



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case No: PR 96/13

In the matter between

**SHOPRITE CHECKERS (PTY) LTD**

**Applicant**

and

**LINDA HARRIET PIKOLI**

**First Respondent**

**SOUTH AFRICAN COMMERCIAL CATERING**

**AND ALLIED WORKERS UNION ("SACCAWU")**

**Second Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION ("CCMA")**

**Third Respondent**

**COMMISSIONER SIYABONGA COKILE N.O**

**Fourth Respondent**

**Heard: 14 May 2015**

**Delivered: 4 November 2015**

**Summary: When a commissioner makes mutually exclusive findings in determining the substantive fairness of a dispute, his or her award is susceptible to review.**

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## JUDGMENT

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Lallie, J

- [1] This is an application to review and set aside an arbitration award in which the fourth respondent who I will refer to as the commissioner in this judgement found the first respondent's dismissal substantively unfair.
- [2] The first respondent was employed by the applicant in February 2002 at its Ziyabuya store as a money market clerk. She was effectively a cashier at the money market section of the applicant. After counterfeit money was found in her takings during cashing up, she faced two charges at a disciplinary enquiry. The first was gross misconduct in that she had a significant till shortage as a result of accepting counterfeit money from a customer in the amount of R1100.00 resulting in the applicant suffering loss. By so doing she breached the applicant's rule 1 and cash handling procedure. The second was gross misconduct in that her till shortage exceeded the applicant's maximum of 0.02% thereby breaching the applicant's rule 1 and cash handling procedure.
- [3] The first respondent was found guilty of both charges and dismissed. She referred an unfair dismissal dispute to the third respondent which I will refer to as the CCMA in this judgement. The dispute was arbitrated by the commissioner who issued the arbitration award the applicant seeks this court to review and set aside. This application was heard on an unopposed basis after the second respondent's application for condonation of the late filing of the answering affidavit was refused. The commissioner found that the first respondent did not make herself guilty of the first charge as no evidence was led to prove that she had been trained to distinguish between real and counterfeit money. The third respondent suspected that she might have been given the counterfeit money by a customer who tendered an amount of R2 050.00 in R50.00 notes. The commissioner considered that the first respondent accepted the counterfeit bank notes on the busiest day of the month. He also

took into account evidence to the effect that when there are shortages investigations are conducted to locate the error which, if located, absolved the cashier. He blamed the applicant for not conducting its own investigations in full by viewing the video footage of the security camera which would have assisted it identify the customer who handed the first respondent R50.00 notes in the amount of R2 050.00. He found that the applicant was not at fault by accepting the counterfeit money as any reasonable cashier would have accepted it under the circumstances.

- [4] The commissioner made a finding that the conclusion that the first respondent received counterfeit money from a customer was not the most reasonable inference which could be drawn in the circumstances of the dispute before him as it could have been Nwabisa, the cash office clerk, who could have placed the counterfeit notes in the first respondent's takings. He based his finding on what he referred to as the first respondent's unchallenged evidence that Nwabisa had her back towards her when counting the first respondent's money and alerted her to the presence of the counterfeit money in her cash ten minutes after she had handed the money over to be countered by Nwabisa.
- [5] The commissioner based his finding on the second charge on the reasons for finding that the first respondent was not guilty of the first charge. He found that the second charge was intricately linked to the first because the till shortage occurred as a result the first respondent accepting counterfeit money. He concluded that the second charge had to fall by the wayside as it arose from the same incident as the first. He further found that the applicant had applied discipline inconsistently by not dismissing employees who had significant till shortages at its New Brighton store. He refused to accept the argument that the branch manager who failed to dismiss the employees was disciplined without evidence on why that branch manager did not dismiss the employees who had significant till shortages. He found the first respondent's dismissal substantively unfair and ordered her reinstatement.
- [6] The applicant submitted that the award should be reviewed and set aside on the basis that it is defective in that the commissioner committed gross irregularities in the conduct of the arbitration proceedings and reached an

unreasonable decision. He failed to apply his mind to issues that are material to the determination of the dispute before him. His unreasonableness is manifested in a number of his findings which include the finding that the first respondent was not provided with training in relation to the identification of counterfeit money. The UV light was a factor to absolve the first respondent from fault. He failed to make findings in relation to the actual counterfeit money. He took into account the first respondent's evidence which was not put to the applicant's witnesses and the finding that the applicant applied discipline inconsistently.

- [7] In deciding whether an arbitration award stands to be reviewed and set aside the reviewing Court is to consider the totality of the evidence before the arbitrator. It must ascertain whether the arbitrator considered the principal issue, evaluated the facts presented and came to a reasonable decision. In this regard see *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*<sup>1</sup>. Not every material error of fact made by a commissioner is sufficient to warrant the setting aside of an award. Errors are of consequence if they have the effect of rendering awards unreasonable. In this regard see *Heroldt v Nedbank Ltd and COSATU Amicus Curiae*<sup>2</sup>.
- [8] Section 138 (7) (a) of the Labour Relations Act 66 of 1995 as amended ("the LRA") requires commissioners to issue arbitration awards with brief reasons. Commissioners are therefore required to determine disputes. In unfair dismissal disputes where only the substantive fairness of the dismissal is challenged, they have to determine whether dismissed employees have committed the acts of misconduct which led to their dismissal. There is merit in the applicant's submission that the commissioner committed a gross irregularity in the conduct of the arbitration. When dealing with the first charge, he found that the applicant was not at fault by accepting counterfeit money as any reasonable cashier would have accepted it in the circumstances. He further stated that he did not discount the likelihood that Nwabisa put the counterfeit money in the first respondent's takings. He expressed the view that receiving the counterfeit money by the first respondent from a customer was not the most reasonable

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<sup>1</sup> [2014] 1 BLLR 20 (LAC)

<sup>2</sup> [2013] 11 BLLR 1074 (SCA)

inference that could be drawn in the circumstances of the dispute before him. The commissioner effectively made two mutually exclusive findings on whether the first respondent accepted the counterfeit money from the customer. The first is that she did. She, however, was not at fault by accepting it as any reasonable cashier would have done so in the circumstances. The second is that she did not receive the counterfeit money from the customer. It might have been planted by Nwabisa in her takings. By finding that the conclusion that the first respondent received the counterfeit money from a customer was not the most reasonable inference that could be drawn in the circumstances of the dispute, he contradicted his finding that the first respondent received the money but was not at fault by so doing. The commissioner was required to have made a finding based on the evidence before him whether the first respondent received the counterfeit money from the customer or not.

- [9] The importance of the commissioner's finding on the first charge is his finding that the second charge was intricately linked to the first. He made a finding that the second charge had to fall away based on his finding on the first. As his finding on the first charge was contradictory, his finding on the second has no basis. When dealing with the issue of inconsistency, the commissioner made a finding that the applicant's witnesses did not give any evidence about the inconsistent application of discipline at its New Brighton store, save for arguing that the branch manager who did not dismiss cashiers with excessive shortages at the New Brighton store was disciplined. He added that the applicant elected not to call any witnesses to explain why the employees at the New Brighton store were not dismissed. This finding is not based on evidence as the record reflects that the applicant did not rely on argument only in proving that it applied discipline consistently. It also led evidence to that effect. The commissioner committed a gross irregularity by disregarding material evidence which proved that the applicant applied discipline consistently. When the totality of the evidence tendered at the arbitration is considered, it proves that the gross irregularities made by the commissioner led him to reach an unreasonable decision which is susceptible to review.

[10] The applicant sought an order substituting the arbitration award. The applicant filed a complete record. It reflects that the first respondent made herself guilty of the charges which had been preferred against her. Unchallenged evidence tendered on behalf of the applicant proved that the counterfeit money was patently fake and that accepting fake money from a customer was tantamount to not accepting money at all. By accepting the counterfeit money the first respondent exceeded the acceptable amount of shortage by far. She therefore breached the applicant's rules of conduct which fetched a sanction of dismissal. Her length of service is outweighed by the gravity of the misconduct. While it is true that employees who have committed the same misconduct should be dealt with the same way, not every act of differentiation constitutes inconsistency which justifies reinstatement. In *Mphigalale v SSSBC Others*<sup>3</sup> it was held that an employer may not repeat a decision made in error in the interest of consistency. The applicant provided reasonable explanation why employees who had substantial shortages at its New Brighton store were not dismissed. The record reflects that the applicant discharged the onus of proving the substantive fairness of the first respondent's dismissal.

[11] In the premises, the following order is made:

11.1 The arbitration award issued by the fourth respondent under case number ECPE 1542-13 dated 18 July 2013 is reviewed and set aside and substituted with the following:

11.2 The dismissal of the first respondent was substantively fair.

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Lallie, J

Judge of the Labour Court of South Africa

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<sup>3</sup> (2012) 33 ILJ 1464 (LC).

APPEARANCES

For the Applicant: Ms Kok of Van Zyl Inc

For the First and Second Respondents: Mr Poni of SACCAWU

LABOUR COURT