

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

**Case No JR 1282/09**

**In the matter between:**

**MOHLAKE NANCY**

**Applicant**

**And**

**JOHN SHADLOW N.O.**

**1<sup>st</sup> Respondent**

**CCMA**

**2<sup>nd</sup> Respondent**

**PICK n' PAY**

**3<sup>rd</sup> Respondent**

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REASONS FOR ORDER

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**CAWE AJ**

Introduction

[1] On the 29<sup>th</sup> April 2011, after having heard argument by both parties, I made the following order:

- 1) The point in limine as raised by the respondent is dismissed.
- 2) The review application is dismissed
- 3) There is no order as to costs.

[2] The applicant has now requested reasons for the order made. These are the reasons for the order made:

The applicant is Nancy Mohlake, an adult erstwhile employee of the third respondent at its supermarket situated in Faerie Glen, Pretoria. During September 2001 she was charged with two counts of misconduct.

[3] The first count related to "dishonesty":

- a) Unauthorised consumption of company property on the 7<sup>th</sup> September 2001, at about 10:00, to the value of R4-10.

[4] The second count, “breaking of company rules and regulations,” flows from the first count. The applicant admitted guilt at the disciplinary hearing she, by way of explaining her conduct, submitted that she had merely forgotten to pay for the coffee that she had consumed. The sanction of dismissal was imposed, on both counts on the 13<sup>th</sup> October 2001.

[5] She then referred her dismissal to the CCMA. The matter was not resolved at conciliation. The matter was arbitrated by the 1<sup>st</sup> Respondent (“the commissioner”) on the 30<sup>th</sup> June 2009. The commissioner upheld the applicant’s dismissal.

[6] The evidence placed before the Commissioner consisted of the record of the disciplinary proceedings and the disciplinary hearing outcome of two co-employees of the applicant, namely Ms Thihe and Ms Dabete, who were charged with misconduct. Ms Thihe was not dismissed. She was given a final written warning. Ms Dabete was dismissed.

[7] It is common cause that the Applicant’s case before the commissioner was limited to the inconsistency in the disciplining of employees of the third Respondent and the question whether or not the sanction imposed on the Applicant was harsh and/or excessive.

[8] At the beginning of the review proceedings the Respondent raised a point *in limine* citing the Applicant’s unreasonable delay in preparing and lodging the record in the instant matter. The Respondent relied on the notion “*vigilantibus non domientibus lex subvernint*” as enunciated in ***Sishuba v National Commissioner of the SAPS (2007) 28 ILJ 2073(LC)***. I entertained the point *in limine* and was satisfied with the applicant’s explanation. I dismissed the point *in limine* and proceeded to hear the main application.

[9] In its Heads of Argument the Applicant (at 6.1.1-6.2) argues that:

6.1 *With regard to inconsistency(sic), it is common cause that the Applicant contended and argued that she was charged and dismissed for misconduct of unauthorised consumption of company property on 07/09/2001 at about 10h00 to the value of R4-10; Breaking of company rules and regulations and handed the sanction of dismissal.*

6.1.1 *However (sic), her colleague one Ms Thihe, who was charged and found guilty with similar if not more serious charges. However, she was given the sanction of final written warning:*

“consuming company property namely cake and also sharing it with customers without paying for it on 3/9/01 at 11h31 am and at 12h48 am respectively” was given the sanction of final written warning.

6.1.2 *With regard to the sanction, it is further common cause that the Applicant contended and argued that the sanction of dismissal imposed to her was too harsh in that she had been employed for [a] period of 16 years with clean[a] record of service. She was honest at all times as evident in that she did not dispute the action and pleaded guilty, and gave justifiable reason*

*for the incident as it was not intentionally done. Taking into account the totality of the matter, dismissal was too harsh and an inappropriate sanction.*

[10] It is for the foregoing reasons that the Applicant submits that the First Respondent's award falls to be reviewed and set aside in terms of section 145 and/or 158 of the Labour Relations Act 66 Of 1995.

[11] The Applicant concedes that she broke a rule that was known to her. This is reflected in the Arbitration proceedings transcript.

[12] She, however, feels that she should have been given the same sanction as Ms Thipe, that is, a final written warning.

[13] Miss Thipe had been charged with consuming cake and sharing it with customers, yet she was not dismissed.

[14] The arbitrator, in his analysis of evidence and argument, states that: *"At first blush this does appear to suggest that the respondent had applied the rule in an inconsistent way, however the evidence led by the respondent showed that although this employee had been charged with consuming and sharing cake, she had actually been found guilty of consuming the left-over crumbs. This makes her offence less egregious than the applicant's misconduct and would have justified the imposition of a lesser penalty".*

[15] I tend to agree with the arbitrator's assertion that the offence by Miss Thipe was less serious than that committed by the Applicant herein.

[16] The arbitrator further states that;

*"Although item 7(b) (iii) of the Code of Good Practice: Dismissal requires consistency in the application of the rule this should not be assessed in a mechanistic manner. In **SACCAWU & Others v Irvin & Johnson LTD [1999] 8 BLLR 741 (LAC)** the Labour Appeal Court stated:*

*"In my view too great an emphasis is quite frequently sought to be placed on to the 'principle' of disciplinary consistency, also called the 'parity principle'... There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness... Every employee must be measured by the same standards... Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility and requires the exercise of discretion in each individual case."*

He concludes thus;

*"Given the difference in degree of seriousness between the applicant's offence and that of Dabete, it is my view that no inconsistency took place, especially as Thipe, who had committed the same offence as the applicant, was dismissed. Even if I am incorrect the views expressed in **SACCAWU & OTHERS (Supra)** mean that the degree of any inconsistency in this matter is not sufficient to render the applicant's dismissal procedurally unfair. It is my view that the dismissal of the applicant was entirely appropriate and fair, and I concur with the respondent's argument that she has, through her actions, rightly forfeited the right to continue employment with the respondent".*

[17] It is noteworthy that the Commissioner makes a fundamental mistake of fact in that Ms Thipe was not dismissed but given a final written warning. It was Ms Dabete who was, in fact, dismissed. This however does not detract from the fact that the Applicant committed a serious offence that is punishable, according to the Rules and Regulations of the Respondent, by dismissal.

[18] The consideration of consistency or equality of treatment is an element of disciplinary fairness. Conradie JA, in ***SA Commercial and Catering and Allied Workers union & other v Irvine & Johnson Ltd [1999] 20 ILJ at 231*** stated that the principle of consistency should not be applied rigidly.

[19] *Prima facie* the evidence that was placed before the Commissioner does not point to inconsistency on the part of the third Respondent. Ms Thipe was caught eating cake crumbs and sharing them with customers. The Applicant deliberately did not pay for the coffee she had consumed.

[20] When one looks at the case of Ms Dabete, who also did not pay for goods she had consumed and was dismissed one sees clearly that the third Respondent was consistent in its sanction for a similar offence. I accordingly find no fault in the Commissioner's reasoning regarding consistency in the instant matter.

[21] Having found the imposition of the sanction of dismissal to be fair, the commissioner upheld it.

[22] The Applicant now seeks to review and set aside the arbitration award. The Applicant's grounds of review are that the arbitrator misdirected himself by failing to apply his mind to the facts placed before him and further of having committed an irregularity in the conduct of the proceedings by ignoring or misinterpreting the facts.

[23] To answer the question whether the decision of the Commissioner, to uphold the Third Respondent's decision, is reviewable one has to have regard to what Willis JA, in ***De Beers Consolidated mines Ltd v CCMA and others (2000) 21 ILJ 1051(LAC) states at 1062G-1063A***,

"The arbitrator's function is to decide whether the dismissal is unfair and not to impose what he or she viewed as the correct sanction.

*The arbitrator is therefore not exercising an independent discretion. His function is limited to assessing the reasonableness and fairness of the decision to dismiss and can only interfere with the employer's decision if it is "found to fall outside a band of reasonableness", the parameters of which are determined by general principles of fairness".*

[24] The Applicant was charged after she was observed by the third Respondent's security personnel minding the store's CCTV at the time. This is according to MR Wimpie du Plessis, the third Respondent's sole witness at the arbitration. At the time of the incident the applicant had been on duty in the Market Café. The applicant had been recorded on camera making and

drinking a cup of coffee. This had occurred just after the café had opened at 09h00. Prior to leaving work he had approached the applicant and asked why she had not paid for the coffee.

[25] Du Plessis explained that it had been necessary to install cameras in the café because of the high level of 'shrinkage'. Employees were consuming food that was for sale to the public. He further stated that the café had not been busy at the time, it had been just after opening time; the applicant had sat in the café and consumed a cup of coffee for which she did not pay. Du Plessis stated it was against the rules for the employees to consume the respondent's goods, and employees were dismissed for consuming food that had not been purchased.

[26] The applicant does not deny that she broke a rule that was known to her. All that she seeks to challenge is the harshness of the sanction meted against her. If one considers Du Plessis's testimony one cannot find fault with the third Respondent's sanction against the Applicant. Du Plessis clearly stated that other employees were dismissed for similar offences.

[27] The function of the arbitrating Commissioner is not to usurp the role of management by exceeding the mandate given to him by the statute even though the arbitration process is a hearing *de novo*.

[28] In light of the foregoing the submissions in the Applicant's Heads of argument, are superfluous. This is especially so since it is common cause that the Applicant did consume Respondent's property without paying for same. In fact paragraph 7.5 of the said Heads of Arguments contradicts Applicant's own version and is totally confusing. It does not enhance Applicant's grounds for review.

[29] It was for these reasons that I made the order referred to in paragraph 1 above.

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CAWE N

Acting Judge of the Labour Court

### Appearances

For the Applicant: W. Khoza

For the Respondent: Simon Dodd

Instructed by: Bowman Gilfillan

Date of Hearing: 28 April 2011

Date of Judgment: 23 June 2011