

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 23 June 2000

CASE NO. J2603/98

In the matter between:

METCASH TRADING (PTY) LTD

Applicant

and

C TLEKO AND OTHERS

Respondents

J U D G M E N T

LANDMAN, J:

[1] On 23 July 1996 Ms Matheboku was found in possession of 1 kilogram of Gemini mixed spice which was contained in a packet with silver markings. The employer stocks and sells Gemini spices in the form which I have described. Ms Robinson, a security guard, found Ms Matheboku in possession of the spices which is common cause had not been cancelled, i.e. disclosed and acknowledged by her employer as being her property.

[2] Ms Matheboku was subsequently charged with the following offence:
"Misappropriation. In that on Tuesday, 23 July 1996 at 16:20 you attempted to remove one packet of Gemini 1 kilogram mixed spices from the MDC Warehouse by concealing it on your person (between your legs)."

- [3] A disciplinary enquiry was held. The evidence of various witnesses were led. In the course of hearing the evidence certain evidence was obtained by the process of interviewing witnesses. The owner and his wife of the Town Hall Butchery provided certain information. As a result of all this the chairperson came to the conclusion that Mrs Matheboku was guilty and she was dismissed.
- [4] Later on she referred a dispute to the CCMA. The dispute could not be conciliated and it led to arbitration proceedings before a commissioner, the second respondent. He heard the evidence presented by the parties, found the dismissal to be substantively unfair and reinstated Ms Matheboku.
- [5] Her employer, Metro Distribution Centre, seeks to review and set aside the commissioner's award.
- [6] During the course of the arbitration, the commissioner was told by Ms Robinson that she searched Ms Matheboku in a cubicle. She found suspicious circumstances. She asked Ms Matheboku to remove the item from her panties where it had been concealed between her legs. She did this and a packet of Gemini 1 kilogram mixed spices was produced. Ms Robinson also noted that Ms Matheboku "was in her monthly".
- [7] Ms Matheboku admitted to a certain Mr Stewart that she was found in possession. Ms Matheboku, however, denied this at the arbitration proceedings. At the arbitration proceedings, but not at the disciplinary enquiry, she said that she had the packet in her hand. She had obtained it from reception where it had been left for her by a friend of hers, a certain Mr Isaac Malawu. She produced a slip to show that 1 kilogram

mixed spice had been purchased at the Town Hall Butchery on 18 July 1996.

[8] Amongst the evidence that was led during the arbitration proceedings were the details relating to the evidence which the disciplinary enquiry had obtained from the owner and his wife of the Town Hall Butchery. I will describe this in a moment.

[9] When it came to consider his award the commissioner set himself the task of determining whether the spice was the property of the employer or not. This was the correct question to ask. He came to the conclusion that it was incumbent on the employer to prove that the spice was not purchased from the butchery. He found that the employer had not proved this and therefore the dismissal was unfair. He therefore did not investigate the further question whether the spice was concealed on Ms Matheboku's person or carried openly in her hand.

[10] The commissioner declined to take cognisance of the hearsay report that the butchery sold 1 kilogram of mixed spice on 18 July. He did, however, take into account the existence of the invoice or till slip. The spice that the butchery sold, according to the hearsay evidence, was its own brand and came in a clear plastic bag. Had the commissioner accepted this, he could not have come to the conclusion that the spice, the Gemini brand spice, found in Ms Matheboku's possession was not that of the employer. However, assuming that the commissioner was correct in refusing to admit hearsay evidence, and it is correct that he was empowered to admit or exclude relevant evidence, he was then left with the evidence that the spice was the same as that stocked by the employer. He would have been compelled to have come to the conclusion

that the witness identified as Mr Isaac Malawu was not called by Mrs Matheboku or her union to say that this was also stocked by the Town Hall Butchery and that he had carried it from those premises to the employer's premises and left it for Ms Matheboku. The commissioner would have also here had to take into account that Ms Matheboku or her union did not call the receptionist at the arbitration proceedings to bolster her version and that of Mr Malawu.

[11] It is also clear that the exclusion of the hearsay evidence did not resolve the dilemma. The commissioner's reasoning is, in my opinion, faulty and it constitutes a latent irregularity, which is a gross irregularity.

[12] But this would not have concluded the process for the commissioner would have been obliged to answer the fundamental question: Did the spice belong to the employer and was it cancelled or was it therefore the property of Ms Matheboku? To answer this question the commissioner would have been obliged to consider the evidence as a whole, including that relating to the ownership issue which I have described above. He would have had to take into account its necessary adverse effect on the credibility of Ms Matheboku. The commissioner, as I have pointed out, did not do this and he makes no finding of credibility at all.

[13] Because this incident dates from July 1996 and was only argued in this court on 22 June 2000, it seems pointless to remit the matter to the commissioner for a re-hearing of the evidence. There is a record of the proceedings which serves before me. True it is replete with the usual transcriber's insertions that the evidence or the recording was indistinct. It makes one wonder why the CCMA has decided to keep a

record when they are kept in such a poor condition that they are often of little value in this court. The present record is one of the better records and I am able to follow the evidence which was presented to the commissioner.

[14] I am of the opinion that it cannot be said that Ms Matheboku was a credible witness. The employer's witnesses on the contrary, appeared to me to have been credible witnesses and their evidence should be accepted. Some of my reasons for coming to the conclusion that Ms Matheboku is not to be believed are the following:

- (a) Ms Matheboku's version was not put to Ms Robinson whilst she was giving her evidence.
- (b) Had the spice been in Ms Matheboku's hand, there would have been no need to conduct a search in the cubicle and it appears from the cross-examination of Mrs Robinson that it was accepted that whatever took place, took place in the cubicle. Indeed in her evidence under cross-examination Ms Matheboku says that she showed the packet to Ms Robinson at the same time that she entered the cubicle.
- c) The fact that Ms Robinson knew that Ms Matheboku was menstruating points to her being searched and to the fact that the spice was found in her panties.
- (d) Ms Matheboku stated that she did not tell Mr Stewart when he arrived immediately after the search that the spices had been brought to her by Mr Malawu.
- (e) She did not after her apprehension by Ms Robinson seek to call the receptionist who would still have been on duty to prove her version of the events.

[15] It is clear to me that Ms Matheboku was guilty of the charge in respect

of which she was found guilty and discharged by her employer. Her dismissal for theft was an appropriate sanction even though she has a clean record and she worked for her employer for 15 years.

[16] In the premises, therefore, the award of the commissioner delivered on 3 August 1998 is reviewed and set aside and substituted with a finding that Ms Matheboku's dismissal was procedurally and substantively fair.

[17] Ms Matheboku is ordered to pay the costs of this application.

DATED AT JOHANNESBURG ON THIS THE DAY OF JULY 2000

JUDGE A A LANDMAN

ADV C E WATT-PRINGLE

: Fluxman Rabinowitz Raphaely-Weiner

: MR ZIBI

: SACCWU

23 JUNE 2000