IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR2786/08

In the matter between:

SUPERAND SUPERSPAR Applicant

and

RETAIL & ALLIED WORKERS UNION
obo KHOZA, DORAH First Respondent

E RICHTER NO Second Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) after he had found that the dismissal of Dorah Khoza (the first respondent) was procedurally fair but substantively unfair. The applicant was ordered to reinstate her retrospectively from the date of her dismissal being 15 February 2005 with back pay.

2. The review application was opposed by the first respondent.

Background facts

3. The first respondent was dismissed on 15 February 2005 after she was found guilty of misconduct in that she took a pie from the normal flow of business without

permission and ate it. Her union, the Retail and Allied Workers Union (RAWU), on her behalf referred a dispute to the third respondent (the CCMA) for conciliation and arbitration. The commissioner who heard the matter found that her dismissal was both substantively and procedurally fair. The award was reviewed by this Court on the grounds that the commissioner did not deal with the objections raised by RAWU against the applicant's representative who sometimes acts as an attorney and other times as an employer's organisation official. The dispute was again referred to arbitration and the commissioner found that the first respondent's dismissal was procedurally fair but substantively unfair and ordered her reinstatement.

The evidence led at the second arbitration proceedings

4. The applicant called two witnesses the arbitration proceedings. The first witness, Dementre Mentis testified that he is a managing member of the applicant which employed the first respondent. The applicant has a zero tolerance in respect of theft of company property. The only sanction deemed to be an appropriate sanction for a transgression of this rule is dismissal. This rule has been implemented consistently and two months before the dismissal of the first respondent, another employee was dismissed for theft. The first respondent should have been aware of this dismissal since it was her colleague who was dismissed. On 4 February 2005, the security officer, Michael Molefe reported to him that he saw the first respondent taking a pie and eating it. When Molefe confronted her, she informed him that what she did was insignificant compared with what other employees were stealing. She indicated to him that she would cooperate with them. He told Molefe to take a statement from her. Approximately five minutes later, he went to the canteen where the first respondent and Molefe were sitting. He noticed she was talking with someone on her cellular

phone and was informed that she had refused to give a statement. After he enquired from her what was wrong, she told him that she knew nothing. He took her to his office where he attempted to resolve the matter.

5. Mentis testified that there are approximately 28 000 items in the shop and it was difficult to exercise effective control over all those items. The attrition due to theft in the shop amounts to approximately 1%, (R30 000), of their turnover. Various measures have been implemented to prevent the shrinkage. The first respondent was subjected to a disciplinary hearing. She did not admit guilt at the hearing. She was employed as a merchandiser and worked with merchandise and worked alone at times. The trust relationship between the applicant and the first respondent had irretrievably broken down.

6. The applicant's second witness was Thabiso Michael Molefe. He testified that he was employed as a security officer by the applicant. On 4 February 2005 he was on duty at 7h00. At 7h45 he saw the first respondent going to the counter fridge where she took a pie and put it in her overall pocket. She had a cup of tea and a bucket in her hands. She left the deli area and he followed her. He found her in the butchery where she was eating the pie. When she saw him, she crumbled a piece of the crust that was still in her hands and threw it under the counter. When he confronted her, she admitted that she took the pie but said that other employees were also committing the same offences and offered to give him their names. He took her to the canteen and waited for Mentis to arrive at work. Upon his arrival, he told Mentis about the incident. Mentis requested him to take a statement from her. She however spoke to someone over her cellular telephone and thereafter refused to give a statement.

7. The first respondent testified that she was employed by the applicant in May 1989. She reported for duty on 4 February 2008 at 7h30. She started working at the deli section where she switched the lights on, put the merchandise in order and cleaned the place. She was the only employee working at the deli. After she finished her work at the deli, she took the cloths, bucket and soap that she had used and went to the butchery. While fetching water at the butchery, the security officer Molefe, called her. She informed him that she would come to him since she was busy fetching water. He approached her and told her that he saw her taking a pie. She told him that he could search her but he did not do so. She denied taking a pie and said that her pockets were dirty and she would not place the pie in her pockets. After the incident, she returned to the deli and commenced with her normal duties. She was later called to Mentis's office. On the way to his office, she received a telephone call and the person who called her told her that her child was sick. When she was in Mentis's office, he asked Molefe what had happened and he explained that he saw her taking a pie and eating it. Mentis then told her to confess and she refused to do so. He then told her that she would be served with a letter. She was subsequently subjected to a disciplinary hearing and a sanction of dismissal was imposed.

8. An inspection *in loco* was held at the place where the security officer stood and the place where the first respondent was cleaning the deli and these were placed on record. The security officer was requested to show what the first respondent did and his actions were observed from where he was standing. It was noted that from where he stood, the pies in the counter fridge were not visible. His body and his hand were visible when he took the pie from the counter fridge and placed his hand where the

pocket of the first respondent would have been. His hand was visible when he took the pie out of the counter fridge but was not visible when it was inside the counter fridge.

The arbitration award

9. The commissioner found that the first respondent was guilty of misconduct. Since this finding is not challenged on review and only sanction is an issue, this Court will only deal with the issue of sanction. The commissioner then proceeded to deal with whether the sanction of dismissal was an appropriate sanction. The commissioner said that the applicant averred that it was common cause that the sanction was an appropriate sanction. The commissioner said that he did not agree with this argument. He said that it was common cause that the applicant deemed the sanction of a dismissal an appropriate sanction and imposed a sanction of a dismissal consistently in similar cases. It was also common cause that the first respondent was aware of the fact that her conduct could lead to a dismissal. The commissioner said that this however did not automatically make the sanction a fair sanction. Those were the guidelines followed in most of the case law before the case of *Sidumo & Another vs Rustenburg Platinum Mines Ltd & Others*, 2008 (2) BCLR 158 (CC). The proper test was whether the commissioner had reached a conclusion that the sanction of a dismissal was the appropriate sanction which a reasonable commissioner might have imposed. Ultimately, it was the commissioner's sense of fairness that must prevail, not that of the employer.

10. The commissioner said that in determining whether a reasonable commissioner would have dismissed an employee under the same circumstances, it was imperative to

evaluate the judgments of the courts in similar cases and apply the guidelines set in those cases. He referred to the decision of *Shoprite Checkers (Pty) Ltd v CCMA and others* Case NO JA46/05 now reported at [2008] 12 BLLR 1211 (LAC) (the Zondo JP judgment), where the applicant was dismissed for eating food on three occasions belonging to the employer. On one occasion, the applicant was captured on CCTV video footage taking something from a plate in the deli area and putting it into his mouth. The applicant was charged with eating food in a non designated area, a rule which had been specifically implemented to protect the employer against shrinkage, and dismissed. The value of the food taken was unknown. The court ruled that the dismissal had been unfair and ordered the retrospective reinstatement of the applicant. The commissioner quoted from paragraph 26 of the Zondo JP judgment as follows:

"I know that from the appellant's point of view this cannot simply be about monetary value of the food that fourth respondent ate. For the appellant, it is probably about a principle and the real problem of shrinkage that it and other similar businesses face every day. I am not ignoring this. I am mindful of it but, nevertheless, when all the relevant circumstances are taken into account, I am of the opinion that a reasonable decision maker could not, in the circumstances of this case, have concluded that an employee who had a clean disciplinary record such as the fourth respondent and had 30 years of service should, in addition to getting a 'severe final warning' for this type of conduct, also forfeit about R33 000,00 for eating food that may well have cost less than R20,00. I do not think that a reasonable decision maker could have sought to impose any penalty in addition to the 'severe final warning'".

11. The commissioner said that in a similar case before the LAC, *Shoprite Checkers (Pty) Ltd v The Commission for Conciliation, Mediation and Arbitration and three others,*

Unreported case number JA08/2004, now reported at (2008) 29 ILJ 2581 (LAC) (the Davis JA judgment) the court had referred to the Zondo JP judgment and remarked that:

"This decision appears to adopt a different approach to the body of jurisprudence as analyzed in this judgment. However, in that case the employee had 30 years of unblemished service. While that employee contended that he had been authorized to taste food in the areas where the video clip had showed him to have so eaten, and that, on one of the occasions, he was eating his own food, unlike the present case, he had not gone so far as to produce manufactured evidence that manifestly was concocted in order to support his own mendacious account, as was evident in the present dispute.

In this case the respondent had engaged in a breach of company rules on two separate days and on three occasions on one day. On 11 October 2000 he had consumed three separate bowls of pap. He had thus acted in flagrant violation of the company rules which had been implemented for clear, justifiable operational reasons. Other employees who had been similarly found to have so acted had been dismissed. In unchallenged evidence Mt. van Staden testified about the breakdown in the trust between the two parties: 'Because he is actually working or he has been trained to work in a speciality department where is busy preparing food, and because of the incidents that happened which actually cause the shrinkage and with the high shrinkage in the store at the moment, we actually cannot afford to get him back in the store. (Indistinct) broke the trust relationship with the company.' In this sense, the facts are distinguishable from that of the Shoprite Checkers case supra and in keeping with the other decisions of this Court".

12. The commissioner said that it was important to note that the Court in the Davis JA judgment did not disagree with the Zondo JP judgment but ruled that the case could be distinguished from the first case based on the aggravating circumstances present in the second case. The commissioner said that the following facts needed to be taken into consideration to decide the appropriate sanction:

12.1 The first respondent had an unblemished service record of 16 years before her dismissal.

12.2 Although the value of the pie was not placed on record, the value thereof should be minimal. The value should be approximately R10. The first respondent took only one pie and this is the only act of misconduct for which she had been charged.

12.3 The applicant averred that the first respondent initially indicated that she had committed the act of misconduct and agreed to cooperate with the applicant in identifying other employees involved in more serious cases. She however, retracted her confession on the advice of a third party. Although she did not plead guilty in the disciplinary hearing, it was evident from the evidence that she did not act in flagrant violation of the company rules which had been implemented.

12.4 The item stolen was not a luxury item or an item which the first respondent stole to enrich herself. She took a pie, which she ate.

12.5 No evidence was led that the first respondent was in a supervisory position or working in a speciality department where most of the shrinkage in the shop originated from.

13. The commissioner said that taking into consideration all the aspects mentioned above and the guidelines set out in case law mentioned, he found that the sanction of a dismissal was not the appropriate sanction in this case. He found that the first respondent's dismissal was procedurally fair but substantively unfair and ordered her reinstatement from the date of her dismissal on 15 February 2005 with back pay of 46 months being R82 800.00.

The grounds of review

14. The applicant contended that the commissioner committed misconduct in relation to his duties as a commissioner or arbitrator, alternatively committed a gross irregularity in the conduct of the arbitration proceedings, alternatively exceeded his powers, alternatively committed another act which constitutes a ground permissible in law for the review and setting aside of the act, alternatively failed to apply his mind to the relevant issues in accordance with the provisions of the Act and the tenets of natural justice, alternatively committed a material error of law and interpretation, in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act) and the Constitution.

15. The commissioner did not have jurisdiction to determine the fairness of the sanction since the sanction of dismissal was not placed in dispute by the first respondent.

16. The finding that the sanction of dismissal was not appropriate is not one which a reasonable decision maker could have reached in the circumstances.

17. The commissioner's finding that the first respondent should be reinstated is not one which a reasonable decision maker could have reached.

Analysis of the facts and arguments raised

18. The commissioner's finding that the third respondent was guilty of misconduct is not being challenged on review. The crux of the matter centres around whether dismissal was an appropriate sanction and whether reinstatement should have been ordered. It must be trite that the reasonable employer test is not part of our law. Any attempts to resuscitate the introduction of the reasonable employer test like the applicant is attempting to do in this case should be resisted and rejected.

19. I had raised with Mr Louw who appeared for the applicant that should this Court not interfere with the commissioner's award but only with the date when reinstatement should run from, what a fair date would be. He said that the reinstatement should be effective from 25 August 2005 which is the date when the first arbitration hearing had taken place and not from the date of dismissal. I do not agree. There were no delays in this matter. The applicant was being represented at the first arbitration hearing by its current attorneys of record, Grant Ray-Howett whose status changes from time to time. When it suits him, he appears as an attorney and at other times appears as an official of ASAMBO an employer's organisation. This is clearly to circumvent the CCMA rules dealing with right of appearance before it. The first commissioner did not deal with the objection raised by the first respondent. The first award was

reviewed and set aside and referred to the CCMA. The first respondent cannot be faulted because the first commissioner did not deal with the objection led on her behalf. The second award was in her favour and it is the applicant who decided to bring this application.

20. This Court was after the hearing of the matter referred to the judgment in *Miyambo v CCMA & Others* [2010] 10 BLLR 1017 (LAC) where the Court found that an employee's theft of scrap metal undermined the trust relationship and the dismissal was a fair operational response. The employee was a security guard who stole scrap metal and had shown no remorse. The Court rejected the distinction between theft and petty pilfering and referred to the Davis JA judgment not to the Zondo JP judgment. The commissioner could not have referred to the *Miyambo* judgment since he had issued an award well before the said judgment. The facts in the *Miyambo* judgment are distinguishable in that the employee in that case was employed as a security guard who had to look after the assets of the employer.

21. The commissioner has referred to recent case law dealing with theft cases in the workplace. He has referred to both the Zondo JP and Davis JA judgments where Davis JA explained why he believed that the facts in his judgment were distinguishable from the Zondo JP judgment. The commissioner followed the Zondo JP judgment and gave reasons for doing so. The award is well reasoned. The commissioner took into account the factors listed in paragraph 12 above in deciding the issue of sanction. He did not adopt an erroneous legal approach to sanction, or failed to apply his mind to materially relevant factors in mitigation/aggravation, or failed to embark on a balanced and impartial assessment of materially relevant factors or failed to apply his mind to the employer's evidence that the employment

relationship has been destroyed. The commissioner followed the guidelines laid down in *Sidumo*. Commissioners must take into account the totality of circumstances, consider the importance of the rule that had been breached; consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal; consider the harm caused by the employee's conduct, consider whether additional training and instruction may result in the employee not repeating the misconduct; consider the effect of the dismissal on the employee and the employee's service record. This is what he did. In deciding the question of sanction, the commissioner must use his own sense of fairness as opposed to deferring to the employer). See also *Shoprite Checkers (Pty) Ltd v Sebotha NO & others* (2009) 30 ILJ 2491 (LC).

22. The applicant has failed to show that the commissioner has committed any reviewable irregularity. The commissioner's finding that the sanction of dismissal was not appropriate and that the first respondent be reinstated is a finding that a reasonable decision maker could have reached.

23. The application stands to be dismissed.

24. There is no reason why costs should not follow the result.

25. In the circumstances I make the following order:

25.1 The application is dismissed with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	ATTORNEY E LOUW INSTRUCTED BY GRH ATTORNEYS
FOR FIRST RESPONDENT	:	W KHOZA - UNION OFFICIAL
DATE OF HEARING	:	19 OCTOBER 2010
DATE OF JUDGEMENT	:	8 DECEMBER 2010