THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2802/21

In the matter between:

MAKGOLANE MENKE **Applicant**

and

COMMISSIONER MAIMELA MASHIGO **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

SHOPRITE CHECKERS (PTY) LTD (LOTUS GARDENS) **Third Respondent**

Heard: **4 September 2024**

Delivered: **4 September 2024**

Reasons: **24 June 2025(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 June 2025.)**

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] On 4 September 2024, this Court dismissed the review application launched by the applicant in terms of section 145 of the Labour Relations Act[1] (LRA) with no order as to costs.

[2] Brief reasons for the order follow.

Relevant background facts

[3] The background facts are common cause. The applicant was employed by the third respondent, Shoprite Checkers (Pty) Ltd (Shoprite) as a cashier.

[4] Shoprite had a policy on Cash Handling, Shortages and Overages that had been operative for a number of years (old policy). According to this old policy, cashiers were permitted to be over or short by R110.00 in their tills. If a cashier was over or short by more than R110.00, they would be dismissed summarily for the first offence.

[5] On 1 July 2021, the old policy was revised and a new benchmark of an amount of R200.1 and more and was implemented (revised policy). Therefore cash handlers whose tills were over or short in the amount of R200.1 or more would face dismissal for the first offence.[2] However, as Shoprite had not consulted with the union SACCAWU on the amendment before the revised policy was implemented, the revised policy was revoked until submissions were received by SACCAWU.

[1] Act 66 of 1995, as amended.
[2] Records bundle at p 56.

[6] E-mail communication by Shoprite on 9 July 2021 communicated the message that the revised policy was withdrawn and that the provisions of the old policy had been reverted to as of 9 July 2021. This means therefore, that the benckmark over which cashiers' tills was not be short or over by, was R110.00.

[7] It is pertinent to set out what Shoprite's emails stated regarding the withdrawal of the revised policy and reverting to the old policy.

[8] The email dated 9 July 2021 sent at 11h44[3] read:

> 'Dear Colleagues
>
> We have just returned from a meeting this past week with SACCAWU and great unhappiness was raised with the Company for implementing a policy on a national level without inviting the union to make a submission. In order to avert further animosity and potential for disruption it was agreed that **the Company will withdraw the Cash Handling Policy that was introduced on 01 July 2021 effective from 09 July** until submissions for review has been received by mid-November 2021 from SACCAWU. The divisional cash handling standard and procedure that existed before 1 July 2021 that was applied in the respective divisions will again apply from 01 October until replaced by a further revised national policy.
>
> Please call me if you have any questions'.

[9] The email by Shoprite sent at 11h58 on 9 July 2021 which followed the email quoted in the preceding paragraph read:[4]

> 'Please remove all notices relating to the new tool short policy and revert back effective immediately to our custom and practise prior to the introduction here of. The attached summary should be displayed in the cash office and cashing up office.

[3] Records bundle at p 58.
[4] Ibid at p 59.

Thank you
Regards'

[10] On 15 July 2021 the amount of cash in the applicant's till was over by the amount of R193.08.

[11] The applicant was subsequently charged for misconduct in terms of the provisions of the old policy and was dismissed following a disciplinary enquiry.

[12] The charge against the applicant read as follows:

> 'Serious misconduct in that on 15/07/2021 you were over with 193.08 from your till takings leading to a potential financial loss to the company and breach to *[sic]* trust relationship'.[5]

[13] The applicant pleaded guilty to the misconduct and was dismissed.

[14] The applicant referred an unfair dismissal dispute to the first respondent which was arbitrated by the second respondent. She contends that the sanction of dismissal was harsh.

[15] The dispute between the parties centred on whether the revised policy was withdrawn on 9 July 2021. This had a bearing on the sanction for the misconduct committed by the applicant, which was not denied. In terms of the old policy, dismissal was the appropriate sanction. In terms of the revised policy, a final written warning was the appropriate sanction.

[16] The second respondent found that the old policy applied, and therefore found that the applicant's dismissal was procedurally and substantively fair.

<u>Argument</u>

[5] Records bundle at p 12.

Applicant's submissions

[17] The applicant states that the crux of the review application is premised on the interpretation of Shoprite's e-mail of 9 July 2021.

[18] The applicant contends that the second respondent did not apply his mind to the e-mail of 9 July 2021. Had he done so, he would not have found that the revised policy was withdrawn on 9 July 2021.[6]

[19] On the applicant's pleaded case, she avers that she was charged in terms of the revised policy, which she avers was in operation when she committed the misconduct on 15 July 2021. She alleges that in terms of the revised policy, a final written warning is the sanction for the first offence when a cash handler's till is over between the amounts of R120.01 and R200.00.[7] The applicant accordingly submits that the second respondent *"erred"* and/or *"exceeded his powers with dismissal sancton".*[8]

[20] The grounds of review are that the second respondent's decision that dismissal was fair based on the applicant having pleaded guilty to the charge is unreasonable.[9] In addition, the second respondent "*erred*" and his finding is that the revised policy was withdrawn on 9 July 2021 is unreasonable. The applicant contends that the second respondent committed a material misdirection in failing to apply his mind to the "*true content*" of the email of 9 July 2021.[10] Further, the second respondent ignored the applicant's evidence that the author of the email, Mr. Gergard Oosthuizen did not have the power to retract the revised policy.[11] In addition, the second respondent failed to apply his mind to the applicant's evidence that Shoprite failed to comply with its own policy.

[21] Although not eloquently pleaded, the applicant's case is that the emails of 9 July 2021 on a proper interpretation, coupled with the applicant's evidence, is that

[6] See: applicant's heads of argument at paras 18 to 24, the content of which is convoluted.
[7] Id fn 3.
[8] Founding affidavit at para 18 on pp 6 to 7.
[9] Ibid at para 25 on p 9.
[10] Ibid at para 28.1 on p 10.
[11] Ibid at para 28.3 on p 10.

Shoprite *did not* withdraw the revised policy on 9 July 2021, and that the revised policy was still in operation when the applicant was charged with misconduct.

[22] The applicant filed a notice ostensibly in terms of the provisions of rule 7A(8)(b) of the former Rules[12] of this Court, indicating that it stands by its notice of motion. Thus, the grounds of review were not supplemented.

The third respondent's submissions

[23] The third respondent contends that the arbitration award is reasonable on the totality of evidence that was before the second respondent. On the evidence before the second respondent, the Human Resources Director of Shoprite, Mr Zakhele Sibiya sent an email on 7 July 2021 notifying the business that the revised policy would cease to be operational and the business would revert to the old policy with effect from 9 July 2021.[13] The evidence of Ms Malema, employed as a Bank Administration Manager at Shoprite, was that the old policy was consistently applied and other employees were also dismissed for "*shorts and overs*" exceeding R110.00.

Evaluation

[24] The test in review applications in terms of section 145 of the LRA is trite.[14] The second respondent was tasked to determine the appropriateness of sanction.

[25] The applicant's contention that the second respondent ignored the full content of the e-mail of 9 July 2021 and therefore, the revised policy was in operation when she committed the misconduct on 15 July 2021 is without merit.

[12] GN 1665 in GN 17495 of 1996 (repealed on 17 July 2024). The Rule 7A(8) notice appears on pp 5 to 6 of the Notices bundle.
[13] Answering affidavit at para 14 on p 31.
[14] *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] BLLR 1097 (CC). *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Limited and Congress of South African Trade Unions* (Amicus Curiae) [2013] 11 BLLR 1074 (SCA).

[26] The second respondent applied his mind to the evidence before him and to the content of the emails of 9 July 2021. On the totality of evidence before him, the revised policy was withdrawn on 9 July 2021 with immediate effect. The revised policy itself, records that it is effective 1 July 2021, therefore, it is incorrect to read the email to mean that this policy was effective from 9 July 2021. The second email on 9 July 2021 clarified as to when the revised policy was withdrawn – this email claified that the revised policy is withdrawn with immediate effect and the former policy is immediately reverted to. When confronted with the second email of 9 July 2021 during cross-examination, the applicant stated that she had no response.[15] Therefore, the applicant could not dispute that the revised policy was withdrawn with immediate effect on 9 July 2021 and on that same date, Shoprite reverted to the old policy. The evidence of Ms Malema was that Shoprite reverted to the old policy on 9 July 2021[16] and this was communicated to satff.[17] Ms Malema confirmed therefore, that the applicant was charged in terms of the old policy.[18]

[27] The applicant confirmed that Shoprite places its policy on the notice board and she was aware of it. It is improbable that the revised policy was on the notice Board when Shoprite instructed that the revised policy be removed from the notice boards immediately and the old policy be reverted to.

[28] Therefore on the totality of the evidence before the second respondent, the revised policy was revoked with effect from 9 July 2021.

[29] The charge was serious and infers a breach of the trust relationship. The purpose of the policy is to curb financial losses suffered by Shoprite due to employees' non-compliance with cash handling procedures. The applicant did not deny the misconduct and only challenged the approriateness of the sanction if dismissal was based on the interpretation of the policy that was applicable at the time. It has been established that the applicable policy was the old policy which stated that dismissal was the sanction for being short or over the amount of R110.00.

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[15] Transcribed record at p 92 to 93.
[16] Ibid at pp 21 to 22 and p 25.
[17] Ibid at p 27 to 28.
[18] Ibid at p 27.

[30] It was not necessary therefore, for the second respondent to make a finding on precedural fairness, as only the approriateness of the sanction was in dispute. This finding however, does not render the outcome he reached unreasonable.

[31] The second respondent considered the evidnce relating to which policy was applicable, as this had a bearing on the appropriate sanction. He found that the applicant was not a credible witness due to her claiming ignorance of the withdrawal of the revised policy on 9 July 2021. He therefore found that Shoprites' version was more probable. An employee who fails to provide honest testimony has no remorse and an employee who has no remorse cannot be rehabilitated. Dismissal is therefore an appropriate sanction.

[32] In view of the aforegoing, there is no basis for this Court to interfere with the arbitration award.

<u>Conclusion</u>

[33] It is for the above-mentioned reasons, the said order was made.

M. T. M. Phehane

Judge of the Labour Court of South Africa