IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

DATE: 18/10/2006

CASE NO: JR853/04

Not Reportable

In the matter between

SUPUDU REUBEN MATSEKOLENG Applicant

and

COMMISSIONER T.L. NKADIMENG First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Second Respondent

SHOPRITE CHECKERS (PTY) LTD Third Respondent

J U D G M E N T

CELE J:

This is an application in terms of Section 145 of the Labour Relations Act 66 of 1995, hereafter referred to if need be, as the Act, to review and set aside an arbitration award issued by the first respondent on 9 February 2004 while he was acting under the auspices of the second respondent. The third respondent which was previously the employer of the applicant and in whose favour the award was issued

opposed the application.

It is expedient that I should firstly deal with those facts which constitute the background to the issues which are to be resolved.

Background Facts

The applicant commenced employment with the third respondent some time in 1984. At times material to this matter he occupied the position of a receiving clerk and was based at Groblersdal store of the third respondent. The third respondent had stock receiving procedures which were prescribed or implemented by the stock receiving staff. Particulars of stock which had been delivered to the store had to be entered into appropriate books and documents for accounting and balancing purposes. This was referred to as being the GRVed being, in the past tense, it would be referred to as the Goods Received Voucher (GRV). So the said security guard services were utilised by the third respondent as part of an exercise in curbing stock shrinkage.

On 24 February 2003 the applicant was on duty when a milk delivery was made by Schoeman Dairy or Milkery at Groblersdal store. Two litres of milk were donated by Schoeman Dairy, which milk was handed to and received by the applicant. He signed a voucher as acknowledgement of receipt but did not enter the particulars of the milk in shop records as was done when stock was to be sold. In other words he did not GR the milk. He took the two litres of milk to the security officer and told him or her that the milk was a donation to the receiving staff for

tea.

Some investigations took place and some developments occurred, and there were discussions involving the applicant, but the applicant then opened the two litres of milk. He took it to the tearoom. The security officer took issue with the milk not being recorded and reported the incident to one Mr Strydom. This was another security officer of the IBI, also stationed at the same shop. Mr Strydom was a branch manager of the third respondent at Groblersdal.

The third respondent issued and handed a notice of suspension, and a notice to attend a disciplinary enquiry to the applicant on the same day. The applicant was charged with the following three acts of misconduct:

1. Misappropriation of company property in that he had opened a plastic bottle of two- litre milk intended for sale, causing a financial loss, or potential financial loss to the company;

Serious misconduct in that he misled a security guard in cancelling company merchandise without authorisation; and

Serious misconduct in that he did not follow the company receiving procedures, causing a financial loss or potential loss to the company.

The third respondent found the applicant to have committed all acts of misconduct with which he was charged, and dismissed him on 9 April 2003. The applicant lodged an unsuccessful internal appeal and a dismissal dispute arose between the parties, which he referred to the second respondent for conciliation. The dispute was not capable of a resolution and he referred it to arbitration, a hearing of which proceeded

before the first respondent. The issue for decision was whether the dismissal of the applicant was substantively and procedurally fair.

Five witnesses were called by the third respondent. The applicant was the only witness in his case. The case of the respondent which was the first to testify at the arbitration, was to the following effect. The applicant failed to comply with procedures prescribed for the receiving of stock when he well knew the same. According to these procedures he should have recorded or GRBed the two litre milk and it should have been put on the shelves for sale. By failing to follow procedures he caused loss of R9.49 to the shop. It was the shop procedure that donated merchandise was shop property for sale. The shop had been consistent with that practice. The applicant misled the security guard as to how the milk was to be disposed of.

The case of the applicant was briefly to the effect that once he signed the invoice of the milk, by not GRBing it the milk had not become the property of the third respondent. The donated milk was, by practice up until 2003 – used by the staff in their tearoom. An attempt was made to hand in Affidavit in substantiation of his claim that there was such practice which had been standing over time on how donated milk had to be dealt with. That in brief were the issues or evidence tendered before the commissioner.

I come then also briefly to the award. In his award the first respondent found in favour of the third respondent. He had looked at the evidence and he said the following on paragraph 31:

"I do not see the reason why Grobbelaar would select

> witnesses for the respondent and not also for Matsekoleng in a disciplinary enquiry. I also do not see any prejudice caused to Matsekoleng by Grobbelaar's conduct of the disciplinary inquiry. Find that Matsekoleng's dismissal is procedurally fair."

This was in relation to the complaint about the witness who was called by third respondent and before he could cross-examine him the third respondent removed him from the stand.

He went on in paragraph 32 and said the following:

> "It was common cause between the parties that rule 13 regulates how stock delivered to respondent should be received. Matsekoleng testified and argued that he was aware of the rule. Matsekoleng, however denied breaching the said rule stating that donation is not the respondent's property as it is not listed as a commodity of the respondent. Matsekoleng went further and stated that he did not grv the donated milk and the milk should not be considered the respondent's property. The milk was donated to the receiving staff of the respondent. Page 100 of the respondent's bundle of documents shows that the milk was donated to Shoprite Checkers in Groblersdal. Matsekoleng and the receiving staff do not have any business deals and they receive goods on behalf of the respondent. I

find that the milk belonged to the respondent and was therefore the respondent's property."

I go to paragraph 33:

"Matsekoleng also testified and argued that in the disciplinary inquiry Masemola and Themba acknowledged that the receiving staff used donated milk for tea after specific authorization was obtained from management. The receiving staff had been consuming donated milk from Schoeman Dairy since 1997 to 2001 and that Schoeman stopped donating milk a year before his disciplinary enquiry. Matsekoleng received the milk on the 24th February 2003. Matsekoleng could not prove that he had obtained such authorization before he opened the milk for consumption. The respondent has employed new management staff. Matsekoleng received the milk in the manner he used to before the donation of milk was cancelled. Matsekoleng did not endear to get specifit authorisation or directives from the new management as to how should the donated milk be received and utilized. Rule 13 is unambiguous in as far as getting specific authorization from management before employees possess or attempt to or consume or remove any company property to mention but few. I find that Matsekoleng did breach the respondent's receiving rules."

The application for review has been premised firstly on the attack on the

procedure adopted by the chairperson of the hearing. The main gripe is that there was a time when the applicant was denied an opportunity to cross-examination a witness and the second respondent dealt with that. There was the attack on the bias on the part of the chairperson in that he sat in a previous enquiry at the level of an appeal where he found in favour of the applicant, I do not want to waste much time in going into that, I do not see the merits in the submissions that were made by Mr Klein in that respect.

I want to look at the findings by the commissioner, and as I do so I remind myself of the limits within which I am empowered to review this award. So many decisions have been handed down in this regard, one such is *Total SA Motors (Pty) Limited v Radebe and others* 2000 (21) ILJ 340 (LAC). I refer in particular to the judgment of Nicholson JA. At paragraph 39 he had this to say:

> "From *Dhlumayo's* case supra it is clear that the court, in an appeal on fact, will interfere if there are misdirections of fact including the overlooking of other facts and probabilities. This is very similar to the notion that an award can be set aside if it is not justifiable with regard to the reasons given. By referring to gross irregularity in s 145 the legislature is clearly contemplating something far more serious than that. Mistakes of fact and law, subject to certain exceptions, are insufficient grounds for interference."

Clearly based on this decision and a number of others such as the *Carephone* decision the powers of a judge on review are limited. Can it

be said in the present case that the award is irrational? I have not heard Mr Pillay say so. If I look at the papers and try to determine the review grounds as distinct from the grounds that would have been appropriate for appeal purposes, I have been unable to find any submissions that make me to arrive to the conclusion that the application for the review has merits.

The commissioner has deferred to the sanction imposed by the employer in this respect. Obviously as I have indicated to Mr Pillay I did not hear him making any attack on that, and therefore even in that respect my powers are limited. I would have been – I have looked at the facts of the case. I got a bit worried, looking at the experience of the applicant, 21 years of experience, being dismissed in a case for misappropriation of property worth about R9.46 but one has to remember that there is a bigger picture. He went to a security guard and created an impression that he had been authorised to appropriate the milk, and in any event that is not really the issue that I have been called upon to decide. But on those grounds for review that appear to have been raised by the applicant I am unable to agree that there are appropriate grounds for review.

Section 145 of the Act clearly indicates that an award may be reviewed if there is misconduct on the part of the commissioner or if the commissioner has committed a gross irregularity, or where a commissioner has exceeded his or her powers. There is the extended ground as we know it, based on the *Carephone* decision based on irrationality. Here I am unable to find, when I look at the award, that the evidence that served before the commissioner, looking at the reasons he

gave for the award and also looking at the award itself that the decision he arrived at is irrational. That being so the application for the review of the arbitration award issued by the first respondent on 9 February 2004 is dismissed.

That brings me to the question of the costs. I think it is a case where it will be fair if the costs order follows the result, and so the application is dismissed with costs.

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Cele AJ

Date of Judgment: 18 October 2006

Date of Editing: 19 March 2009

Appearances

For the Applicant: Mr Pillay – Shabangu and Pillay Attorneys

For the Respondent: Mrs M Kraus – Perrot, Van Niekerk, Woodhouse, Matyolo Inc