IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Not of interest to other judges

Case No. JR 435/15

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD **Applicant**

and

ANNIE MALEPO LETSOALO **Respondent**

Heard: 01 September 2017
Delivered: 01 September 2017
Edited: 20 November 2017

***EX TEMPORE* JUDGMENT**

COETZEE. AJ

<u>Introduction</u>

[1] This is the *ex-tempore* judgment with reasons, in the matter between Pick 'n Pay Retailers (Pty) Ltd (the applicant/employer)

and Letsoalo Annie, (first respondent/employee) represented by the University of Pretoria Law Clinic, Muteleni (second respondent) and the Commission for Conciliation, Mediation and Arbitration cited as the (third respondent).

[2] The applicant seeks to review and set aside an arbitration award GATW10373/14 dated 27 February 2014.

[3] The first respondent was initially represented by a union by the name of JAMAFO but is now represented by the University of Pretoria Law Clinic.

[4] The applicant employed Annie Letsoalo (Letsoalo) for 28 years. At the time of the incident that led to her dismissal, Letsoalo rendered services as an inventory clerk in the receiving department, but had been acting in the position of receiving manager in that department.

[5] It was a requirement of the applicant that Letsoalo had to pass the prescribed examination with a pass mark of 90% before the applicant could confirm her appointment to the position of receiving manager.

[6] The applicant allowed Letsoalo four opportunities to write and pass the examination. Letsoalo, on three previous occasions, unsuccessfully attempted to pass the examination. On the fourth occasion she sat for the examination on 3 December 2013. This was her last opportunity to pass the examination.

[7] It is common cause that during the test her employer found her with crib notes on her desk under her examination pad. The employer's witness testified that the employee admitted having used the crib notes during the examination. The employee explained that she did not use the crib notes to copy from the notes but merely to refresh

her memory.

[8] Julianne Matshaba sat for the same examination on the same occasion. The employer charged her with the same misconduct as Letsoalo but found her not guilty. The employer had found crib notes in her handbag that was put away, and the employer was unsuccessful in proving that she had made any use of the crib notes during the test.

[9] In the case of Letsoalo, the employer subjected her to a disciplinary enquiry. The employer dismissed her, and her appeal failed. She referred the matter to the CCMA.

[10] She testified at the disciplinary enquiry that she saw others using crib notes and that she did not know that she was not allowed to use the crib notes during the examination.

[11] The evidence for the employer was that the receiving department within the retail industry is a high risk area. That is the reason why employer required a pass mark of 90%.

[12] Letsoalo then referred the matter to arbitration. The second respondent arbitrated the dispute, and rendered an award to the effect that the dismissal of Letsoalo was substantively unfair, ordering the employer to reinstate her and to impose a final written warning.

[13] The employer now seeks to review and set aside the award.

[14] This case is about the appropriateness of the sanction.

[15] The commissioner made the following finding, with which the employer agrees:

> "I find, regarding the claim of substantive fairness … she contravened the rule."

[16] He further found that the rule was reasonable and valid, given that this was not an open book examination. He further held that the rule was known, or ought to have been known, by the applicant and that the employer applied discipline consistently.

[17] The commissioner then made the following further finding:

> "For almost a period of a year she was working in a high risk department, and the test that she sat for was in order to assist her to attaining a position of trust, that of receiving manager. But she elected to act in a dishonest manner by resorting to cheating."

[18] The employer however, challenges the following further finding of the commissioner:

> "The applicant, during investigation, admitted to her manager, to the whole incident, and was corporative (which should read cooperative). The conduct of the applicant did not go to the heart of the employer relationship between her and the respondent employer. Other measures short of dismissal were not considered by the respondent employer, and there is no evidence indicating why this route was not followed prior to imposing a dismissal sanction."

[19] In this case the applicant submits that the test to be applied by this Court is one set out in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[1]

> "…Where a commissioner misdirects himself by ignoring material facts, the award will be reviewable, if the distorting effect of this

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[1] [1] [2015] 10 BLR 1052 (LC) at para 10.

misdirection was to render the result of the award unreasonable."

[20] The applicant submits that the commissioner failed to undertake a proper enquiry regarding sanction. The commissioner failed to consider various relevant and material facts having a direct bearing on the appropriateness of the sanction imposed by the company.

[21] The factors not considered are the nature and importance of Letsoalo's position. That the position of receiving manager is a high risk position and requires a person of integrity. A fact if properly construed, Letsoalo's actions amounted to dishonesty and fraud, which go to the heart of the trust relationship between an employer and employee.

[22] In trivialising Letsoalo's misconduct, the commissioner failed to appreciate the employer's need for honesty in the workplace.

[23] The evidence adduced by the employer clearly showed that Letsoalo owed a duty of good faith to the company, which included a duty to act honestly. The Commissioner failed to understand that the receiving department is a high risk department, and that the company viewed such misconduct in a serious light as it destroyed the relationship of trust.

[24] The evidence of Mr Joel von Bissis, the initiator at the disciplinary enquiry set out how the trust relationship between the employer and Letsoalo had broken down, and that because of her dishonesty, the employer could not entrust her with the position of receiving manager. This evidence was not seriously contested. In fact, his evidence related to any person working in the receiving department.

[25] It was also clear that the use of crib notes during the examination was prohibited. The first respondent had previously written the same examination on three occasions and failed. She was fully

aware of the procedure and rules relating to the taking of the test. Her conduct in cheating is antithesis to the position of anybody working in the receiving department, which entails substantial trust. She undermined the essence of this trust relationship.

[26] Mr von Bissis testified as follows:

> "The seriousness of this offence is that there is a trustworthy between the company and the employee that has basically been broken, because the company entrusted or trusts its employee to work at the back, to receive our stock from the supplier. This is basically what it is. So the company, when the company sees this, that this person was dishonest in writing the test, how will this company then trust this person working in the department receiving our stock? That is how important this position is."

[27] Ms Bush, who is the case manager, also described the conduct as a serious transgression, and that the business is that of receiving and selling, and both these ends are very important. That is where one loses money.

[28] The first respondent submitted that both these witnesses were not in a position to testify to the trust relationship. Firstly, because Mr von Bissis is an administration manager, and not a line manager of the first respondent. In addition, Ms Bush is the case manager, who also cannot testify as to whether there was a trust relationship or not.

[29] The fact is, they both testified to the business and the way the business is conducted. They have knowledge of the nature of the business.

[30] In addition, evidence was led of a number of persons who had been dismissed for the same reason, that is, dishonesty in the

examination, and some that were not dismissed because of discrepancies and what have you.

[31] The conduct of Letsoalo in no way amounted to cooperation after the fact, nor did she show remorse, and this was not taken into account. She was caught red handed and was accordingly left with no option but to admit that she used crib notes.

[32] She subsequently provided conflicting versions at the enquiry and at the arbitration. Her evidence in this regard is contradictory and that does not show a reason to trust her any more.

[33] The applicant submits that the above facts are material. If they had been correctly considered, the commissioner, on a balance of probabilities, would have come to a different conclusion altogether, in determining the appropriateness of the sanction. As a result, the award is *prima facie* unreasonable.

[34] Turning to the second enquiry and asking the question whether there exists a basis in the overall evidence to displace the *prima facie* case of unreasonableness, no such basis exists, and thus the award is further confirmed to be unreasonable.

[35] In my analysis, the case of *Independent Newspapers (Pty) Ltd v Media Workers Union SA*, *on behalf of McKay and others*[2], is appropriate. I quote:

> "This court, has held on numerous occasions that in the face of dishonesty by an employee, there is very little chance of the trust relationship being rebuilt. Dismissal is general seen as a fair sanction in those circumstances. The arbitration in this case did not consider that aspect of the case before him. That failure makes his

[2] (2013) 34 ILJ 143 (LC).

> finding on sanction so unreasonable that no other arbitrator could have reached the same conclusion. In those circumstances the award must be reviewed and set aside."

[36] The comments of the commissioner that the employer did not consider a sanction short of dismissal, or counselling, is inappropriate. In cases where there is dishonesty and it goes to the heart of the trust relationship in a high risk department such as in this case, there is no need to consider any other sanction, unless of course there are special circumstances that relate to the matter. No such special circumstances have been raised by the employee in this matter, and therefore the general rule that dishonesty goes to the heart of the trust relationship prevails.

[37] The employer's decision to dismiss was fair, having regard to the importance of the rule, and all the other factors. And more specifically, the importance of the trust relationship with regard to a person that works in the receiving department of a retail organisation, and this evidence was not disputed by the applicant.

[38] I find that the finding of the commissioner is not one that a reasonable commissioner could have arrived at. The factors that he failed to consider and his failure to give due regard to distorted the outcome of his enquiry. All the evidence relevant to determine whether the dismissal was substantively fair is on record, and this court is in as good a position to substitute the finding.

[39] With regard to costs, I have considered the relevant factors in determining a cost order. In my view, there is no reason to make a cost order. I make the following order.

<u>Order</u>

1. The arbitration award dated 27 February 2014 in the case

GATW10373/14 is reviewed and set aside. The arbitration award is substituted by a finding that the dismissal of Annie Letsoalo was substantively fair.

2. There is no order as to costs.

F Coetzee

Acting Judge of the Labour Court

Appearances

For the applicant: Sibusiso Dube (Bowman Gillfillian Inc)

For the respondent: QM Dzimba (Pretoria University Law Clinic)