REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Of interest to other Judges

Case no: JR1245/10

In the matter between:

MR PRICE GROUP LTD — **Applicant**

and

MARTHA MALEFETSE — **First Respondent**

JACKSON MTHUKWANE N.O — **Second Respondent**

CCMA — **Third Respondent**

REASONS FOR JUDGMENT & ORDER

LENGANE AJ

Introduction

[1] This is an unopposed application in terms of section 145 of the Labour Relations Act, 66 of 1996 ("the LRA"), to review and set aside the award issued by the second respondent ("Commissioner") on or about 30 April 2010 and under the auspices of the third respondent ("the CCMA"). The applicant delivered its heads of argument and also delivered an affidavit of service in respect of them. There is an annexure which is attached to that affidavit, marked "*WVDV3* ", which is a letter addressed to the applicant's attorneys by the first respondent's attorneys, Van Den Berg and Meintjies Attorneys, to the effect that the first respondent would abide the decision of this court.

The following relief is sought:

> '(a) that the arbitration award handed down under case Number: GATW 14895-09 dated 30th April 2010 be reviewed and set aside and replaced with an order upholding the First Respondent's dismissal;
>
> (b) costs jointly and severally in the event of any of the respondents opposing this application; and

Further and/or alternative relief.'

[2] The application came before me on 21 December 2011. On 23 December 2011, I made an order dismissing it and undertook to furnish my reasons at a later stage. My reasons follow below. But, before I turn to dealing therewith, it will, in my view, be necessary first to summarise the evidence which was produced by the parties before the Commissioner at arbitration. I have gleaned that evidence and other relevant facts from the transcript of the oral evidence as well as from the Commissioner's impugned award. I also had regard to the applicant's founding affidavit, more particularly where it contains allegations which seek to summarise that evidence. I hasten, though, to mention that the purpose of the summary of the evidence in this judgment is not to assess its veracity, credibility or reliability. That was the function of the Commissioner. I summarise it solely and purely for the purpose of assessing the viability or lack thereof of the first five of the six grounds of review upon which the applicant relies in these proceedings - to contend that the Commissioner either ignored, misunderstood or misrepresented relevant evidence in making the award that he did.

<u>Factual Background</u>

[3] The first respondent was employed by the applicant, a business conducting a chain of clothing retail stores, as a "store associate". She commenced her employment as such on 3 February 2003 at one of the applicant's stores known as 'Gift Acres' in Pretoria North. She remained employed, as a store associate at Gift

Acres until she was dismissed on 30 November 2009, after having been found guilty for misconduct by the applicant's internal disciplinary tribunal. The charge of misconduct was coined thus by the applicant in the notification to attend a disciplinary hearing:

> The Gift Acres store where you are employed has been experiencing stock losses (*sic*) that the company considers unacceptable. The results of previous stocktakes (*sic*) were as follows:
>
> 18 October 2009 1.51%
>
> 08 October 2009 2.19%
>
> You are aware that it is your responsibility, in your capacity of <u>store associate</u> to take steps to prevent further stock losses, or to report on the cause of the stock losses to the company. The company has compiled an action plan, in consultation with you, to combat stock losses in your store, which you were aware of. Despite all of this, the stock losses have continued to increase.
>
> The last stock take, conducted on 10 November a result of 2.5. %. This is completely unacceptable."

[4] The notification is dated 23 November 2009 and the hearing "was to take place on 27 November 2009. It took place and the first respondent pleaded "not guilty" – despite, according to her evidence, the fact that the chairperson of the disciplinary tribunal had attempted to cajole her into pleading guilty. The outcome of the disciplinary hearing was issued on 30 November 2009 and the first respondent was found guilty and dismissed with immediate effect.

[5] The first respondent, aggrieved by the outcome, referred a dispute of unfair dismissal to the CCMA, contending, according to Part B of LRA Form 7.1.1 that:

> 'There was no good reason to dismiss me. The employer did not want to properly assist me.'

[6] At the commencement of the arbitration, it was established as a common cause fact that the first respondent had been dismissed. The applicant was represented by its "*People's Facilitator*", Mr. Shawn Naidoo ("Naidoo"). Naidoo had been the applicant's initiator during the internal disciplinary hearing. He called three witnesses, Messrs J.D. Kunneke (applicant's area manager for Pretoria North), Dingaan Jeremiah Zuma (applicant's store manager in Soshanguve) and Jacques Ball (chairperson of the internal disciplinary hearing). After the applicant had closed its case, the first respondent's representative called two witnesses, namely, the first respondent and her erstwhile colleague at Gift Acres, Ms Letta Mphaka.

I now turn to summarising the various witnesses' evidence. I shall attempt to capture only those parts of it which are, in my view, relevant for the purposes of the review application and this judgment.

J.D. Kunneke's evidence ("Kunneke")

[7] Kunneke, was employed by the applicant in the position of area manager: Pretoria North for a period of two to three years, at the time of the dismissal of the first respondent. Gift Acres store falls under the Pretoria North area. He testified that the applicant had a Group Disciplinary and Incapacity Code, in terms of which, to the extent relevant for the present purposes, excessive stock losses were deemed to constitute team misconduct. A stock loss management process must be started when the extent of stock loss in any store has been exceeded. In this regard, he was referring to, and relying on, a two-page document in the Bundle of documents, at the foot of which is written:

> 'Mr. Price Group Disciplinary and Incapacity Code June 2008.'

[8] When, during his examination-in-chief, he was asked if the applicant had any rule regarding what percentage of stock loss would the applicant expect? (I read that question to mean what was the upper limit beyond which stock loss would not be tolerated by the applicant). He said that the company standard was 1%. He then

explained the procedure which the applicant would follow to identify a particular store as a "stock loss or shrinkage problem". He also explained the stock management procedure which is followed if a stock loss in a store exceeded 1%. His explanation was briefly to the effect that the stock loss management process must start when a particular store's stock loss was in excess of 1% and, in such circumstances, the applicant would consider all the employees of that store, including management, to be collectively responsible in the same way.

[9] However, in cross-examination, Kunneke failed to point out in the Disciplinary and Incapacity Code where it is stated that the threshold for stock loss which would be deemed as team misconduct was 1%. He conceded that there was no such provision in the Code. As to the next logical question, how would the employees then know of the existence of such a rule, he referred to a letter which he described as a standard warning letter, which would be given to all the employees and management of the affected store and which indicated the existence of the 1% threshold.

[10] In addition to this letter, his testimony proceeded, employees would be given an action plan designed to reduce further stock losses. This procedure is implemented on the occasion of every successive stock loss in a store. He said that that the implementation of the procedure was the responsibility of an area manager. He further testified that where there was no improvement in the rate of stock loss after three successive stock takes "*all associates and managers will be notify* (sic - notified) *to attend a hearing and may be dismissed*".

[11] He testified that this procedure was followed at Gift Acres because the stock take which was conducted there on 18 August 2009 showed a loss of 1.5%, which is "totally unacceptable". He continued to say that that meant that store 'associates are either behaving in a gross and negligent manner by allowing stock to go missing or unaccounted for. Or it means that the stock is going missing because of deliberate

dishonesty.'

[12] Each employee was expected to append his or her signature to the action plan and thereby signify his or her acceptance of it, but even if an employee refuses to sign it, he or she is, nonetheless, still required to implement the plan.

[13] The action plan did not accompany the first warning letter which was issued on 3 September 2009. It accompanied the second warning letter which was issued to the first respondent and all her fellow store associates on 22 October 2009. The store associates, including the first respondent, refused to sign it and it was posted on the notice board in the staff canteen.

[14] A follow-up action plan dated 29 September 2009 was issued. On the face of the document which Kunneke described as this follow-up action plan, there is an inscription to the effect that the first respondent and all other associates agreed to the first and second letters as well as to the action plan. In fact, Kunneke confirmed in examination-in-chief that the first respondent agreed to the plan and that resolved the matter.

[15] The exact quantification of the extent of the stock losses suffered by Gift Acres was summarised by Kunneke, with the aid of a document headed: '*Gift Acres 434 - Stock loss History*'. It summarises the stock loss history of the Gift Acres store for the periods 10 February 2009, 18 August 2009, 8October 2009, 10 November 2009 and 25 January 2010 as follows:

- 10 Feb 2009 (1.14%, Rand Value = R33 864.00);
- 18 August 2009 (1.51%, Rand Value =R55 777.00);
- 8 October 2009 (2.19%, Rand Value = R15 591.42);
- 10 November 2009 (2.56%, Rand Value = R9 423.73); and

- 25 January 2010 (084%, RAND Value = 9 O40.00).

[16] Kunneke testified further that he did not follow the aforementioned stock loss management procedures in respect of the losses recorded on the stock take of 10 February 2009. That is, he neither issued any warning letters nor an action plan in respect thereof. He said that he decided not to do so but, instead to "*start up nice and fresh*" by explaining the stock loss management process to everyone in the store. In that process, he asked the employees present, including the first respondent, for their suggestions as to what action or measures could be taken to avoid future stock losses. He said that two major suggestions which the store associates raised were that the applicant should employ/deploy a security guard at, and install cameras in, the store.

[17] He considered these suggestions but decided not to employ/deploy a security guard or to install cameras because that would have occasioned too big a cost on the applicant. However, he did not know how much it would have cost the applicant if it had acceded to the suggestion to employ a security guard and/or install cameras in the store. He further said that installation of cameras would, in any event, not have made a difference in abating the extent of the stock losses.

[18] The warning letters which were each also accompanied by an action plan were those which he issued in respect of the stock losses reflected against 18 August 2009, 8 October 2009 and 10 November 2009.

[19] On 17 November 2009, the first respondent and "everyone in the store were suspended. They were subsequently summoned to a disciplinary enquiry.

[20] During their suspension the applicant employed casual employees and they were supervised by an acting manager. During this period, according to Kunneke, the stock loss results went down to 0.84%. It is convenient for me to pause at this point and mention that under the cross-examination it emerged that there was a certain fellow store associate, Reneiwe Mogamogani ("Reneilwe"), who was neither

suspended nor dismissed together with the first respondent and the other store associates. At the time of the arbitration proceedings, she was still in the employ of the applicant. I shall return to this point later, when I deal with the principle of parity in the context of team misconduct. Suffice it to say, for now, that Kunneke's explanation for the exclusion of Reneiwe from the disciplinary action taken against the rest of her fellow associates was that she was not part of team because she had been employed at Gift Acres as an associate for about three months only when the decision to discipline the others was made; whereas the stock loss problem that precipitated the process of discipline had spun a period of over six months prior. This is how I understand the testimony of Kunneke and, in my view, the Commissioner understood, and summarised, it similarly in his award.

Dingaan Jeremiah Zuma's evidence ("Zuma")

[21] Zuma, at the time of the arbitration proceedings, was the applicant's store manager: Soshanguve.

[22] He started working as store manager at the Gift Acres store on 17 November 2009. On this date the first respondent and her fellow store associates had already been on suspension although not yet dismissed. He remained in this position until 28 January 2010.

[23] The only stock-take that was conducted at the Gift Acres whilst he was employed there was on 25 January 2009, which recorded a stock loss of 0.84%. During December 2009, there was a security guard at the Gift Acres store. He did not know why the security guard had been placed there. He surmised that it must have been because that was the applicant's practice so to do every December.

[24] In my view, the Commissioner summarised the evidence of this witness correctly. In any event it was, in my view, an exercise in futility for the applicant, in an attempt to show that there was a good reason to dismiss the first respondent, to call a witness to testify about a the extent of stock loss (recorded on 25 January 2010) covering a period during which the first respondent had already been dismissed and which did not play any role in influencing the decision to dismiss her.

Jacques Ball's evidence

[25] Ball was the presiding officer during the disciplinary hearing of the first respondent as well as the separate disciplinary hearing of her colleagues. He testified that he had been playing such a role on behalf of the applicant for a period of six to seven years.

He denied that he had attempted to coerce the first respondent to plead guilty.

He said that the only appropriate sanction for the sort of charges which the first respondent faced was dismissal.

[26] Ball was the respondent's third and last witness.

Martha Malefetse's evidence (First Respondent)

(a) She was employed by the applicant at the Gift Acres store as a store associate since 3 February 2003 until her dismissal on 30 November 2009.

(b) Her duties as a store associate entailed cleaning, working at the till as cashier, fitting room, markdowns and mark-ups, opening boxes and merchandising.

(c) She denied having had any sight or knowledge of the applicant's Disciplinary and Incapacity Code as she had never been provided with one.

(d) She was aware of the existence of the first warning letter dated 3 September 2009 as she had received it and she understood its contents.

(e) She said she knew about the 1% stock loss threshold because she and her colleagues had been told about it at a meeting in 2009, which taken place in 2009 after the stocktaking and after the first warning letter of 3 September 2009.

[27] Prior to Kunneke becoming area manager: Pretoria North, no disciplinary action had been taken against her by the applicant. There had been stock losses before Kunneke became the area manager, but they were less than 1%. She testified that she would surmise that stock losses would have been less than 1% because they (store associates) used to get incentives then. Store associates only became aware of the existence of the 1% threshold rule after Kunneke had informed them so at the meeting which took place in 2009 after the issue of the warning letter of 3 September 2009.

[28] She further testified that she was aware that shoplifting used to take place at the Gift Acres store. They, as employees of the store, would try and apprehend these shoplifters and oftentimes would fail because mostly shoplifters were men and the store associates were women. Sometimes they would succeed in apprehending a shoplifter but "*the cases would not go any further*". Previously, there used to be cameras that had been installed in the store. This was during the time when the area manager was 'Enthias' and the store manager was Pauline. The cameras were placed around the shop and one could see on the screen placed on the cash desk what was happening in the shop.

[29] She was aware of the action plan (which was introduced by Kunneke after the stock loss experienced during the stock take of 18 August 2009) and she followed the action plan.

[30] She and other store associates were suspended and later charged with misconduct arising from stock losses and two of her colleagues pleaded guilty.

[31] She knows Reneiwe, as they used to work together as store associates. She felt aggrieved by the fact that Reneiwe was not also charged for the same misconduct as her and the other store associates, whereas she (Reneiwe) had also been part of the group of store associates throughout the periods from the stock take of 18 August 2009.

[32] Lastly she denied Ball's evidence that she stated in her mitigation of sanction in the disciplinary hearing that she was sorry for what she had done as she had not done anything wrong and would, therefore, not have apologised.
She feels that her dismissal was unfair and she seeks reinstatement.

Letta Mphaka

[33] She was employed by the applicant at the Gift Acres store as a store associate. She was charged for the same misconduct as the first respondent and she was also dismissed.

[34] She had expected that she and the first respondent would have been charged together as a group but they were called individually. She was forced by the chairperson, Jacques Ball to plead guilty. She pleaded not guilty.

The Grounds of Review

[35] I have already mentioned that the applicant relies on six grounds of review.

[36] The first five all boil down to the contention that the Commissioner ignored, or failed to apply his mind properly to, relevant evidence that was placed before him.

[37] The sixth ground is that the Commissioner committed a reviewable irregularity by disregarding the "*judicial precedents cited to him by the applicant (respondent at arbitration) in its closing argument but relied instead solely on CCMA arbitration awards and, in addition, applied incorrect legal principles in coming to the conclusion that the first respondent's dismissal was substantively unfair*".

Are these grounds sustainable?

The Test on Review

[38] In order for the application to succeed, the court must be satisfied that no other reasonable Commissioner placed in the same position as the second respondent was, would have reached the same conclusion. [1] '*Same conclusion*' , in the sense that the phrase is used here, encompasses a band or range of reasonable conclusions or outcomes. If, in the opinion of the court, the impugned conclusion or outcome falls within such a band or range, the application must fail.[2]

[39] The issue which the Commissioner was called upon to determine was whether the first respondent had been properly found guilty of group misconduct by her failure to address the question of stock loss in the Gift Acres store and whether her

1 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 at para 110.
2 Id at para119 See also *Transnet Freight Rail v Transnet Freight Bargaining Council and Others* (2011) 32 ILJ 1766 (LC) at [8].

dismissal was substantively fair or not. In my view, the Commissioner's award shows that he understood and appreciated this. That is made clear by his consistent, if not persistent, reference to arbitration cases that dealt with the issue of collective misconduct.

[40] What it is that I have to determine in this matter is whether the Commissioner failed correctly to apply the law relating to collective misconduct such that, as a result, the applicant was denied a fair trial.

[41] I accept that it is settled law that the concept of collective liability is part of our labour law. This arises in circumstances where the employer is unable to identify a particular employee or particular employees who are guilty of misconduct because the other employees refuse to disclose the identity of that particular culprit or culprits among them. In such a case, the employer's rationale is that it has sufficient grounds for inferring that the whole group of employees is responsible for, or is involved in, the misconduct.[3] The employer's entitlement to make such an inference arises from the trust and confidence relationship which an employment relationship gives rise to *ex naturalia contractus*.[4]

[42] However, the evidentiary principles applicable to inferential reasoning still apply in matters involving group misconduct or collective liability. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts.[5] Facts are to be proved on a balance of probabilities. Thus, facts proved by inference must still be proved on a balance of probabilities. The mere feasibility of proving misconduct by inferential reasoning does not disturb the requirement of proof on the basis of a balance of probalities. If this standard of proof is not met the inference cannot, and, I might add, must not, be drawn.

[43] In this matter, the doctrine of collective liability ceased to be of applicability

3 *Chauke and Others v Lee Service Centre t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) at para 29.
4 *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-E
5 *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1063C - D.

immediately after the two store associates had pleaded guilty because the applicant thereafter could no longer be heard to say that it was unable to identify the particular employee or employees who had been responsible for causing the problem of stock loss. As articulated by Cameron JA (as he then was), in the *Chauke* matter, the doctrine of collective liability is applicable only when the employer is unable to identify the culprit(s) of misconduct.

[44] I find that the conclusion which the Commissioner reached, to the effect that the applicant had failed to prove that the first respondent was guilty of causing stock loss was a conclusion which any other reasonable Commissioner could have reached.

[45] Even if I am wrong in coming to this finding on the foregoing bases, I would still find that the conclusion to which the Commissioner came was not one outside the band or range of reasonable conclusions to which another reasonable commissioner could have. I have in mind the principle of parity which, according to Mlambo J (as he then was), means that like cases must be treated alike.[6] Mlambo J said that in terms of the parity principle, it would be unfair to impose a more severe penalty on one employee than on the other in circumstances where both were guilty of the same misconduct. I would add that it would be even more injurious to fairness to select some and not others to be charged collectively in circumstances where all of them were part of the same group of employees who all equally qualified to be charged collectively. Reneiwe was not charged at all although she was one of the store associates, having the same job responsibilities as the first respondent and the rest of the other store associates.

[46] Furthermore, there is no evidence whatsoever that the managers of the store were charged, in spite of the existence of the so-called Disciplinary and Incapacity Code of the applicant which states that managers would also be deemed guilty of causing stock losses if those losses exceeded the threshold of 1%.

[47] In the circumstances, I find that there is no basis to interfere with the finding of the Commissioner on the bases of the first to fifth grounds of review.

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6 *SACTWU and Others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC) at para 28.

[48] The sixth ground of review is that the Commissioner committed a reviewable irregularity in that he unjustifiably disregarded the judicial precedents upon which the applicant had relied in its closing argument but relied, instead, upon CCMA awards and thereby applied legal principles incorrectly. Ms Lapham, who appeared on behalf of the applicant, submitted that the judicial precedent which the Commissioner failed to follow was the one established by the Labour Appeal Court in the Chauke matter. I disagree. In the Chauke matter, the employer was unable to identify the culprits.

CONCLUSION

[49] In the premises, the application must be dismissed.

I make the following order:

(1) The application is dismissed.
(2) The second respondent's award stands.
(3) The registrar of this court must make this order known to the first respondent.

Each party is to pay its own costs of the application.

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LENGANE AJ
ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

APPEARANCES:

For the Applicants: K LAPHAM

For the Third Respondent: None Appearance