock handling measures implemented.

[14] The Applicant contended further that the Sarnia store (the workplace) is in significant size constituting a two storey building with a dining facility on both floors as well as a drive-thru facility, as such managers and supervisors were not always within the area where employees work namely the cooks, expedites and the cashiers.

[15] Applicant contended further that it is literally impossible to constantly keep fridges locked and to prevent access to the store room by employees especially when it was very busy and stock had to be replenished.

[16] Although the Applicant was able to identify Dolwane and another employee who failed to ring certain items by reviewing the CCTV footage in conjunction with ALOHA system, the Applicant contended that to do this every time was an impossible task as it would require one to go through all footage to check each and every cashier.

[17] The Applicant contended further that the losses were alarming, that in some instances 424 cans of cool drink went missing and in another instance 518 cans of juice went missing-all during one shift.

[18] There were also a number of other items that also disappeared in large volumes namely, chicken, in one instance 113 pieces of chicken and 32 kg of chips went missing.

[19] The Applicant contended that given these large volumes, it was literally impossible that all the team members would not have been aware of what was going on.

[20] The Applicant contended further that the stock could have been lost in various ways including:

- as a result of cans and crates of juice, frozen chicken and chips being removed from the store room and fridges by various members of the team who from time to time would have been called upon to fetch stock and others being thrown out the rear entrance door or over the balcony.

- through a process of stock not being rung up by cahiers and being moved out of the business.

- items disappearing through the drive-thru.

[21] It was further contended that there were freezers and walk in coolers downstairs in close proximity to where cooks and expeditors worked and as such, they would have and could have been removed from their storage facilities particularly if this took place in large quantities.

[22] Generally managers determine the amount of chicken to be cooked per hour, however, the expeditors had the powers to call for more chicken to be cooked and this could result in more items being cooked than was required and these could be passed out of the store on pretext of having been sold.

[23] The cooks would have been aware and they would have been involved, with the process of preparing this chicken.

[24] During May 2010, the store received from Head Office an email which emphasized zero tolerance of shrinkage and the fact that disciplinary action would be taken if stock losses continued at the significant levels as was taking place at the Sarnia store.

[25] During the period between 27 May-29 May 2010, the following items disappeared during the shift worked by the respondents:

- Some 77 pieces of chicken and 42 kgs of chips-27 May 2010

- Some 55 pieces of chicken and 20.72 kgs of chips-28 May 2010

-Some 113 pieces of chicken-29 May 20

[26] The decision was then taken to proceed with disciplinary process against the Third Respondents.

[27] Prior to the Third Respondents being suspended, they were spoken to by the Area Manager namely Nadeira Sheik, who gave each of the Third Respondents an opportunity to come forward and provide any information of how the stock losses were taking place. None of them accepted the offer.

[28] A disciplinary enquiry was then held in respects of the Third Respondents, all of whom worked in one shift when the stock got lost and they were all found guilty and dismissed.

[29] It was further contended that since the dismissal of the Third Respondents, the stock position resolved itself and there are no longer any stock losses.

[30] The Third Respondents referred the matter to the CCMA. The Second Respondent ("the arbitrator") determined that the Applicant had failed to prove that the Applicants were involved in causing the items to leave the store without it being paid for or that they knew or should have known who was responsible for it. He consequently found the dismissal of the Third Respondent substantively unfair and ordered six months compensation in respect of each Third Respondent.

[31] It is this decision that is sought to be reviewed and set aside.

Grounds of review

The grounds of review are listed as follows:

[32] The Second Respondent committed an irregularity in that he based his conclusions on the following issues:

32.1 A conclusion that the concept of 'team misconduct' as was espoused in the *Snip Trading* case was unclear in its application as far as the individual culpability of employees was concerned and in

fact tendered to suggest the imposition of an unacceptable concept of strict liability upon some employees.

32.2 That the team misconduct did not apply in the *Foschini* case as that finding of the Labour Appeal Court was based upon an inference that the employees had colluded to keep the employer ignorant of the fact that a third of the stock had disappeared. As such, the Second Respondent reasoned that the *Foschini* case was decided essentially upon the principles of common purpose and derivative misconduct as opposed to team misconduct.

32.3 That the facts of *Foschini* case were distinguished from the present matter as management were aware of the stock variances and it was not proved that the percentage stock losses were anywhere close to 28% that had taken place in the *Foschini;*

32.4 That it was not possible to draw an inference that the team constituted by the Third Respondents had colluded to allow items to leave the store without being paid for;

32.5 That is was not the most probable inference that all team members knew who was responsible for letting items leave the store without them being paid for;

32.6 That on the probabilities the shrinkage was not something that was easy to detect i.e. the movement of stock out of the store;

[33] The Second Respondent exceeded his powers by finding that the Applicant had failed to acquit the onus as is required in Section 192 of the LRA.

33.1 It was submitted that had he assessed the evidence properly he would have found that the Applicant had demonstrated through credible evidence that its version was the only version before the arbitrator.

33.2 The Second Respondent ignored evidence that every effort had been made to identify individual perpetrators of the misconduct without success, and that any of its Third Respondents would have

been aware of the fact that shrinkage was taking place given the proximity with which they worked to one another.

33.3 The Second Respondent failed to give weight to the evidence that due to the scale of the stock loss and the type threat it was not possible that this could have taken place without being detected by the team members who worked together all the time and were in full view of one another.

[34] Unreasonable Finding.

34.1 Second Respondent failed to properly assess the totality of the evidence adduced in determining the probabilities of the Applicant's version;

34.2 In this regard the Second Respondent ignored crucial and essential factual information favouring the probabilities of the Applicant's version that all the Third Respondents were involved in or know about the misconduct;

34.3 Although the Second Respondent refers to the significant losses that were occurring and that it is difficult to 'imagine how this could have gone undetected' and that some of the Third Respondents 'must have been aware of how this was taking place', he unreasonably fails to take these factors into account in his determination of the inferential probabilities of the matter resulting in a decision that cannot be said to be that of a reasonable decision maker.

34.4 He further completely ignored the principles espoused in the *Snip Trading* case and in *Foschini* case that relates to team misconduct and in the face of this established precedent instead it requires the Applicant to demonstrate the individual involvement of each of the Third Respondents in the losses that took place.

34.5 It was submitted that no reasonable Arbitrator would have concluded on the facts and evidence that the Third Respondent as a team were unaware of the losses or that as a team they should have been held responsible for the stock loss.

The test for review

[35] The test for review of arbitration awards is now accepted as the one enunciated in the well-known case of *Sidumo and Another v. Rustenburg Platinum Mines Limited and Others*[1] . In this case the Court held that the review grounds set out in section 145 have been suffused by the constitutional standard of reasonableness, and that an arbitration award of the CCMA or Council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

[36] In *Sidumo*, Ngcobo J, as he then was, was of the view that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard of a reasonable decision maker, a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review.

[37] Regarding gross irregularity as a ground of review Ngcobo J said the following:

> '[262] The basic principle was laid down in the oft- quoted passage from *Ellis v Morgan [Ellis v Morgan, Ellis v Dessan* 1909 TS 576] where the court said:
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> 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined'.

[38] The Court went further to say that:

> '[264]*In Goldfields [Goldfield investments LTD and Another v City Council of Johannesburg and Another* 1938 TPD 551], Schneider J distinguished between 'patent irregularity' that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and 'latent irregularities'', that is, irregularities that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given

[1] 2008 (2) SA 24 (CC*)* at paras 262 and 264*.*

> on the decision maker. In the case of latent irregularities one looks at the reasons not to determine whether the results is correct but to determine whether a gross irregularity occurred during the proceedings. In both cases, it is not necessary to show intentional arbitrariness of conduct or any conscious denial of justice…'

[39] This test was interpreted in many cases. In the case of *Herholdt v.Nedbank* Ltd[2] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 SCA; (2013)34 ILJ 2795 SCA 5 September 2013 the court having considered a number of these cases , summarised the test as enunciated in the *Sidumo* case as follows:

> 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

Evaluation

[40] The Third Respondents were charged and found guilty on a charge framed as follows:

> 'Charge 1 Theft or attempted theft of company property-It has been discovered on 2nd June 2010, that various items of stock have been misappropriated from the store. It is alleged that over the period 27th May-30 May 2010, the items have been removed from the store without authority of the company'.

[41] They were found guilty and handed out a sanction of dismissal.

[2] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 *ILJ* 2795 (SCA) at para 25.

[42] The award is facing attack from many angles. The close examination of the grounds of review reveals that many of them emanate from or are related to the following finding of the commissioner:

> 'In my view the respondent failed to acquit itself of the onus. It particularly failed to prove that the applicants were involved in causing items to leave the store without it being paid for or that they knew or should have known who was responsible for it. I accordingly find that the applicant's dismissal were substantively unfair'.

This the Applicant regards as an irregularity sufficient to cause the award to be reviewed and set aside.

[43] The disciplinary hearing chairperson found the Third Respondent guilty of theft on the basis of 'team misconduct' (team liability). It is clear from the finding of the arbitrator that the applicant was required to prove guilt on each of the Third Respondents, something that according to him they failed to do so.

[44] John Gregon, Dismissal, Juta & Co LTD, 2002 cited with approval the following paragraph from *FEDCRAW v.Snip Trading (Pty) Ltd* [2001] 7 BALR 669 (P) case:

> ''Team misconduct', according to the arbitrator, was to be distinguished from the kind of 'collective misconduct' dealt with in cases such as Chauke, in which the employer dismissed a group of workers because they refused to identify the individual perpetrator, whose identity was known to them. 'Team misconduct' is also distinguishable from cases in which a number of workers simultaneously engaged in conduct with a common purpose. In cases of 'team misconduct' the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to prove individual culpability, derivative misconduct or common purpose-the three grounds upon which dismissal for collective misconduct can otherwise be justified. The essence of team misconduct said the arbitrator, is that the employees are dismissed because, as individual components of the group, each has culpably failed to ensure

that the group complies with a rule or attains a performance standard set by the employer. The arbitrator concluded that dismissal for team misconduct is not inherently unfair. He said:

'as in many sports, productive and commercial activities depend for their success, not on the uncoordinated actions of individuals, but on team effort. In situations, when a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be apportioned among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent. It seems to me that the notion of 'team liability' underlies the line of cases in which it has been held that it is fair to dismiss the entire staff of a branch or store where 'shrinkage' reaches unacceptable levels'.

[45] In *SA Commercial Catering and Allied Workers Union v PEP Stores* (1998) 19 *ILJ* 939 (CCMA), the entire staff compliment in a particular store of the respondent were dismissed after an enquiry into stock loss of 81%. The arbitrator had found that the stock figure was so glaring that it could not possibly have escaped the attention and knowledge of every member of staff. It was further held that it was the responsibility of every staff member to protect the interest of their employer.

[46] What is clear to me is that in the case of 'team misconduct' just as in the case of derivative misconduct and common cause purpose there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, a team the members of which have individually failed to ensure that the team meets its obligations, in our given case, to ensure that there is no stock loss.

[47] In our given case it is common cause that there was stock loss, that many measures were taken to cap the stock loss but all failed. It is common cause that the employees including the Third Respondents were on several times warned of the stock loss and told of attitude of the employer towards it. It was further contended for the employer that the rate in which the stock was lost and the manner in which operations were arranged there was no way that the employees were not aware of the manner in

which the stock was lost and who was responsible for the stock loss. Further, that the Third Respondents were told that they were responsible for the said stock and were under a duty to take care of stock and to ensure that no stock loss took place. The Third Respondents were further given the opportunity to come clean on the stock loss but to no avail.

[48] It was also contended for the Applicant that the viewing of the footages to identify the culprit although it has resulted in the discovery of two culprits, it was a tedious process which required hours and hours of viewing.

[49] It must be noted here that the Third Respondents neither gave evidence at the disciplinary hearing nor filed answering affidavit herein to explain themselves or counter the evidence of the Applicant. The version of the Applicant is therefore the only version before the court.

[50] I have no doubt in my mind that the facts of this case fall squarely within the concept of 'team misconduct' defined above. This approach was confirmed in the case of The *Foschini Group v Maidi and Others* , (2010) 31 *ILJ* 1787 (LAC);[2010] 7 BLLR 689 (LAC) where 5 employees were charged and dismissed for collective misconduct of failure to secure assets of the company, after substantial stock losses were detected at the clothing store where they were employed. Once the arbitrator confirmed the massive stock loss, he had to determine whether the finding of 'team misconduct' was on the part of the respondents and the subsequent sanction of dismissal in respect of each respondent, was a reasonable one. Relying on the case of *Federal Council Retail and Allied Workers v Snip Trading* cited above, the arbitrator concluded that if the employees in a small store are unable to give explanation for stock losses in that store to the effect that it was beyond their control, the only possible inference is that they are guilty. The arbitrator decided that such a policy was not unfair. The LAC agreed with the arbitrator.

[51] To the extent that arbitrator has made a finding to the effect that in case of 'team misconduct' the individual culpability has to be proved, the arbitrator

has failed to apply his mind or has misconstrued the issue before him. His finding is therefore unreasonable and falls to be reviewed and set aside.

[52] I am not sure as to what confused the commissioner to conclude that *Foschini* was not decided on the principle of 'team misconduct', but on derivative misconduct and common purpose. This cannot be correct. At para 41 of *Foschini* case the court said the following of the decision of the arbitrator under review:

> 'Once the arbitrator's finding as to the existence of massive stock losses in the store is found to have satisfied the test of reasonableness, the next question is whether the finding of "team misconduct" on the part of the respondents and the subsequent sanction of dismissal in respect of each respondent, was a reasonable one'.

[53] At para 48 of the same decision, the court said the following:

> 'the arbitrator, in concluding that all five employees were fairly dismissed, came to a decision which falls within the range of reasonable outcomes by following legal principles that have been authoritatively dealt with in the matters referred to above'.

[54] In other words the court approved the principles relating to team misconduct as outlined in *Snip Trading* and *SA Commercial Catering and Allied Workers Union v PEP store*, as the court cited these cases with approval.

[60] It is clear that the arbitrator misunderstood the principles outlined in *Foschini* case hence the outcome he arrived at, which in my view falls outside the range of reasonable decision a reasonable decision maker could make. In coming to his conclusion the commissioner seemed to have followed the CCMA commentaries in *Case Law Monitor for Commissioners, first edition,* November 2012 at paragraph 2440 wherein the commentator said the following regarding *Snip Trading*:

> 'It is not clear what was meant in the *Snip Trading* award when it was indicated that, because the collective conduct is indivisible, it "is unnecessary in cases of team misconduct to prove individual culpability; derivative misconduct or common purpose". The suggestion seems to be that it follows that if the team misconduct is indivisible the team members are individually guilty (*culpable*). Whether that is a correct statement depends on what is meant by "indivisible". It probably refers to circumstances where the acts or omissions of some members of the group can justifiably be attributed to all members, but it is suggested that individual culpability for the actions of other group would still have to be proved and, if that is the case, it is unnecessary to work with a concept of team misconduct'.

This is a clear misconception of the concept of team misconduct explained in the proceeding paragraphs. This misconception led to the commentator and the commissioner to conclude that the ratio *decidendi* of the judgement in *Foschini* was not team misconduct but decided on derivative misconduct and common purpose which is clearly not correct as I have shown above.

[61] Having concluded that on the ground outlined above the decision of the commissioner falls to be reviewed and set aside, I see no reason of pursuing other grounds.

[62] In the premise, I make the following order:

a) The application for review and setting aside of the award issued under case number KNDB8398-10 succeeds.
b) The award of the Second Respondent is substituted with an order to the effect that the Third Respondent's dismissal was substantively fair.
c) Third Respondents are ordered to pay the costs of the review application.

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Shai, AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Mr I Lawrence from Edward Nathan Sonnebergs

For the Respondent: Mr S Mhlanga from Mhlanga Incorporated