IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: **D625/05**

NOT REPORTABLE

In the matter between

ESHOWE SPAR Applicant

and

E MKHWANAZI 1st Respondent

CHARLES OAKES N.O. 2nd Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION 3rd Respondent

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JUDGMENT

PILLAY D, J

[1] An application for condonation prefaces this application to review and set aside the award of the second respondent commissioner.

[2] The Court deals with the prospects of success on the merits first before turning to consider the other elements relevant to an application for condonation.

[3] The critical evidence for the applicant employer at the arbitration was the minutes of a disciplinary inquiry. The first respondent employee disputed the minutes and refused to sign for them. In the absence of agreement about the minutes, the witness for the employer, Mr

Evans, who chaired the inquiry, was material.

[4] The witness who had direct evidence of the alleged over-ringing of the shaving cream, on the one hand, and the failure to ring the Coke, on the other hand, was a customer of the applicant. His whereabouts were apparently unknown to the applicant and, for one reason or another, he did not testify either at the disciplinary inquiry or at the arbitration.

[5] So the exclusive evidence on which the employer relied was the evidence of the chairperson about the admissions and denial that the employee made at the disciplinary inquiry. In this regard there were two versions – that of Evans, against that of the employee.

[6] The probabilities favour the evidence of Mr Evans to the extent that there is corroboration for it in the form of the till slip. It is manifest from at least one till slip that the employee had rung the till for two shaving creams when the customer had taken only one shaving cream.

[7] When giving her evidence-in-chief, the employee did not state that the customer had bought two shaving creams. However, her representative put the following leading question to her:

> "And then on bundle 3 you stand by that the customer bought two shaving creams. It is shown here, to your

belief?

MS MKHWANAZI: Yes.

RESPONDENT: Mr Commissioner, I don't remember I heard her in evidence-in-chief stating she had two shaving creams, unless I am wrong. I don't believe her giving evidence that two shaving creams had been bought in her evidence. I could be wrong."

[8] Her evidence-in-chief in that regard was as follows:

"MS MKHWANAZI: It is not two. The customer just bought the cakes, the hot cross buns. He paid with cash and the thing for shaving he paid with credit card."

[9] The customer was unlikely to have objected to not being charged for the Coke. However, he would more likely have objected, as he did, for being double-charged for the shaving cream. The probabilties are that she did double ring the shaving cream and not charge for the Coke. That is not the end of the matter. The question is whether the offences for which the employee was charged amount to dismissable offences.

[10] Whilst it was common cause that the employee signed an acknowledgment that such conduct would be a dismissable offence, each case has to be assessed on its own merits. In this instance the

employee stood to gain nothing. On the contrary, the applicant stood to gain from overcharging the customer. Although the Coke was not charged for, the cost of the shaving cream which was R11,99 each was probably more than the cost of a tin of Coke.

[11] The first three charges, namely allowing goods to pass through the tillpoint without being rung up; double-ringing of customer goods; and improper performance of duties arise from the same incident relating to the customer. The further charges, namely refusal to obey a lawful instruction resulting in gross insubordination; improper behaviour towards the public; and defiance of authority shown towards an immediate supervisor or manager relate to the employee's conduct after the incident with the customer.

[12] Mr *Forster,* for the applicant, submitted that the latter charges arose from the employee refusing to attend her disciplinary inquiry and refusing to plead when she did attend . Mr *Forster* submitted that in conducting herself thus the employee was insubordinate.

[13] In the opinion of the Court, an employee may refuse to attend and to plead at an inquiry. To hold an inquiry is the obligation of the employer and to participate in an enquiry is the right of the employee. If the employee chooses not to exercise the right, that is the employee's perogative. The employer cannot from that deduce that the employee is insubordinate. Even if the employer instructs

the employee to attend the inquiry, which in the opinion of the Court is not an appropriate instruction, the employee may refuse to participate. Of course, adjudicators are free to draw such inferences as they might from the employee's refusal to participate. However, employees who refuse to participate in their enquiries do not commit workplace offences.

[14] Another factor to take into account is that the employee had long service of about 20 years. The misconduct which the Court has found proved amounts to no more than negligence and a mistake that can happen to any cashier, no matter how long her service.

[15] However, that is not the reasoning of the commissioner in finding that the dismissal of the employee was unfair. The critical consideration for the arbitrator was the following:

> "As a critical witness regarding the incident did not testify I am left with no alternative but to give the benefit of doubt to the applicant."

On that basis the arbitrator found that the applicant had failed to discharge its *onus* on a balance of probability.

[16] Although the arbitrator's reasoning is valid in that the evidence before him supports it, there are further considerations which do not appear from his award. It has been said time and again that if an arbitrator's award does not manifest all the reasons for his decision,

it does not render the award reviewable.

[17] In the circumstances, on the merits the review must fail. Furthermore, the Court's refusal to condone the late application for review is fortified by the delay of almost a year in filing the review. The explanation for the delay is that the applicant believed or was allegedly under the reasonable impression that the matter might be settled. The applicant had made a proposal to the trade union at a meeting and followed this with a letter on 23 November 2004. However, by January 2005 the trade union had filed an application in terms of section 143 to have the award made an order of court. Any reasonable person would have inferred that the possibilities of settling the matter had dissipated. The applicant did nothing about filing the review until 12 September 2005.

[18] To assume without more that the matter might still be settled was not a reasonable inference for the applicant to draw. In any event, the applicant was represented by an employer's organization. It should have been aware that the clock was ticking, and without an agreement to delay the review application or to respond to the settlement agreement, the applicant could have no reasonable belief that the matter would be settled.

[19] In the circumstances, the application for condonation is refused. The application for review is refused, the applicant to pay the costs of

both applications.

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PILLAY D, J

JUDGE OF THE LABOUR COURT

DATE OF JUDGMENT: 4 DECEMBER 2007

APPEARANCES:

FOR THE APPLICANT: MR JAFTA

FOR THE RESPONDENT: MR J R FORSTER
