

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN CASE NO: DA14/00

In the matter between:-

SOUTH AFRICAN CHEMICAL WORKERS UNION__First Appellant

SUSAN MAMAHLODI Second Appellant

and

MARBLE HALL SPAR Respondent

JUDGMENT

JOFFE, AJA

1. The second appellant was employed by the respondent as a cashier. On 21 May 1996 the respondent, represented by one Mr Panayiotis, accused the second appellant of stealing R 300-00. Second appellant was immediately suspended from her duties with full remuneration. A criminal charge of theft was laid against second appellant. This resulted in second appellant's arrest and subsequent arraignment in the Marble Hall magistrates' court.
2. The second appellant was duly convicted on a charge of theft and was sentenced on 26 July 1996.
3. Subsequent to the finalisation of the criminal trial, the respondent convened a disciplinary enquiry. The enquiry was held on 29 August 1996. It was held in the absence of the second appellant and her representative. At the

disciplinary enquiry the second appellant was found to have committed the theft. The sanction imposed on her was one of dismissal.

4. A conciliation board was unable to settle the dispute between the appellant's and the respondent. The matter was referred to the Industrial Court. The appellants sought an order declaring the dismissal of the second appellant to have been an unfair labour practice and requiring the respondent to reinstate the second appellant. It was contended on behalf of the appellant's that her dismissal was both procedurally and substantively unfair.
5. In a written determination the Industrial Court held that the second appellant's dismissal was both procedurally and substantively fair and did not constitute an unfair labour practice. The application was accordingly dismissed. The respondent was awarded costs on the highest magistrates' court scale. This appeal is against that determination.
6. It is common cause that the respondent operates a supermarket. Second appellant was one of the cashiers employed by it. It was customary for the cashiers to cash-up their cash registers at approximately 13h30 each day. For this purpose each cashier would attend in Panayiotis's office. His office was located on a higher floor than the trading area of the supermarket and access to it was gained up a flight of stairs. It is not in dispute that Panayiotis office is extremely small. It is, at most, some 2 metres by 2 metres. It appears that there is a working surface in the office which runs the width of the office. Whilst checking the cash in the Panayiotis would sit in front of the working surface. The cashier would stand alongside Panayiotis.
7. According to Panayiotis it was the custom of the cashiers to obtain coinage for their cash registers whilst in the process of cashing-up their registers. To this end bags containing coins in different denominations were kept on the floor in the office behind Panayiotis. Thus there were bags containing R 5

coins, R 2 coins, R 0.50 coins as well as all smaller denominations of coins. Each denomination of coin was packed in individual containers. Thus the R2-00 coins were contained in bags of 25 coins each, having a total value of R 50-00. Whilst Panayotes was in the process of checking the money in their cash registers, the cashiers would remove from the aforesaid bags the change they required for their cash registers and place it, still in its individual container, in their cash register so that Panayotes could have account thereof.

8. According to Panayotes as at 21 May 1996 he had reason to believe that a member of his staff was stealing R 2-00 coins. Indeed the suspicion was that one of the cashiers employed by respondent was the thief and that the theft was committed when the cashier or cashiers came to Panayotes's office to cash-up. His suspicion fell particularly on second appellant as she did not come to his office on 20 May 1996 to cash in and on that day no R2-00 coins went missing.
9. Panayotes testified that on 21 May 1996 second appellant came to cash-up. At that time there were 8 packets of R 2-00 coins in the R 2-00 coin bag behind Panayotes's back. During the cashing up process second appellant took one packet of R 2-00 coins and placed it in her cash register. When the process of cashing up was completed and second appellant had left his office, Panayotes inspected the R 2-00 coin bag and found only one packet left. He accordingly assumed that second appellant had stolen the other six bags
10. Panayotes immediately followed second appellant to her till. He enquired from her how many packets of R 2-00 coins she had removed. She replied that she had taken one packet. Panayotes then requested second appellant to go to his office. He there explained to her that 6 packets of R 2-00 coins were missing. Second appellant denied taking the coins. Panayotes testified that as he turned around to call his father to the office, he saw the second appellant make a sudden movement. This he saw out of the corner of

his eye. He testified that when he looked back at the second appellant the cap that she had been wearing was on the office floor. Inside the cap were the missing packets of R 2-00 coins.

11. It is the respondent's case that, when removing the one packet of R 2-00 coins, the second appellant secreted the 6 other packets on her head under her cap and removed the coins in that manner from Panayiotis's office. In this regard it should be pointed out that the cap worn by second appellant was given to her by respondent and was being worn as part of a business promotion conducted by second respondent.
12. Second respondent denied Panayiotis's version and denied having stolen the coins at all.
13. Only two witnesses gave evidence as to the events which occurred in Panayiotis's office on the day in question. They were second appellant and Panayiotis. The presiding officer in the court a quo correctly points out that there were two conflicting versions before him as to what had occurred on 21 May 1996. He makes no finding as to credibility and proceeds to deal with the matter on the probabilities. By implication he rejects second appellant's evidence as being improbable and finds Panayiotis's evidence probable.
14. In accepting Panayiotis evidence the court a quo does not address the inherent improbabilities in his version. First, the office in which the events took place is extremely small, yet Panayiotis heard nothing when second appellant removed the extra 6 packets of coins. It is not suggested that the coins were packed tightly. It is improbable that whilst being picked up and placed on second appellant's head, they would not at least have jingled and so alerted Panayiotis. Second, it is improbable that second appellant would have been prepared to risk detection by stealing the coins in the manner alleged in such close proximity to Panayiotis. Third, it is improbable that the bodily movement which second appellant must have executed, would not have attracted Panayiotis's attention, particularly in view of the fact that he was suspicious of second appellant. Fourth, it is improbable that one

or more of the bags would have fallen off second appellant's head despite the cap when going up and down the stairs.

15. regard being had to the foregoing, the court a quo erred in accepting Panayiotis's evidence.

16. The onus was on respondent to establish that second appellant stole the money. In the absence of discharging that onus, the court a quo should have found that the dismissal of the second respondent was substantively unfair.

17. In the circumstances it is not necessary to consider whether the dismissal was procedurally fair.

18. It was not contended by respondent's counsel that re-statement was not an appropriate remedy despite the lengthy period of time that was elapsed since the second appellant's dismissal.

19. Second appellant is also entitled to receipt of remuneration during her period of unemployment. The trial in the court a quo commenced on 11 May 1998. It was enrolled for 4 days. Properly conducted in that time. What largely precluded the proceedings being determined was the lengthy and largely irrelevant cross-examination of Panayiotis by appellant's legal representative. The inordinate duration of the cross-examination is apparent from the record. Panayiotis's evidence in chief runs to 29 pages. His cross-examination runs to 239 pages.

20. Had the matter been properly handled it would have been concluded in May 1998. Accordingly it would be equitable if respondent is only ordered to pay second appellant the remuneration she would have earned from termination of her employment to 31 May 1998.

21. As far as costs are concerned the conduct of the matter in the court a

quo was such as to preclude the appellant being awarded the costs and for a special cost order to be made. In addition to what has already been referred to, appellant's legal representative wasted 4 court days with an abortive recusal application. In these circumstances it would be just and fair if each party were to pay their own costs in the court a quo.

22. As far as the costs of appeal are concerned the respondent ought not to bear the cost of the preparation of the record.

23. In the result the following order is made:

1. The appeal is upheld. Appellants are awarded the costs of appearance on appeal and for the preparation of the heads of argument. Save as already ordered each party is to pay their own costs on appeal.
2. The order of the court a quo is set aside and substituted with the following:
 - 2.1 "the second applicant is to be reinstated on terms and conditions no less favourable than those which govern her employment at the time of her dismissal.
 - 2.2 the respondent is to pay the second applicant the remuneration she would have earned from the termination of her employment to 31 May 1998.
 - 2.3 Each party is to pay their own costs.

M M JOFFE

ACTING JUDGE OF APPEAL

I agree

R M M ZONDO

JUDGE PRESIDENT

I agree

J TRAVERSO
ACTING JUDGE OF APPEAL

Date of Judgment: 29 June 2001

