IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

DA2/2020

In the matter between:

MASSMART HOLDINGS **Appellant**

and

MARVIN VINOGREEN REDDY **First Respondent**

COMMISSIONER B GRANT NO **Second Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **19 November 2021**

Delivered: **18 January 2022**

Coram: Coppin JA, Savage AJA and Kubushi AJA

JUDGMENT

KUBUSHI AJA

Introduction

[1] The first respondent, Marvin Vinogren Reddy, was dismissed from the employ of the appellant, Massmart Holdings, for misconduct relating to dishonesty and gross negligence. The first respondent referred the unfair dismissal dispute for arbitration under the auspices of the third respondent, the Commission for Conciliation Mediation and Arbitration, which served before the second respondent ("the commissioner"). In the arbitration award that was

issued by the commissioner, the first respondent's dismissal was found to be procedurally and substantively fair.

[2] The first respondent challenged the award on review on the basis that the commissioner committed a gross irregularity in the assessment of the evidence before her, to the extent that she arrived at a conclusion of fairness that no other commissioner could have reached. The court *a quo* reviewed and set aside the award with costs and ordered that the first respondent be retrospectively reinstated.

[3] Pursuant to a petition for leave to appeal granted by this court, the appellant is hereby appealing against the whole of the judgment and order of the court *a quo,* and seeks that the order of the court *a quo* be set aside and be replaced with an order dismissing the review application with costs. The first respondent, has on the other hand, filed a cross-appeal in relation to certain factual findings in the judgment.

[4] The appeal was decided on the papers that were filed on record, without oral argument, with the consent of the parties involved in this matter.

The factual matrix

[5] The factual matrix on which the appeal emanates are mostly common cause and have been gleaned from the papers filed of record. In brief, the facts are that: at the date and time of his dismissal, the first respondent was in an employment relationship with the appellant, and held the position of an audit manager. At the time of dismissal, the first respondent had worked for the appellant with an unblemished record for approximately twenty (20) years. He had previously worked in different other divisions of the appellant, but when he was dismissed he had been working specifically in the audit environment for ten (10) years and, had recently been promoted, in October 2016, to the role of audit manager, a position in question at the times material to this matter. His line manager was Mr Suren Roopnarian ("Mr Roopnarian"), to whom he reported.

[6] As part of his duties as an audit manager, the first respondent was responsible, together with his line manager and subordinates, for the development of the department's risk assessment plan which would then be used to prepare the annual audit plan for their area of operation. He formed part of what is known as the internal audit team.

[7] The risk assessment plan is said to be extremely important in the furtherance of the appellant's governance function, as it determines the resources required for the next financial year and the subsequent budget. Consequently, it is a complex process which requires the holding of many meetings through the entire process until the deadline is reached, to calibrate findings.

[8] The risk assessment process was kick started on 3 August 2017, by Ms Cecile Louw ("Ms Louw"), Massmart's Audit Market Leverage Manager, in an email circulated to a number of employees, including the first respondent and Mr Roopnarian, indicating that the risk assessment was to be completed, and entered into the software program, Team Mate, by 30 September 2017.

[9] Further details of the process were furnished on 17 August 2017 by Ms Nokubonga Ngidi ("Ms Ngidi"), the first respondent's Senior Internal Audit Manager, in an email transmitted to a number of people including the first respondent and Mr Roopnarian. The email provided recipients with a template of the risk assessment to ensure consistency and informed recipients of the steps to be followed in the risk assessment and audit planning process, the first of which was to complete the risk assessment worksheet (attached to the email) and to discuss same with their respective senior managers. She also advised the recipients that as a starting point they can refer to the previous year's risk assessment worksheet. The recipients were further advised that the risk assessment worksheet was to be submitted to Ms Louw by 8 September 2017; and that a meeting would be scheduled for 25 August 2017 for the parties to go through the process and ensure that they are all in alignment and have the same understanding of the process. This meeting did not materialise and was rescheduled to 28 August 2017.

[10] On 25 August 2017, the first respondent and Mr Roopnarian, held a brief meeting between them, to discuss the first respondent's progress with the risk assessment. The details of what transpired at that meeting are in dispute and forms a critical subject matter of this appeal. Mr Roopnarian contends that the first respondent informed him that he was" almost done" with the risk assessment worksheet, whereas the first respondent's version was that he informed Mr Roopnarian that he had "started the process".

[11] Ms Ngidi sent a further email on 4 September 2017, to several audit managers, including the first respondent and Mr Roopnarian, which introduced simplified risk assessment templates to be used by the managers to finalise their risk assessment.

[12] In accordance with the above process, it was expected of each of the risk assessment managers to populate the risk assessment worksheet and to submit same to their respective line managers, for review and finally for submission to Ms Louw by 8 September 2017. Like all the other managers, it was expected of the first respondent to populate the risk assessment worksheet and to timeously hand it to his line manager, Mr Roopnarian for review before submitting same to Ms Louw by 8 September 2017.

[13] In the meanwhile, the first respondent had earlier on, made arrangements and was given permission to take sick leave from 29 August 2017 until 11 September 2017 to undergo a scheduled non-emergency medical procedure on 29 August 2017. The first respondent's last day at work was 28 August 2017.

[14] It appears that the first respondent and Mr Roopnarian held another meeting between them on 28 August 2017, the details of which are also in dispute. The first respondent's testimony is that there was an understanding at that meeting that he would provide the risk assessment worksheet post-operation, on 30 August 2017; whereas Mr Roopnarian's evidence is that the understanding was that the first respondent was to provide the worksheet on the day before he went on sick leave and being unable to do so he undertook

to provide same in the morning of 29 August 2017, which he, also, failed to do.

[15] In terms of the charge sheet preferred against the first respondent, the deadline for the first respondent to hand in the risk assessment worksheet to Mr Roopnarian is stated as 28 August 2017 and 30 August 2017. Thus, when the first respondent went on sick leave, that is on 28 August 2017, he had not provided Mr Roopnarian with the risk assessment worksheet. The first respondent's version, as earlier stated, is that he had undertaken to provide the risk assessment worksheet after his operation which would be 30 August 2017. However, this did not materialise as after the procedure, the first respondent was not fit enough to undertake the work.

[16] Immediately after the surgery, Mr Roopnarian contacted the first respondent via WhatsApp several times enquiring about his health, nothing work related was mentioned. It was only on 3 September 2017 that Mr Roopnarian started making enquiries about whether the first respondent had been able to attend to the risk assessment worksheet and found that the first respondent had not started with it. The first respondent provided Mr Roopnarian with points which the first respondent had been considering and which he contended, he would have used in populating the risk assessment worksheet. Mr Roopnarian's evidence, however, is that the points provided were inadequate to enable proper compilation of the risk assessment worksheet and that he had to start the work from scratch. It is alleged that the first respondent returned from sick leave on 12 September 2017 and finalised the risk assessment that Mr Roopnarian had started working on in his absence.

[17] On his return to work, the first respondent was investigated for misconduct and was eventually subjected to internal disciplinary hearing where he was found guilty of two acts of misconduct with which he was charged and then dismissed.

Arguments

[18] The gravamen of the appellant's complaint in this court is that in coming to the decision the court *a quo* reached, it considered the first respondent's evidence

before the commissioner in a fragmented and piecemeal approach, such that its decision essentially resulted in a rehearing of evidence rather than the broad-based evaluation of the totality of the evidence. According to the appellant, permitting the court *a quo* to approach the review in this manner defeated the review process and resulted, in effect, in a determination of whether the commissioner's decision was wrong, rather than whether it impacted on the overall reasonableness of the decision. Thus, it was argued on behalf of the appellant that the court *a quo*'s decision resulted in an interference with the factual findings of the commissioner without a clear indication of why the commissioner's findings cannot reasonably be sustained on a full conspectus of the evidence.

[19] Conversely, it is submitted on behalf of the first respondent that the court *a quo* was correct in its finding because the commissioner failed to understand the essential question before her, misevaluated facts, failed to consider material evidence entirely and adopted a probability test before even evaluating all the evidence. The first respondent contended that the commissioner simply listened to the two stories (which apparently she cajoled out of the witnesses) and came to the conclusions as to what probably happened, without considering facts and evidence that were available to her in the bundles of documents and the testimony of the witnesses. According to the first respondent, a reasonable commissioner would have evaluated all the evidence and only then applied the probability test.

[20] This court, has therefore, to determine whether the court *a quo* correctly evaluated the evidence that was before the commissioner to have reached the decision the appellant is attacking.

The applicable law

[21] The Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,[1] whereat the court held, at paras 58 and 59 thereof, that:

> '58. Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices.

[1] 2008 (2) SA 24 (CC); [2007] 28 ILJ 2405 (CC).

> Where an employee claims that he or she has been unfairly dismissed, the dismissal dispute is submitted to compulsory arbitration in terms of section 191(5)(a), either before the CCMA, or a bargaining council. On the other hand, section 192 of the LRA, under the title *Onus in dismissal disputes*, provides that once an employee establishes the existence of the dismissal, the employer must prove that the dismissal is fair.
>
> 59. The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of section 138 of the LRA, a commissioner should do so fairly and quickly. First, he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based. This involves an inquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, is not limited to what occurred at the internal disciplinary inquiry.'

Discussion

[22] It is self-evident from the above quote that in order for the commissioner to determine the fairness of the dismissal she first has to determine whether a misconduct on which the employer's decision to dismiss was based, was committed.

[23] In this matter, the first respondent was found guilty of the following misconduct:

i) Charge 1: in that the first respondent acted dishonestly, in that he advised Mr Roopnarian on more than one occasion during the period 26 August 2017 to 3 September 2017 that he was in the process of compiling the risk report notwithstanding the fact that he had not done any work in respect of the risk report.

ii) Charge 2: in that the first respondent acted in a grossly negligent manner and/or acted in dereliction of his duty in that he failed to meet

the agreed upon deadline (28 and 30 August 2017) for the submission of the risk report; failed to communicate to Mr Roopnarian that he would not meet the agreed upon deadlines; and in fact follow up conversations regarding the risk report and his failure to meet the deadlines had to be initiated by Mr Roopnarian.

[24] It is common cause that the first respondent was dismissed for misconduct relating to dishonesty and gross negligence. It was, therefore important that the commissioner makes a finding that the employer had proven dishonesty and gross negligence in order to come to a finding that the dismissal was fair.

[25] It is common cause that both charges on which the first respondent was found guilty of, involved the failure to produce a document which he had allegedly promised. It is also not in dispute that the first respondent never produced the said document.

The misconduct based on dishonesty

[26] In respect of the charge based on dishonesty, the issue was that the first respondent advised Mr Roopnarian that he was compiling the risk report when in fact he did not do any work in respect of the said report.

[27] The commissioner made a finding that the first respondent acted dishonestly based on his evidence that when Mr Roopnarian enquired about the progress of the report, the first respondent indicated that he was working on it, whereas in fact he was not doing so. The commissioner based her finding that no work has been done by the first respondent on the fact that there was no risk assessment worksheet submitted or completed by the first respondent on which Mr Roopnarian would have been able to complete the work on.

[28] It is my view, that the commissioner misunderstood the question before her and incorrectly evaluated the evidence, which resulted in her coming to an unreasonable finding.

[29] What, in my view, the commissioner failed to understand is that the risk assessment worksheet was the final document to be produced after a long

and complex process. The process required consultations, meetings with client businesses, receiving instructions on how to proceed for the year under consideration and receiving templates that would guide the process so that everyone was in alignment. This was explained in detail by Mr Roopnarian in his evidence in chief when he stated the following:

> 'Every auditor understands the starting behind audit plan is a risk assessment and there is a detailed process around that. Because of it being complex the process is an inter-written one so while the template is sent out there are meetings held consistently about where we are, our thoughts, change in templates until we get to the deadline. So, Mr Reddy [the first respondent] is quite right in that there have been meetings that has been held subsequent to the initial instruction; there has been a change in templates, there has been further confirmation of what needs to be done. But again, it is part of the process as each one goes through their own risk assessment in the division to be able to say what about this, what about that and we meet again and we calibrate and we discuss and we get to the point.'

[30] The risk assessment worksheet, therefore, was the end product of all these interactions. The first respondent had to go through all this process before he could write the risk report.

[31] The commissioner's finding that the first respondent did not do any work because he did not provide Mr Roopnarian with the final product, that is, the risk assessment worksheet, is, in my view, unreasonable. Contrary to the finding of the commissioner, from the perusal of the charge sheet coupled with evidence on record, the risk assessment worksheet was not the work that the first respondent was supposed to show as an indication that he has not been honest. What was expected of the first respondent, as charge 1 indicated, was to show that he had been in the process of compiling the worksheet and not that he had already completed compiling the risk assessment worksheet.

[32] Having understood the evidence, particularly that of Mr Roopnarian, being in the process of compiling the risk assessment worksheet would not necessarily be the physical completion thereof. Mr Roopnarian explained it in his closing argument when he remarked as follows:

> 'At no stage did I ever expect a completed risk assessment document from Mr Reddy by 28th. I expected some work being done. Yes, by [my] WhatsApp confirmed if any work had been done by the 28th. I think the risk assessment process ought to have been subject today (sic!) it is very, very time consuming, it requires deep thoughts. . .'

[34] It is also apparent from this statement that it was not the final document, that is, the risk assessment worksheet, that Mr Roopnarian was aggrieved about, but the work preceding the completion of the worksheet. In answer to a question put to him by the first respondent, Mr Roopnarian answered "*I have never asked for a completed product, give me what you have done at least.*"

[35] The question, therefore, is whether the first respondent did not do this work. In my view, he did.

[36] It is the first respondent's testimony that in doing the work that was required pre-completion of the risk assessment worksheet, he consulted with one of the audit managers who took him through the process for clarification and how he should go about with it; he considered the information provided by the leverage manager; he attended the meeting of 28 August 2017 to get more clarity and to ensure that he gets to the correct output and to make sure to that he was in alignment with how the risk assessment was to be developed; he had created a list of audit points which he intended to utilise in completing the risk assessment worksheet and considered the previous years' assessment report. His testimony is that he had gone through the process itself and understood the risk areas that required to be changed. The only thing that was outstanding, according to him, was to physically change the ratings on the template, which he would have done post-operation. This is the work that the commissioner should have sought to establish, instead of finding out whether the risk assessment worksheet had been completed or not.

[37] As earlier stated, the risk assessment process is said to be complex, and it is not in dispute that it was for the first time that the first respondent participated in the process. However, when assessing the evidence before her, the commissioner failed to consider the first respondent's undisputed evidence

that it was the first risk assessment that he had done. The first respondent testified that

> 'for somebody who is doing it for the first time, surely the process warrants you to, in order to be professional and to execute it to a point where you can deliver something of quality you have to go through the process in its entirety to understand it and then be able to execute the task at hand.'

[38] This evidence is material in the sense that the information required to complete the risk assessment was not provided all at once. The process that the first respondent had to go through is explained clearly by the appellant's witness, Mr Roopnarian, in his testimony as quoted in paragraph 29 of this judgment.

[39] The fact that the employee mulled over the issues or could have had rough sketches to work on and then gather information as soon as he could so that when the deadline came, he and the line manager were able to then form together one document in the form of the risk assessment worksheet, could not, in my view, be faulted.

[40] In addition, it is common cause that the first respondent provided Mr Roopnarian with a list of factors which he said were his thoughts which he was going to use when he populates the risk assessment worksheet. Mr Roopnarian also confirmed, as indicated above, that "*while the template is sent out there are meetings held consistently about where we are, our thoughts, change in templates until we get to the deadline.*" Thus, thinking through the process is one of the work that is expected of a manager to do in the process of coming up with the risk assessment worksheet. I, as a result, do not see why the first respondent should be faulted for that.

[41] Furthermore, there is unchallenged evidence on record that on his return from sick leave, the first respondent completed the risk assessment worksheet on which Mr Roopnarian has started working on, and submitted it to Ms Louw. If the first respondent was able to finalise the worksheet on his return from sick leave, it goes without saying that he had done some initial work before he

went on sick leave. There is no evidence on record that indicates that Mr Roopnarian showed him how to finalise the worksheet.

[42] Over and above what is stated, the evidence of the first respondent that on 28 August 2017, in a discussion with Mr Roopnarian, there was an understanding that the document will be provided post-operation, which was 30 August 2017, was not challenged. In his closing argument before the commissioner, Mr Roopnarian, as earlier indicated, remarked that he at no stage expected a completed risk assessment document from the first respondent by 28 August 2017.

[43] This remark by Mr Roopnarian, is a clear indication that it was expected by both the first respondent and Mr Roopnarian that the work will be finalised post-operation, during the sick leave.

Misconduct based on gross negligence

[44] The commissioner further made a finding that the first respondent had acted grossly negligent when he failed to submit a worksheet with the risk assessment and failed to inform Mr Roopnarian that he was unable to meet the deadline when he realised on 30 August 2017 that he was still not feeling well. He also did not make any effort to contact Mr Roopnarian as the only way Mr Roopnarian became aware that no physical work has been done was on 3 September 2017, when Mr Roopnarian once again contacted the first respondent via WhatsApp.

[45] It was the first respondent's version that he had undertaken to provide Mr Roopnarian with the completed risk assessment worksheet on 30 August 2017. As earlier stated, Mr Roopnarian as well expected the finished product post-operation. This is common cause.

[46] However, the first respondent submitted, correctly so in my view, that it could not be said that he acted either grossly negligently or negligently by not informing Mr Roopnarian that he (the first respondent) would not be able to complete the work as undertaken, because he was not well after the operation. This he contended was so, due to the fact that his testimony that

he could not complete the work on 30 August 2017 because he was incapacitated owing to post-operative complications, was not challenged by the appellant.

[47] The evidence on record is that after the operation, the first respondent's state of mind was not well, he was not sleeping, he was not eating and was excessively bleeding. He was constantly having issues and not able to do work. None of this evidence is in dispute.

[48] It is my view that had the first respondent not experienced post-operative complications, it is possible that he would have been able to work on the risk assessment and completed the worksheet. On his own version, which is not contested, the first respondent was fully prepared to work during his sick leave and Mr Roopnarian was aware about that. It, however, became impossible for him to do so given the severity of his post-operative problems. His ability to finalise the risk assessment worksheet on his return to work after the sick leave gives credence to his argument that he had gone through the process and would have been able to complete the risk assessment worksheet by 30 August 2017.

[49] It should be remembered that after the first respondent's evidence in chief, Mr Roopnarian opted not to cross-examine him. Consequently, all the evidence tendered by the first respondent, which is unchallenged, should be accepted when considered against that of Mr Roopnarian. As a result, the commissioner's credibility findings against the first respondent are unreasonable.

Cross-appeal

[50] The cross-appeal was only an attempt by the first respondent to correct certain factual errors on the part of the court *a quo*. However, because of the decision I came to in respect of the appeal, I find it not necessary to deal with.

[51] In my view, the court *a quo* was correct to have reviewed and set aside the findings of the commissioner, as it did. There is no basis therefore to interfere

with the decision taken by the court *a quo* and accordingly the appeal is dismissed. There is no order as to costs.

Kubushi AJA

Coppin JA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT:	P Maharaj-Pillay
	Instructed by Webber Wentzel
FOR THE FIRST RESPONDENT:	S Moodley
	Instructed by Narain Naidoo and Associates