



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR2078/13

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

ANTONIO MOODALEY N.O.

Second Respondent

JAMAFO OBO ROXANNE CAMELIO

Third Respondent

Heard: 21 October 2015

Delivered: 26 October 2015

Summary: (review-dismissal-sanction)

JUDGMENT

LAGRANGE J

Introduction

- [1] The third respondent was dismissed after being found guilty of dishonesty for using her personal “smart shopper” card to earn points on customers’ purchases.
- [2] The arbitrator confirmed that she was guilty of the charge but found that dismissal was not in appropriate sanction because:
 - 2.1 there was no evidence of a prior disciplinary record;
 - 2.2 the fact that she showed much remorse regarding what had happened showed that the adoption of progressive discipline was required;
 - 2.3 although dishonesty was serious every type of dishonesty warrant dismissal particularly in the circumstances, and
 - 2.4 the respondent had not suffered any actual loss and there was no evidence that the employment relationship had irretrievably broken down.
- [3] Accordingly, the arbitrator substituted the sanction of dismissal with a final written warning and reinstated her without back pay rather than full reinstatement.
- [4] The applicant seeks to review the award on the grounds that the award was not one that a reasonable arbitrator could have made because:
 - 4.1 The arbitrator’s conclusion that she was remorseful could not be sustained because-
 - 4.1.1 she had sought to blame customers for coercing her into using her card, which was highly improbable given that she had swiped her own card 28 times on the day in question.
 - 4.1.2 She claimed not to be provided with the required training for her positing including training in the use of the smartcard, whereas evidence was provided to the contrary.

4.2 The third respondent was a cashier, a position which required the utmost honesty and integrity.

4.3 It was inconceivable the applicant could trust her in that position.

4.4 The applicants treated the offence seriously and dismissed other employees for such misconduct.

[5] There was an *in limine* challenge to the authority of the deponent to the founding affidavit to institute review proceedings on behalf of the applicant, but this objection falls away in light of the authority of the SCA judgment in ***Unlawful Occupiers, School Site v City of Johannesburg***¹

Merits of the review

[6] What the record shows is that:

6.1 The third respondent knew even from the training that she claims she only received from her fellow cashier's that they were not supposed to use their personal smart shopper cards to accumulate points from customers' purchases. However she claimed that she only took this seriously when the store manager confronted her. She did not offer any explanation why she should have disbelieved what the other cashiers had told her. It was suggested in argument that it was only after she learnt this from the manager that it was confirmed by other cashiers, but the transcript clearly indicates that she heard about the rule before the manager confronted her. Rather than seeking certainty if she had any doubt that there was such a rule she chose to ignore what the other cashiers had told her viz:

"Ms Camelio: When he asked me what happened with my Smart Shopper card I told him what happened. Then he asked me to I think it was right or wrong what I did, and I said I think it was wrong.

Mr Paulos: now why did you think it was wrong?

Ms Camelio: when he told me about the policy but were not supposed to use our smart shopper cards, I heard it from the cashier's but I did not know

¹ 2005 (4) SA 199 (SCA) at 206-207, paras [14]-[15]

if it was the truth will not. So when I heard it from him I felt for me it was wrong.

Mr Paulos: I am not sure if you understand, I am not getting your answer. For somebody that did not receive training, as you claim, and yet when confronted by Management on your actions on the 17th, you are happy to admit that you are wrong.

Ms Camelio: yes

Mr Paulos: now my question is wedded that admission come from for somebody who does not know any better?

Mr Williams: Objection, Commissioner, I think the applicant answered that question because the applicant says the reason why he answered it was wrong, he heard from the other cashier's that this is wrong to earn points from customers and then he did not take them seriously and then when they store manager raised this issue again he saw it is serious and that is why he said he believed that he was wrong, because the store manager asked it was not right or wrong, then she said it was wrong, after being told that she does know the policy does not allow that she must claim the points. That question was answered."

- [7] It is only after this exchange that the applicant then corrected herself to say that she only heard that what she had done was wrong from the other cashiers after the manager had told her what the policy was. However, it is difficult to see how the variation in her version can reasonably be accepted when it is obvious from her initial statement and from that of her representative at the arbitration that she was saying that it was only when she heard the same thing from her manager that she took it seriously. It makes no sense why she would have said she did not take it seriously when she heard it from the other cashiers if she only heard it from them after her manager had already told her about the policy. Clearly this statement was an admission that she had heard about the policy but did not accept that it was true until the manager confirmed it.
- [8] The third respondent persisted in arguing that customers had insisted that she used her card and she only thought it would be wrong to use her personal card without the customer's permission. This in itself was a tacit admission that she knew there was a rule against crediting her own card

with a customer's points, coupled with a contention that there were exceptions to the rule if the customer insisted on donating their points to the cashier.

Evaluation

- [9] The difficulty with the arbitrator's conclusion that the applicant showed remorse is that it was an admission of having done wrong by someone who nonetheless persisted with a wholly implausible explanation that on 28 occasions on the same day customers had insisted on her using her card, and she had innocently believed that when this happened the rule that she could not use her own card to accumulate customers points did not apply. The arbitrator's reasoning tacitly accepts the implausible explanation, which no reasonable arbitrator would have accepted when the most obvious explanation is that she most probably used her own card when the customer did not ask her to swipe their own, which was a contravention of the rule she was aware of but chose not to believe.
- [10] As such it was not a candid admission of acting in breach of the policy but an attempt to justify her actions as being based on an innocent belief that there were exceptions to the rule and that on each occasion when she swiped the card 28 times that day she did so because the exception was applicable, which is plainly unbelievable.
- [11] The third respondent also argued that the employer had not presented any evidence that the employment relationship had irretrievably broken down, but specific evidence is not a *sine qua non* before that conclusion can be reached and depends on the context.² Misconduct involving dishonesty will usually be destructive of the employment relationship, absent circumstances in which the dishonesty does not impact on the employer's business. See **Absa Bank Ltd v Naidu & others**.³ In this case, the

² In **Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others (2015) 36 ILJ 1453 (LAC)** at 1462, fn 8, the LAC said "Insofar as the requirement to lead evidence to establish a breakdown in the employment relationship is concerned, *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA); [2010] 1 BLLR 1 (SCA) turned on its own facts, and was not the law when the commissioner's award in this dispute was handed down."

³ **(2015) 36 ILJ 602 (LAC)** At 622-623, viz: "

"[53] In *De Beers Consolidated Mines Ltd*, ²⁶ the court further pointed out that 'the seriousness of dishonesty — ie whether it can be stigmatized as gross or not — depends not only, or even

applicant was a cashier and it is difficult to see how the arbitrator could reasonably have believed that, given her contrived and implausible rationale for what she did, the employer could have felt assured that she was someone who could be trusted to perform her duties with integrity.

[12] The mere fact that the third respondent, with fourteen months' service, did not have a prior disciplinary record could not, in the light of the above, reasonably justify retaining the third respondent.

Order

[13] In light of the above reasoning:

13.1 The arbitration award of the second respondent dated 15 November 2015 under case number ECPE 4009-13 is reviewed and set aside.

13.2 The finding that the dismissal of the third respondent was substantively unfair and consequential relief in paragraphs 31 to 34 of the award is substituted with a finding that the third respondent's dismissal was substantively fair.

13.3 No order is made as to costs



mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business'...

[54] ...

[55] On the issue of the breakdown in the trust relationship occasioned by an employee's dishonest misconduct, this court (per Davis JA) in *Shoprite Checkers (Pty) Ltd v CCMA & others*, stated the following:

'[T]his court has consistently followed an approach, laid out early in the jurisprudence of the Labour Court in *Standard Bank SA Ltd v CCMA & others* (1998) 19 ILJ 903 (LC); [1998] 6 BLLR 622 (LC) at paras 38-41 where Tip AJ said:

"It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee. ... A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."

[56] I am satisfied that, on the basis of her dishonest and fraudulent misbehaviour in relation to Mr Khan's matter, Ms Naidu's trust relationship with the appellant was, indeed, irreparably broken down. In my view, any plea of remorse, genuine or otherwise, was, in the circumstances of this case, most unlikely to bring back that trust, which was the cornerstone of her employment relationship with the appellant."

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: S Dube of Bowman Gillfilan
Inc.

THIRD RESPONDENT: T Moquechane of JAMAFO

LABOUR COURT