

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

CASE NUMBER: JR 1068/02

In the matter between:

STER KINEKOR FILMS (PTY) LTD

APPLICANT

AND

MASEKO N.O.

1ST RESPONDENT

**THE BARGAINING COUNCIL FOR
THE ENTERTAINMENT INDUSTRY**

2ND RESPONDENT

BADI BETTY

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the Applicant sought an order to review and set aside the award issued by the First Respondent (the Commissioner) under EI008/200, dated 6 June 2002. In terms of the award the Commissioner found that the dismissal of the Third Respondent was substantively and procedurally unfair and ordered her reinstatement.

Background facts

- [2] The Third Respondent, Ms Babedi (the employee) who was before her dismissal employed as a catering cashier by the Applicant at the Sandton City branch was charged, disciplined and dismissed for effecting two sales transactions in a fraudulent and dishonest manner. The charges arose from failure by the employee to ring on the cash register certain items which she sold to a customer. The value of the two transactions in question was R14. 00.
- [3] The transaction in terms of which the employee was accused of failing to ring was captured on the Applicant's surveillance camera. After failing to ring the two transactions the employee was apparently seen on a video camera later at the end of her shift wrapping money with a cloth.
- [4] Mr Taute, the chairperson of the disciplinary hearing, testified on behalf of the Applicant that failure to ring up the stock was an act of dishonesty, serious enough to justify a dismissal. The employee's dishonesty according to Taute arose from the fact that she gave out stock without ringing it whilst at the end of the day her till balanced.
- [5] The employee testified that she was employed by the Applicant since 23 June 2000. She further testified during evidence in chief that on the day in question and

also as shown on the video clip, she in the first instance gave a customer a coke and packet of whispers which were at the value of R14, 00. In the second instance, also shown on the video clip, she gave out a coke and popcorns to the value of R14, 00 without ringing up these items. It would seem on her version the total amount was R28, 00.

The grounds for review and the award

- [6] The Applicant contended that the Commissioner committed a gross irregularity in concluding that the employee did not fail to comply with the Applicant's till procedure by failing to ring up the two transactions on the 20th December 2001. The Applicant further challenges the finding of the Commissioner that the dismissal of the employee was both substantively and procedurally unfair.
- [7] It is apparent that the Commissioner in his award found that the employee did not follow the tilling procedure but however found that such failure was justified by the explanation given by the employee. The explanation was that there was common practice, which arose from the suggestion by the credit controller that the sales of items that follow after an over-rung sales, should not be rung in order to balance the sales and the amount in the till at the end of the day. This practice was introduced after it was suggested by one of the credit controller whose identity, the

employee never disclosed in her testimony. It was according to the employee introduced because cancellation of sales is prohibited in the retail industry.

[8] The Commissioner further found that had the Applicant conducted a proper investigation whilst the employee was on suspension, it would have emerged that the employee *“had no ‘dolus malus’ or an ulterior motive, but incorrectly omitted to ring those items up in order to balanced out.”*

[9] In dealing with the appropriateness of the dismissal the Commissioner found the sanction to be *“extremely harsh”* because according to him the employee:

“... boasted an impeccable disciplinary record which spanned over a period of fourteen years, albeit, broken, if the chairperson had applied his mind he would probable (sic) have come to a different sanction that metered out if warranted.”

[10] The procedure followed by the Applicant in disciplining the employee was also found by the Commissioner to be unfair because according to him, both the complex and catering managers *“ganged up against”* the employee. In this regard the Commissioner found that :

“... It is wrong for initiators to co-prosecute. I can see no reason why if both felt there was something they needed to tell the hearing, one of them could not be a witness. This is tantamount to ganging up against the

Applicant (sic) could have the effect of denying the Applicant the right to cross-examination, whereas the other initiator has testified as a witness, the Applicant would have used the opportunity to subject the witness to cross-examination in order to establish her innocence. The process therefore took away the right, as she could only (sic) ask question. I find this practice unprocedural.”

Evaluation

Substantive fairness

- [11] In my view the Commissioner committed a gross irregularity and a misconduct in the manner in which he approached the evaluation of the evidence before him. See *SA Veterinary Council v Veterinary Defense Association* 2003 (4) SA 546 (SCA). In this regard the Commissioner accorded undue weight to evidence of the employee. He in fact misapplied the rules of evidence in evaluating the evidence of the employee. He ignored the critical weaknesses in the evidence of the employee.
- [12] Had the Commissioner applied his mind to the evidence before him and taken into account the circumstances of the case, he would have accorded less or no weight to the evidence of the employee in particular regard being had to the fact that she testified during both evidence in chief and cross examination that she could not

remember what happened on the day in question. This includes the fact that the employee conceded under cross examination that she failed to comply with the proper tilling procedure in not ringing up the two transactions. She also admitted to failing to raise the issue of the over-ringing during her evidence in chief and failed to provide an explanation for it. If the Commissioner took all these factors into account in evaluating the evidence of the employee he would have arrived at a different conclusion regarding the reasonableness of the explanation provided by the employee.

[13] In my view the common cause facts together with the evidence of the witnesses of the Applicant established a clear *prima facie* case which required the employee to present evidence explaining what happened. As mentioned earlier, the employee, in her evidence particularly during cross examination repeatedly stated that she could not remember what happened on the day in question.

[14] The explanation which the employee sought to present was inconsistent in that when questioned during cross examination about the over-ringing which, she initially presented as the reason for not ringing up the till, she suggested that it was because the machine did not function properly. It was only later during the cross-examination that she sought to emphasis the breakdown in the functioning of the

machine. It is apparent from the record that this explanation could not be sustained during cross-examination.

- [15] The other difficulty with the employee's case, which the Commissioner failed to consider relates to the money which the employee was seen on the video recording wrapping with a cloth. She initially claimed to have counted the money in the presence of the incoming cashier but could not recall how much it was. However, when confronted by this version and the one reflected on the video recording she changed and said:

“The situation is such that this cashier you saw coming in already had a tray with all her goodies, now what I do with the money in the cloth is not exchange with her specifically, but to other cashiers.”

- [16] The other version the employee presented when questioned further about the money in the cloth was that she took it to the cashier controller. She answered in the affirmative when asked whether the cash controller would sign for the money once in receipt thereof. However, the very next answer when questioned about this was that she did not give the money to the cashier controller but made a note that she had exchanged the money with other cashiers who signed acknowledgement receipt thereof.

[17] This version also changed when the employee was questioned further as to whether the acknowledgement of receipt by the other cashier was done on Applicant's official paper. She initially stated that it was done on the Applicant's official paper known as "pay in docket." When asked to point out on the "pay in docket" where the entry was made, the employee replied as follows:

"It is not reflected here, but the other person with whom I make the exchange writes down (sic) at the end in the pay book as her float or his float and the person who cashes me up and writes down on my notes that this is the money that I made in exchange."

[18] It is evidently clear from the above that the employee has failed to provide a plausible explanation as to why she breached the tilling procedure and what happened to the money she had wrapped with a cloth. It is clear from the evidence which was properly placed before the Commissioner that the money which was wrapped in the cloth does not belong to the employee but the Applicant. The employee has failed to explain what happened to that money. It is apparent that had the Commissioner properly applied his mind to this evidence he would have come to the conclusion that the reasonable inference to be drawn was that in the absence of a reasonable explanation; the employee had misappropriated the money and was accordingly guilty of an act of dishonesty. In addition had the

Commissioner applied his mind he would have found that the employee had failed to provided a reasonable explanation for failing to comply with the tilling procedure.

Procedural fairness

[19] As indicated earlier the Commissioner found that the dismissal was procedurally unfair because the Applicant was during the arbitration proceedings represented by two initiators. I have not been able to find authority that says that it is not permissible to have two people representing an employer in a disciplinary hearing. In my view there is nothing in principle that prohibits an employer from appointing two people to represent it. It would seem to me that even if there was such a prohibition, on the facts of the present case it cannot be said that the employee was denied a fair hearing due to the two representatives. In fact the record reveals that on the main one person was actively involved in the representation.

Appropriate sanction

[20] A significant factor which the Commissioner would have taken into account had he applied his mind and appreciated the task before him was that the employee committed an act of dishonesty and has not shown any remorse. To this extent the

Commissioner would have found that the trust in the relationship between the employee and the Applicant had broken down to such an extent that it could not be mitigated by the length of service and the clean disciplinary record of the employee.

Conclusion

[21] In my view the decision reached by the Commissioner is not reasonable because it is not a decision which a reasonable decision maker could have reached. In this regard had the Commissioner applied his mind, considered all circumstances of this case and appreciated the task before him he would have found that; (a) the Applicant had established a *prima facie* case of dishonesty on the part of the employee, (b) the employee had failed to provide a plausible and reasonable explanation for his failure to ring up the two transaction and (d) that the employee was guilty of a misconduct involving an act of dishonesty. The Commissioner would also have found that a dismissal was the most appropriate sanction in the circumstances.

[22] There is sufficient evidence before this court upon which a determination of the dispute can be made. There is therefore no need to remit this matter back to the CCMA for a hearing *de novo*.

[23] In the premises the Commissioner's arbitration award is reviewed and set aside.

[24] The Commissioner's decision is substituted with the following order:

1. The dismissal of the employee (Ms Badi) was both procedurally and substantively fair and the decision of the Applicant to dismiss her is upheld.

MOLAHLEHI J

DATE OF HEARING: 18 SEPTEMBER 2008

DATE OF THE ORDER: 11 JANUARY 2008

DATE OF THE JUDGMENT: 24 JANUARY 2008

APPEARANCES

For the Applicant : Sean Snyman of Snyman Attorneys

For the Respondent: Andrew Golberg of Nomali Tshabalala Attorneys