



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR 1484/12

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

CCMA

First Respondent

D K NKADIMENG N.O.

Second Respondent

M Q NGOVENI

Third Respondent

Heard: 20 March 2014

Delivered: 22 April 2014

Summary: Review – misconduct – breach of company policy – award unreasonable – reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Ms Mwamasilani Queen Ngoveni (Ngoveni or “the employee”) was dismissed for misconduct.

- [2] The employee referred an unfair dismissal dispute to the CCMA (the first respondent). The second respondent (“the commissioner”) found that the dismissal was not for a fair reason and ordered the applicant to reinstate her. The applicant seeks to review that award.

Background facts

- [3] The employee was the branch front end manager at the applicant’s Musina store. She was called to a disciplinary hearing to face the following allegation:

“Serious misconduct in that on the 05/06/2011 and on the but not limited thereto [sic], you failed to follow company policies and procedure on cashing up by allowing/instructing cashiers to pay in the amount short on their daily takings.”

- [4] The allegation flowed from an incident on 5 June 2011 when Ms Rinah Lithole, a money market clerk, was short in her daily takings by the amount of R1 400, 00. She was dismissed for an unrelated incident of shortage. Lithole referred an unfair dismissal dispute to the CCMA. At conciliation she alleged that the employee, Ngoveni, had allowed cashiers to pay shortages from their own pocket.
- [5] At the arbitration relating to Ngoveni’s dismissal, Lithole testified that, on 5 June 2011, the cash office controller, Ms Anneline Matsila, told her that her cash was short by R1 400. Matsila called Ngoveni, who was the manager on duty on that day, and asked her about it. Ngoveni tried to trace the missing cash in the scanning room but couldn’t. Ngoveni then gave Lithole her (Ngoveni’s) bank card and told her to withdraw R1 400 from Ngoveni’s bank account to make up the shortfall. Lithole did so.
- [6] Another witness, Ms Selaelo Mariba, testified that she was the cashier on 8 June 2011 and had had a till shortage of R 233, 81. Ngoveni told her to pay the amount in to the cash office. She went to withdraw R200 to do so. The money she paid in was recorded as a “pick-up”.
- [7] These actions were in breach of the applicant’s policies contained in its “Front End Administration Manual”.

- [8] Ngoveni initially denied lending Lithole R1 400. However, after she had been challenged to produce her bank statement, she conceded that she did. It is clear from Ngoveni's bank statement that R1 400 was withdrawn from it on 5 June 2011. Ngoveni testified that she did not know that Lithole was going to use the money to cover the shortage. With regard to Mariba, Ngoveni denied signing her performance record; yet her signature clearly appears in a column that reflects that she (Ngoveni) had investigated the cause of the shortage. Ngoveni did not take any action against Mariba or Lithole, but did subsequently initiate disciplinary steps against Lithole for another shortage of R700.

The arbitration award

- [9] The arbitrator based his conclusion that Ngoveni's dismissal was unfair on the following findings:

9.1 The only direct evidence relating to Ngoveni's alleged permission or instruction to cashiers to conceal their shortages by using their own cash came from Lithole and Mariba. Lithole's evidence must "be approached with caution" because she was a single witness and for the following reasons:

9.1.1 She was "close to" Ngoveni and assisted her with domestic charges when Ngoveni was pregnant. Lithole was in a position to abuse this relationship.

9.1.2 She did not report Ngoveni for advancing the R1400 to her until she was at the CCMA for her own unfair dismissal dispute. "This defines Rinah as a dishonest person".

9.1.3 She still owed Ngoveni R1400 at the time she was dismissed. The arbitrator concluded: "I find the evidence of Rinah [Lithole] unreliable and in the absence of corroboration thereof by independent testimony or evidence, I reject it".

9.2 Mariba's evidence was also not corroborated by "independent external evidence". She gave evidence because otherwise she would be "in trouble". She had previously been given a warning by the

applicant for a shortage of R800 “and had an additional motive to lie”. The arbitrator rejected Mariba’s evidence.

9.3 The arbitrator found that the employer had failed to prove, on a balance of probabilities, that Ngoveni had allowed or instructed Lithole or Mariba to pay in their own cash to balance the books.

Review grounds

[10] With reference to the SCA decision in *Herholdt v Nedbank Ltd*¹ the applicant argues that the arbitrator committed a gross irregularity that led to an unreasonable result. It argues that the arbitrator committed a gross irregularity in failing to resolve the factual dispute that existed between Ngoveni and the company’s witnesses. That led to an unreasonable result.

Evaluation / Analysis

[11] There was a clear factual dispute between the evidence of Lithole and that of Ngoveni regarding the events of 5 June 2011.

[12] Lithole testified that:

12.1 She was short with R1400;

12.2 Ngoveni gave her (Lithole) her (Ngoveni’s) bank card to withdraw R1400 to make up the shortfall;

12.3 Ngoveni told her that it was a secret between them as it was not allowed in terms of the company procedure;

12.4 She gave the money to Ngoveni; and

12.5 Ngoveni gave it to Matsile.

[13] Ngoveni initially denied giving Lithole her bank card or the money. She only conceded it after she was challenged to produce her bank statement. Then she said that it was a loan. The statement shows that R1400 was withdrawn on the day. The “loan” was never repaid.

[14] The commissioner accepted Ngoveni’s version (despite it being inherently improbable) without resolving the obvious factual dispute between the two

¹ [2013] 11 BLLR 1074 (SCA).

witnesses. He dismissed Lithole's evidence out of hand because she was a "single witness" and he declared her to be dishonest because she did not disclose Ngoveni's actions before she went to the CCMA.

[15] The commissioner made no attempt to resolve the factual dispute through a balanced assessment of the reliability, credibility and probabilities of the conflicting versions put forward by the witnesses, as set out in *Stellenbosch Farmers Winery Group Ltd v Martell et cie.*² In *Lukhanji Municipality v Nonxuba N.O.*³ it was held that, where a commissioner purports to resolve a factual dispute with reference only to the credibility of a witness, and without an assessment of the probabilities and surrounding facts, it constitutes a reviewable defect. I do not think that the *Herholdt* decision changes that principle in circumstances where, as in this case, that failure led to a different conclusion.

[16] The commissioner also did not resolve the conflicting versions offered by Mariba and Ngoveni with regard to the events of 8 June 2011. He simply rejected Mariba's evidence on the basis that it was not independently corroborated. In doing so, he ignored the following evidence:

16.1 Mariba's bank statement showing that she withdrew R200 on the day;

16.2 The fact that the money was recorded as a "pick-up", corroborating Mariba's version;

16.3 Ngoveni signed Mariba's performance record that showed that she was short by R233, 81;

16.4 Ngoveni did not discipline Mariba;

16.5 Botha's undisputed testimony that the employment relationship had irretrievably broken down.

[17] The failure by the commissioner to have regard to this material evidence and to resolve the different versions before him on the probabilities led to an unreasonable result.

² 2003 (1) SA 11 (SCA).

³ [2007] 2 BLLR 130 (LC).

Conclusion

- [18] I am of the view that the commissioner committed an error of law in rejecting the evidence of Mariba and Lithole because they were “single witnesses”; and that he failed to weigh up the conflicting versions before him in order to consider which was the more probable. That led to an unreasonable result that is open to review.
- [19] However, this is not a case where the Court is in a position to substitute its decision for that of the commissioner. The interests of justice will best be served if the matter is remitted for another commissioner to apply his or her mind properly to the evidence and to make a fresh decision.
- [20] In law and fairness, the individual employee should not have to carry the applicant’s costs in circumstances where she had to incur her own legal costs to defend the commissioner’s decision. The dispute is also not at an end. A costs order is not appropriate.

Order

The arbitration award of the second respondent dated 4 June 2012 under case number LP 6989-11 is reviewed and set aside. The dispute is remitted to the first respondent (the CCMA) for an arbitration *de novo* before a commissioner other than the second respondent.

Steenkamp J

APPEARANCES

APPLICANT: D Chiti of Mervyn Taback Inc.

THIRD RESPONDENT: G J Scheepers
Instructed by Venter attorneys.