IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J5026/99**

In the matter between:

TRAVELLERS RETAIL SERVICES, A DIVISION OF THE FEDICS GROUP (PTY) LTD Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MOTLATSIE PHALA, N.O. Second Respondent

SACCAWU Third Respondent

NELLY MANAKA Fourth Respondent

JUDGMENT

JAMMY AJ

In this application, an order is sought reviewing, correcting, or setting aside the arbitration award made by the Second Respondent, in his capacity as a Commissioner of the First Respondent on 22 November 1999 and in terms of which he held that the Respondent, the Applicant in these proceedings, **"was unable to prove the charge of fraud against the Applicant therefore dismissal was substantively unfair"**. Consequent thereon he ordered **"that the Respondent reinstate the Applicant with retrospective effect from the date of dismissal the 25 August 1999 on the same**

terms and conditions that existed prior dismissal” *(sic)*

The facts forming the basis of the dispute between the Applicant and the Fourth Respondent and which were in the main undisputed, are the following:

The Fourth Respondent, a cashier employed by the Applicant was found guilty in a disciplinary enquiry of fraudulent conduct involving credit card transactions. The allegation against her was that she had processed two credit card transactions in amounts respectively of R1 349,00 and R445,00 when in fact no purchases had been made in those amounts.

The procedural fairness of the disciplinary process instituted against her was not challenged and with regard to the substantive aspects of the matter it emerged that the discrepancies in question had been exposed in the course of a routine audit inspection, that they had occurred in the cash till operated by the Fourth Respondent during a period when she was on duty and in charge of that till, that the explanations offered by the Fourth Respondent in her defence were that the transactions could have been processed by a cashier at a neighbouring store operated by the Applicant with the credit card slips being placed in her till, alternatively by another cashier in the same store whilst the Fourth Respondent was away on lunch.

The first of those explanations were, in my view, comprehensively discounted by the Applicant in the arbitration hearing and with regard to the second, the Fourth Respondent acknowledged firstly that, at all times that she was on duty, the security of her till was her responsibility and that she was not entitled to any lunch break between the hours of 16h30 and 18h30, within which the two transactions in question were processed. She was required furthermore, at any time that she left the till, to log off, thereby necessitating the insertion of either her own, or another password before the till could again be operated.

I should mention at this stage that, at the hearing of this matter, there was technically before this court an application for condonation of the late filing of the responding papers

herein by the Third and Fourth Respondents. That application, comprehensively dealt with in the supporting and opposing affidavits on the papers, was not vigorously argued by counsel for the parties when this matter was heard. I am satisfied however that, although not entirely satisfactory in its terms, sufficient grounds have been submitted to justify an order that condonation be granted and that the matter be determined on its merits rather than on a technicality.

The specific grounds forming the basis of this application are firstly, that a comment by the Second Respondent to the effect that the charges against the Fourth Respondent were brought by the Applicant three months after the actual incident giving rise thereto was a cause for concern, informed and influenced his eventual determination. Secondly that cogent evidence by the Applicant in the arbitration regarding the restraints on absences by cashiers from their till positions was disregarded by him. Thirdly that in reaching his conclusion that the charge of fraud had not been established on a balance of probabilities, the Second Respondent had applied the incorrect test of the probative value of circumstantial evidence, namely that applicable in criminal, rather than in civil proceedings. By doing so, it is submitted, the Second Respondent applied incorrect legal principles, thereby committing a gross mistake which precluded the fair determination of the Applicant's case.

In his award, the Second Respondent reviewed in broad detail, the evidence both of the Applicant and the Fourth Respondent, recording that the Fourth Respondent had been unable to explain the discrepancies which had been discovered, that she could not remember whether she had taken lunch on the day in question, that she confirmed that at the time that the two transactions were processed, her till was operational and that she had offered the two possible explanations for the discrepancies to which I have made earlier reference.

The Second Respondent proceeded then to record that the Applicant's case against the Fourth Respondent was one based on circumstantial evidence and that, in the nature of the arbitration proceedings, **"if the facts permit more than one inference, the most plausible inference must be selected"**. His conclusion that **"the fact that the**

Applicant did not have exclusive use of the credit machine raised other possibilities" indicates to me that both those possibilities and the Applicant's testimony in support of their rejection, were considered by him. Allowing for an obvious typographical error in the text of the award, he then concludes that

> **"the facts of the case permit more than one plausible inference",**
>
> leading him to the conclusion, as I have indicated, that the Applicant had been unable to prove the charge of fraud against the Fourth Respondent on a balance of probabilities.

There is nothing in my view to support the Applicant's contention that in reaching that conclusion, the Second Respondent failed to apply his mind to the other possibilities which existed. The fact that he does not, in his reasoning, elaborate upon them does mean necessarily that he ignored them. By necessary inference, his conclusion is that in his opinion, on the evidence before him, the most plausible of the inferences to be drawn therefrom is that the Fourth Respondent's guilt had not been established.

It may well be that another Commissioner would not have reached that conclusion on the evidence presented in the course of the arbitration but that possibility does not render the conduct of the Second Respondent grossly irregular within the ambit of Section 145 of the Labour Relations Act 1995 and nor does it constitute misconduct or the exceeding by the Second Respondent of his powers. The conclusion reached by an arbitrator in compulsory arbitration proceedings under that Act may not, on one or other subjective assessment be correct but that will not necessarily render it unjustifiable.

> **See Purefresh Foods (Pty) Ltd v Dayal and Another (1999) 20 ILJ 1590 and the case authorities there cited.**

. In that context, it seems to me that the grounds of review advanced by the Applicant would more accurately constitute grounds of appeal, if an appeal against the award of the Second Respondent was competent. They do not however in my opinion, present an adequate basis to warrant the interference by this court with the Second Respondent's

reasoning and determination, however inelegantly, and I say this with due respect, those may have been expressed.

. Finally, with regard to the Second Respondent's comment regarding the delay in the disciplinary proceedings instituted against the Fourth Respondent, there is again nothing that I can find in the papers or submissions before me to support the Applicant's contention that these may improperly have influenced his final determination. They were not, in my view, anything more than the expression, by inference, of his disapproval of delayed disciplinary proceedings in the ordinary course.

. For these reasons, the order that I make is the following:

1 The application is dismissed.

2 The Applicant is to pay the Third and Fourth Respondents' costs.

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B M JAMMY
Acting Judge of the Labour Court

16 July 2001

Representation:

ant: Mr C Todd: Bowman Gilfillan Inc

and Fourth Respondents: Advocate T J Bruinders, instructed by Routledge – Modise Attorneys.