

**IN THE LABOUR COURT OF SOUTH AFRICA
CASE NO J2228/99**

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER SEEDWELL LUKHELE

Second Respondent

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION**

Third Respondent

LINDIWE ANNAH SHABANGU

Fourth Respondent

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JUDGMENT

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JAMMY AJ

1. This is an application for the review and setting aside of the award of the Second Respondent, in his capacity as a Commissioner of the First Respondent in arbitration proceedings between the Applicant and the Third and Fourth Respondents held under the auspices of the First Respondent in April 1999.
2. In disciplinary proceedings conducted by the Applicant in June 1999 the Fourth Respondent was charged with -
"removing of unpaid merchandise from Shoprite Checkers and the merchandise was found on her person, which is against company policy." (sic).
3. The Fourth Respondent was found guilty of that charge and was dismissed. Pursuant to the Applicant's disciplinary procedure, she appealed. The minutes of that internal appeal hearing were not tabled in the arbitration and were stated to be missing. The Fourth Respondent's testimony was that her appeal

was successful and that she was reinstated. This was denied by the Applicant.

4. The facts of the matter were consistently disputed. The Fourth Respondent, at the time an employee of the Applicant, was alleged to have been found in unauthorised possession of, and to have attempted to remove from the Applicant's premises, merchandise for which no payment had been made. It was alleged that, having been found in possession of the items in question, she ran to a toilet where she endeavoured to conceal or dispose of them. All aspects of those allegations were denied by the Fourth Respondent.

5. The Second Respondent purported, in his award, to present an "analysis of both party's submissions." The following extracts therefrom have relevance.

"I should clearly state from the onset that I have applied my mind carefully to the facts before me and have taken into account all relevant issues which were outlined during evidence in chief, cross-examination, re-examination and my own enquiries. I have discarded irrelevant details and have concentrated on the salient aspects of the dispute.

The employer has conceded that the minutes of the appeal hearing have gone missing. This problem materially affects the contention that the Applicant is not telling the truth when she states that the appeal hearing actually reinstated her. It would obviously have helped if the appeal hearing chairman had been called in to give evidence and to clarify his position on the issue of reinstatement or confirmation of the findings of the initial hearing. It must be pointed out that according to s192(2) of the Labour Relations Act 66 of 1995, at all times the onus to prove whether a dismissal is fair always lies with the employer.

The failure to provide the minutes of the hearing, is ex-lege enough to demonstrate to this Commission that unfairness exists in the dismissal of the Applicant.

During this Arbitration, I have established that in fact some bad blood existed between the lady security officer and the Applicant the extent to which such bad blood could actually impact on the lady security officer to frame the Applicant is a matter for speculation and not fit to be focused upon in this matter.

Because of the bad blood between the parties, and the failure by the security officer to there and then arrest the Applicant with the exhibit as per procedure, materially dilutes the version of the employer on what exactly took place on this day. This however does not in any way strengthen the version advanced by the employee except insofar as it further highlights the failure of the respondent party to move this arbitration in favour of believing that the onus placed on the employer party has been established as per s192(2) cited above.

The value of the items plus-minus R13,00 vis-a-vis the fact that the Applicant has worked for the Respondent for at least 11 years without any disciplinary incidents persuades me to hold that the failure by the initial hearing chairman to find any mitigating circumstances was procedurally unfair to the Applicant's position."

6. The Second Respondent then makes his award in the following terms:

"1. I find that the employer acted substantively unfair and has not proved that the dismissal of the Applicant was effected in accordance with a fair procedure.

2. I therefore order the employer to reinstate Annah Shabangu retrospectively, paying ten months salary of R21 000,00."

7. What, in my view, is immediately remarkable, to say the least, about that

determination is that it is made without any apparent finding by the Second Respondent on the substantive merits of the dispute. Nowhere in the course of his award is the initial finding of the Fourth Respondent's guilt in relation to the charge against her critically examined by him. He concludes however that that finding was substantively unfair, without in any way motivating or justifying that conclusion.

8. His finding of procedural unfairness appears to relate to the disciplinary hearing chairman's failure "to find any mitigating circumstances." Whether or not there is substance to that conclusion, it can only have relevance if the initial determination of the Fourth Respondent's guilt was, in the Commissioner's assessment, justified. That issue, I repeat, is nowhere adjudicated upon by him.
9. The Second Respondent's further conclusion that the failure of the Applicant, if indeed it was its obligation to do so, to provide the minutes of the appeal proceedings was "ex-lege enough to demonstrate to the Commission that unfairness exists in the dismissal of the Applicant", is, in my view, incomprehensible. Quite apart from the fact that it is devoid of legal substance, the Fourth Respondent appears to disregard the fact that the statutory arbitration, insofar as the substantive merits of the Fourth Respondent's dismissal are concerned, was an adjudication *de novo*, to be made by him on the basis of the evidence presented to him and, where factual aspects thereof were disputed, on the probabilities emerging therefrom in his perception.
10. In response to the Notice of Motion and Founding Affidavit served upon him, the Second Respondent elected to file an Explanatory Affidavit. Although not specifically stated therein, it is to be assumed that it was not submitted in opposition to the application and that, as is usually the case in review proceedings of this nature, he was content to abide the decision of this Court. The following statements in that Affidavit bear upon what is set out above.
"The unavailability of the appeal hearing minutes shifted the balance

of probabilities in favour of the Applicant, especially because there were two different versions of what the decision of the Appellate (sic) hearing found. In the circumstances I accepted and believed the version advanced by the Applicant.

It was a fact that there was bad blood between Barnett and Shabangu as per the evidence brought before me by Ndlovu and Shabangu. The Respondent specifically on the point of bad blood between the two never challenged Ndlovu's evidence under cross-examination."

11. The purpose of an explanatory memorandum or affidavit is presumably to assist the reviewing Court. With due respect to the Second Respondent in this instance however, it serves only further to illustrate his apparent confusion in the discharge of his function. No reason whatsoever, either in the course of the award or this Affidavit, is advanced by him to justify his acceptance of the Fourth Respondent's version of the result of the internal appeal and his rejection of that of the Applicant. On the issue of the "bad blood" allegedly existing between the Fourth Respondent and her superior, the contradictory statements made by him in the course of his award are now reiterated and exacerbated. As quoted earlier in his award, the Second Respondent's express statement in that regard was that that issue -

"..... is a matter for speculation and not fit to be focused upon in this matter" -

whereas this statement is immediately followed by the comment that

"..... the bad blood between the parties materially dilutes the version of the employer on what exactly took place this day."

All of this notwithstanding, the Second Respondent now submits a further explanation to the effect that the existence of bad blood between the parties "was a fact" that was "never challenged under cross-examination," - thereby unambiguously attributing to that alleged state of affairs the significance specifically disavowed by him in his award as quoted above.

12. The Labour Appeal Court, in a line of recent authoritative decisions, has enunciated the general test for reviews of the decisions of Commissioners of the CCMA. See in that regard -

Carephone (Pty) Ltd v Marcus NO & others 1998(19) ILJ 1425 (LAC)
Toyota SA Motors (Pty) Ltd v Radebe & others 2000(21) ILJ 440/LAC.

13. I have no hesitation in concluding, from the documentation and submissions in this matter, that on an objective assessment there is no rational connection between the conclusions reached by the Second Respondent and the evidential material available to him in the course of the arbitration over which he presided. He manifestly failed to apply his mind to the evidence adduced and reached purported conclusions therefrom which could not reasonably be drawn.

See **Mathews v Hutchinson & others 1998(19) ILJ 1512 (LC).**

14. In **Carephone (Pty) Ltd v Marcus NO & others (supra)**, Froneman DJP held that an Arbitrator is constitutionally constrained to produce a justifiable award and that if he fails to do so he exceeds his powers. That is precisely what has occurred in this instance and, in the result, neither the Applicant nor the Fourth Respondent can objectively be said to have had what may be termed a fair trial.

14. In these circumstances I make the following order:

The award of the Second Respondent dated 23 April 1999 in the arbitration conducted by him in Case No GA41075 under the auspices of the First Respondent is reviewed and set aside.

The dispute between the Applicant and the Fourth Respondent which was the subject of that arbitration is referred back to the First Respondent for determination by a Commissioner other than the Second Respondent.

The Third and Fourth Respondents are ordered jointly and severally to pay the Applicant's costs of this application.

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B M JAMMY

Acting Judge of the Labour Court

23 August 2000

Date of hearing: 17 August 2000

**Representation: For the Applicant: Adv A Snider, instructed by
Perrott Van Niekerk & Woodhouse Inc**

**For the Respondent: Adv E M Mogolane, instructed by Wits Law Clinic,
University of the Witwatersrand.**