

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 1046/02

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER HLATSHWAYO M D

Second Respondent

SACCAWU obo D MASEKO

Third Respondent

JUDGMENT

REVELAS J

- [1] This is an application for review of an arbitration award reinstating Dulcie Maseko in the employ of the applicant, who had dismissed her for alleged gross misconduct. The gross misconduct is described by the applicant in the charge sheet as “**arising out of the removal of bones from meat on sale at deli on 14/01/02 – which leads to shrinkage**”.
- [2] The applicant, represented in these proceedings by the third respondent (“the Union”), contended that her dismissal was both procedurally and substantively unfair. This was also found to be

the case, by the second respondent (“the arbitrator”), who arbitrated the matter under the auspices of the first respondent.

- [3] The procedural unfairness found by the arbitrator was that Maseko had not testified at the hearing. She only handed in a written statement, wherein she totally denies that she had removed bones from some meat belonging to the applicant and that she paid only for the deboned meat. She gave no oral evidence and was not cross-examined by the initiator.
- [4] The Union, who also represented Maseko at the disciplinary enquiry, raised the issue of Maseko’s evidence when the chairperson of the disciplinary enquiry requested the Union to put forward mitigating circumstances in writing.
- [5] The Union was given an opportunity to put forward further evidence or written submissions so that Maseko could lead oral evidence. The chairperson of the hearing, Mr Logan, said he received no response from the Union in this regard. Even though Maseko did not give oral evidence, the Union representative, Mr Rakolle cross-examined all the witnesses who testified on behalf of the applicant. They also had handed in written statements to the chairperson, as Maseko had done.
- [6] In my view, there was no procedural unfairness, and even if the procedure followed, was less than perfect, no prejudice towards Maseko emanated therefrom. Most importantly, the chairperson accorded her the opportunity to rectify any flaw. That was not

taken up. In such circumstances, there can be no valid complaint about procedural fairness.

- [7] I will now deal with the substantive unfairness (or otherwise) of the dismissal.
- [8] The applicant had informed its employees in a memorandum, which was also read out to all the employees, that it was experiencing serious problems with stock losses and would take disciplinary steps aimed at preventing further stock losses.
- [9] Two independent witnesses observed how the applicant removed the bones from some meat commonly known as “chuck”, and which is, always sold with bones. One of the witnesses, Lettie Moolman, confronted Maseko about her conduct. Maseko told Moolman that she does “not pay for bones”.
- [10] At the disciplinary enquiry and at the arbitration hearing, Maseko denied that she deboned the meat before she handed it to the deli assistant, Grace Nkosi, who weighed them.
- [11] The arbitrator found that Maseko was not guilty of a breach of any standard rule made by the applicant and took into account that the Union denied the existence of such a rule. He found the memorandum handed to the applicant’s employees to be an “internal” memorandum which did not constitute a standard rule. He quite strangely, (given the aforesaid findings he had made), found that the memo constituted (and was apparently implemented as) a collective written warning and he further took it upon him, to

pronounce on the repugnancy of such collective warnings. Apart from being contradictory, the aforesaid reasoning is patently disconnected to the facts that were placed before the arbitrator. The memorandum merely reiterated a standard rule which exists in every retail business in the country. Furthermore, there was evidence that Maseko was present when the memorandum was explained to all the applicant's employees. Finally, the applicant did not regard or implement the memorandum as a final or written warning. It was presented in evidence to prove that a policy which existed. Even without the memorandum, the applicant could prove such a rule against the misappropriation of stock which is a very common one in most industries.

[12] The arbitrator also found that because the deli assistant (Nkosi) who weighed the meat in question, was not disciplined for the same misconduct or at least her participation therein, the applicant had applied unfair and selective discipline. The arbitrator conceded that the applicant was entitled to curb stock losses with disciplinary action, but held that it should be done in a manner which does not allow it to make "unnecessary errors". Grace Nkosi did not testify before the arbitrator, but only at the disciplinary hearing where she gave evidence on Maseko's behalf. She confirmed that Maseko indeed removed the bones from the meat.

[13] The arbitrator accepted that Maseko removed the bones from the meat. Therefore, by implication, he found that Maseko had lied at the disciplinary hearing and at the arbitration hearing. It does not lie in the mouth of a party who denies misconduct, to derive any benefit from the version which proves his or her denial to be false.

It was further not open to the arbitrator, once he had rejected Maseko's denial, to find that she was selectively disciplined. Such a finding was unjustifiable, particularly as no witnesses were led on the question of selective discipline.

[14] The bones were worth R1, 00. Many might reason that the *de minimis non curat lex* principle applies to this case. Yet it is an established Labour Law principle that the value of unauthorised stock appropriation is irrelevant, and dismissal is the correct sanction. If Maseko and her Union played open cards from the beginning, so that she could give evidence in mitigation (as she was invited to do) or explain the alleged selective discipline by the chairperson of the disciplinary enquiry, perhaps Maseko would not have been dismissed. Unfortunately she chose to deny the incident. Sadly, it happens so often that misconduct is falsely denied, which only further compounds the broken trust of the employer in the employee.

[15] In my view, the award of the second respondent should be set aside and substituted with one reflecting Maseko's dismissal as procedurally and substantively fair. I see no reason why costs should not follow the result, particularly because of the untruthfulness of Maseko's version.

Elna Revelas

Judge of the Labour Court

Date of hearing: 20 April 2006

Date of judgment: 21 April 2006

Typed reasons: 25 April 2006

On behalf of the applicant:

Ms Janine Germanus of Perrot Woodhouse and van Niekerk

On behalf of the third respondent:

Ms Molefe of SACCAWU