



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR725/23

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

And

**SACCAWU o.b.o. SETLOPA ASHNATH LYDIA
RAMOLOBENG**

First Respondent

ELIA ROBERT MOKUNGWE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

Third Respondent

Heard: 11 February 2025

Delivered: 11 February 2025

Reasons: 25 February 2025

REASONS FOR ORDER

PHEHANE, JIntroduction

[1] This is an opposed application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award by the second respondent dated 14 April 2023, in which award the second respondent found the dismissal of the first respondent from the applicant as substantively unfair and ordered retrospective reinstatement.

[2] On 11 February 2025, this Court issued an order dismissing the review application with no order as to costs.

[3] The reasons for the order follow hereunder.

Background

[4] The first respondent was dismissed from the employment of the applicant on 3 August 2022 following an internal disciplinary hearing. At the time of her dismissal, she was employed as a Receiving Clerk and was a shop steward. She had worked for the applicant for a period of 12 years.

[5] During July 2022, the first respondent was identified in video footage removing items from a bin in the receiving or waste area at Rivonia Village, a shopping centre where the applicant is located. It is common cause that the items she removed from the bin were pies, yoghurt, cabbage and carrots, waste products that had been discarded by the applicant as no longer being fit for consumption.

[6] The charges against the first respondent at the disciplinary hearing were the following:

‘Serious Misconduct in that:

¹ Act 66 of 1995, as amended.

1. You have intentionally and deliberately taken waste from Checkers Rivonia Village.
2. By your actions you have damaged the trust relationship between yourself and the Company[.]
3. Breach of Company Rules[.].'²

[7] The version of the applicant before the second respondent was that the first respondent breached clause 11 of its Workplace Rules, which read:

'11. COMPANY AND OTHER GOODS

11.1 Employees shall not consume or attempt to consume any goods belonging to the Company or any other third party (including but not limited to supplier representatives, co-employees, customers) unless such goods have been purchased in terms of the Company staff buying procedures and/or the relevant cancelling procedure for which the employee can produce a valid invoice justifying lawful possession of the goods.

11.2 Employees in departments where the preparation of food is involved may not taste or sample any food or beverages unless they have the specific prior permission of management to do so.

11.3 Employees shall not remove or attempt to remove or assist in the removal of any goods or property belonging to the Company, a supplier or customer.

11.4 Employees may not, hold, keep or store for any reason whatsoever any goods at the workplace in a place which is not specifically authorised by management for that purpose and without management's prior permission. This includes any goods of the Company, a supplier, customer or fellow employee.'³

Grounds of review

[8] The applicant lists four grounds of review. The first ground of review is that the second respondent committed a gross irregularity by failing to undertake a

² Record, Vol 2 at p 121.

³ Record, Vol 2 at p 153.

proper assessment and evaluation of the “*competing*” evidence before him and failed to make a credibility finding. The second round of review is that the second respondent committed a gross irregularity in finding that the applicant did not discipline the first respondent in accordance with a “waste policy” in circumstances where the first respondent was not charged premised on a “waste policy” but on the applicant’s Workplace Rules. The applicant avers that the second respondent committed an irregularity in criticizing it for not charging the first respondent on a “waste policy” when no such policy was before the second respondent and did not feature in the internal disciplinary hearing. The third ground of review is that the second respondent failed to determine that the employment relationship between the parties had broken down in circumstances where this was inferred from the nature of the charge, as this was a serious charge and that the first respondent had put up a dishonest defence. The fourth ground of review is that the second respondent was biased towards the first respondent.

[9] In opposing the grounds of review, other than in the main, denying the allegations by the applicant and stating the opposite, the first respondent contends that the applicant failed to prove the existence of a rule that prohibits employees from removing waste and therefore, the second respondent found that dismissal was not the appropriate sanction. Finally, that there was there is nothing that supports the allegation that the second respondent was biased.

Analysis

[10] The test to succeed in a review application is trite.⁴ The applicant must demonstrate that the decision of the commissioner is one that no reasonable decision maker could arrive at on the totality of the evidence before him or her. Where it is alleged, as it is in the present case, that the commissioner committed an irregularity, the decision is only reviewable where the irregularity has a distorting effect on the outcome with the result that the outcome is unreasonable.⁵

⁴ *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

⁵ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

[11] On the totality of the evidence before the second respondent, the witnesses of the applicant, namely, Mr. Mdluli, the Store Manager, and Ms. Kekae, the chairperson of the internal disciplinary hearing, was that there was no rule in the workplace that prohibited employees from removing waste products from the waste area. Mr Mdluli stated that he could not recall a rule that prohibited staff from taking waste⁶ and confirmed that the first respondent was not aware that she could not remove waste until the disciplinary proceedings were instituted against her. The first respondent's evidence was that she was only informed on 28 July 2022, a day before she was charged with misconduct, that it is impermissible to remove waste and this incident was the first time she had removed waste as she was working near the waste area. Her reason for taking the waste was due to destitution. Ms Kekae stated that the applicant had a "waste policy" but such policy was not before her, and neither was it before the second respondent during the arbitration proceedings.

[12] Mr. Mdluli and Ms. Kekae were adamant that the waste was the property of the applicant and therefore, the first respondent breached clause 11 of the Workplace Rules.

Analysis

[13] The applicant failed to prove the existence of a rule that staff are not permitted to remove waste for whatever reason, be it health reasons or due to the waste being the property of the applicant after it had been "scanned out" and removed from its system.

[14] No evidence was placed before the second respondent to the effect that food that is discarded in the waste area is a risk to the applicant.

[15] That the applicant failed to prove the existence of a rule prohibiting the removal of waste is the end of the matter in my view, which renders the dismissal substantively unfair.

⁶ Transcribed record at p 15.

[16] On the evidence before the second respondent, the waste area is a receiving area in the complex which is accessible to employees working in the [shopping] complex. The first respondent explained that she was destitute and wanted to take the food that was thrown out by the applicant. She apologised for her conduct and showed remorse.

[17] In my view, there was no need for the second respondent to make a credibility finding as he was not confronted with two mutually destructive versions. The witnesses for the applicant did not prove the existence of a rule. The first respondent's evidence was that no such rule existed.

[18] The applicant's witnesses were at pains to point out that the waste was the property of the applicant and therefore, the first respondent ought to have known that she was not permitted to remove the applicant's property without permission. However, this is not the allegation that she was to meet during the disciplinary hearing.

[19] The allegation was that she intentionally and deliberately took waste from the applicant and that her actions damaged the trust relationship and breached company rules. There was no evidence before the second respondent of the damage to the relationship of trust. The rule she was alleged to have breached is not contained in the charge sheet.

[20] The applicant avers in paragraph 42 of its founding affidavit that the first respondent's dismissal "*related to acts of unauthorised consumption and / or removal of the applicant's property*".⁷ This was not the charge levelled against the first respondent.

[21] Considering the provisions of clauses 11.1 to 11.4 of the Workplace Rules, it is clear that the goods mentioned in these clauses are goods that are "*fit for consumption*". Waste discarded by the applicant is not mentioned in these clauses. This is common cause.

⁷ p 16.

[22] It is also common cause that the waste the first respondent took was “*not fit for consumption*”. Thus, no mutually destructive versions were presented before the second respondent. The second respondent’s criticism that the applicant dismissed the first respondent in haste is not far off the mark, in view of the evidence before him regarding the inconsistent application of discipline for the same offence where yet another employee (Annie Manthole) was not dismissed.

[23] Simply labelling a charge serious does not make it serious. While it is appreciated that taking food that is not fit for consumption poses a health risk, there was no evidence before the second respondent that this conduct breached the relationship of trust.

[24] In my view, the second respondent considered the totality of the evidence before him and he considered the circumstances of the infringement, the seriousness of the misconduct, the remorse of the first respondent, and that there was no rule prohibiting employees from taking waste. Therefore, his decision falls within the band of reasonable decisions.

[25] In conclusion, there is nothing in the record to substantiate the allegation of bias in respect of the second respondent.

[26] There is thus no basis for this Court to interfere with the arbitration award.

[1] In view of the foregoing, the order as aforesaid was made.

M. T. M. Pehane
Judge of the Labour Court of South Africa