

Sneller Verbatim/MLS

IN THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: J 2748/00

2002

In the matter between

**SHOPRITE CHECKERS (PTY) LTD**

Applicant

and

**COMMISSION FOR CONCILIATION**

First Respondent

Second Respondent

Third Respondent

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J U D G M E N T

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NTSEBEZA AJ: On 13 June 2002 I heard argument from Ms Araujo, who appeared for the applicant and from Mr Ramogale, who appeared for the third respondent.

The issue was whether I ought to interfere in an award made by the second respondent, commissioner Tshiqi,

hereinafter referred to the commissioner, in a dispute between Shoprite Checkers (Pty) Ltd, trading as Hyperama, (hereinafter referred to as the employer) and the third respondent, James Molefe, (hereinafter referred to as the employee).

The employee had been dismissed by the employer after a disciplinary inquiry held by the employer in which the employee had been charged for breach of common regulations on Saturday, 12 June 1999 insofar as it was alleged that he had been in possession of a firearm without permission from his manager.

The second charge was that he had grossly misconducted himself in that on the same Saturday he had fired a shot on the sales floor whilst stores were trading.

The third allegation was that he had grossly misconducted himself on the same Saturday, insofar as by being involved in the two charges mentioned above, he had brought the company's name into disrepute with customers, tenants and staff.

The matter had been referred to the first respondent (hereinafter referred to as the CCMA). The arbitration award by the commissioner was that the dismissal by the employer was substantively unfair and the commissioner ordered reinstatement of the employee.

The proceedings before me were an endeavour by the

employer to review the commissioner's award in terms of Section 145 of the Labour Relations Act, no. 66 of 1995 (the Act).

The background to this matter is that Molefe was employed as a food manager at the employer's store in Kempton Park. He went into his workplace on 12 June 1999 in order to prepare for the stock take which was to take place on the following day. On the evidence of the employer, the employee was aware of various policies and procedures regarding the carrying of firearms on its premises. He was also aware of the rules.

Whilst Molefe was in the store, an incident took place as a consequence of which two shots were fired and, according to the employer Molefe was in possession of his gun when a shot (or shots) was (were) discharged out of his firearm.

After having been suspended, Molefe received a notification to attend a disciplinary inquiry. He was dismissed consequent upon the findings of the disciplinary inquiry on 21 June 1999. His subsequent appeal against the dismissal sanction was unsuccessful, hence the referral of his dispute to the CCMA.

I am being prevailed upon by the applicant to hold that the commissioner committed misconduct or gross irregularity as contemplated in Section 145(a)(1)(ii).

Alternatively, I am being asked upon to find that the award

was obtained improperly, as described in Section 145(2)(b) or that the commissioner's actions are not justifiable in terms of the reasons given for them and that she accordingly exceeded her powers as described in Section 145(2)(a)(iii) of the Act.

For the latter proposition I am referred to the case of *Carephone (Pty) Ltd v Marcus NO and Others* 1998 19 ILJ 1245 (LAC) and to *Shoprite Checkers (pty) Ltd v Ramdaw NO* (2001 BLLR 1011 (LAC).)

The main submission is that there is no rational connection between the commissioner's award and the material/evidence that was placed before him at the arbitration.

Insofar as the commission found that the employer was unable to show that the employee knew of its policies with regard to the carrying of firearms on its premises, Ms Araujo submitted that in holding that the employee was not aware of the change in the procedures the commissioner had ignored the inherent improbabilities of Molefe, being a senior manager, being unaware of changes to policies and procedures.

In any event, so argued Ms Araujo, the unchallenged evidence from Ellinas that he always put rules and procedures in the pigeonholes of managers should have been accepted by the commissioner. There was a duty on all employees, particularly senior employees like Molefe, to keep themselves abreast of

changes to rules and procedures and, in the absence of any contradicting evidence, Ellinas' evidence to the effect that he had put a copy of the new procedures in each of the managers' pigeonholes had to be taken into account.

In so far as the commissioner had held that the employee was unaware of the rules regarding the possession of firearms on the premises, Ms Araujo argued that that finding was not substantiated by Molefe's own evidence that the only rules that he was aware of were those on the notice-board, the old Hyperama rules. The argument was that even those old Hyperama rules prohibited the carrying of firearms whilst an the employee was on duty.

The commissioner seems to have also held the view that the evidence did not show that the employee had been on duty.

Ms Araujo argued that in so holding, the commissioner misdirected herself inasmuch as she failed to properly assess and consider the employee's own version that he did not believe that he had breached the employer's procedure. His attitude had been that the rules and procedures prohibited the carrying of firearms whilst one was on duty, whereas he was not on duty because if he had been on duty he would have been paid overtime and would have been in uniform.

The argument against Molefe's contentions was that he

was on the shop's premises on that day to ensure that his department was ready for the stock take on the following day. That evidence, taken together with Ellinas' evidence to the effect that he was on duty, should lead to the only probable inference that the employee was on duty on the day in question.

Insofar as the commissioner's finding was to the effect that there was no evidence to show that Molefe deliberately fired a shot from his firearm, Ms Araujo's argument was that due regard must be given to the evidence, particularly Molefe's own evidence that a shot was fired from his gun when it fell on the floor, a version that is in direct contradiction to that presented on his behalf by his representative, one Steyn, who had alleged, in addressing the commissioner:

"That James pulled out his own firearm to protect himself, as he pulled it out a shot went off from his firearm."

There had also been the evidence of Ellinas who had testified that during the incident he had seen both the employee and the other individual involved in the fracas. They had guns in their hands.

There was also evidence that at the disciplinary inquiry the employee had not disputed firing a shot. Besides, the general tenor of questions that had been put to Ellinas, suggesting that the employee was acting out of self-defence in

pulling out a handgun, is inconsistent with a finding that there was no evidence to show that the employee deliberately fired a shot from his firearm.

The offence for which the employee had been charged was a serious one, the consequences of which were that customers and staff were forced to take evasive action and had been at the risk of being shot. The employee was a senior member of staff and had allowed himself to be involved in a situation where he placed the safety of his colleagues and of customers at risk. This conduct was so grossly unacceptable that the commissioner should not have hesitated in finding that not only was there overwhelming evidence against the employee but that the only appropriate sanction in the circumstances was that meted out at the disciplinary inquiry - namely dismissal.

On behalf of the employee, Mr Ramogale argued that the commissioner had correctly found that there was confusion as to which two sets of rules were applicable, namely the Hyperama rules or the Shoprite Checkers rules with regard to the carrying of firearms whilst an employee was on duty.

The one rule held that it was an offence to be in possession of a firearm whilst one was on duty whilst the other held that it was an offence to be in possession of firearms whilst one was in the workplace during working hours.

To the degree that the employer's witnesses were assuming that the employee was aware of which rules were applicable, the commissioner had been right in giving the employee the benefit of the doubt as to whether he was aware of which rules were applicable, so argued Mr Ramogale.

As far as the firing of the shot was concerned Mr Ramogale argued that nowhere had it been admitted by the employee that he had drawn out his firearm. However, Mr Ramogale was not able to surmount the hurdle presented by the employee's representative at the hearing, Mr Steyn, aforementioned, who had submitted on his behalf that the employee had had to draw his firearm in order to defend himself.

I am quite satisfied on what has been presented to me that the evidence led before the commissioner was sufficient for it to have come to a different conclusion. The award cannot be justified in the light of the evidence. It is reviewable.

It also is not necessary for me to remit the matter to the CCMA as I have a fairly comprehensive view of all of the evidence. Even though the record has got a number of inaudibles, to the extent that the matter was fully argued by both parties before me, it does not seem to me that any useful purpose would be served by remitting the matter to the CCMA.

Accordingly, my order is as follows:



1. The award of the commissioner under case number JA71046 which was received by the applicant on 16 May 2000 is reviewed and set aside.
2. The award of the commissioner is substituted with an order that the dismissal of the employee, Mr Molefe, was substantively fair.
3. There will be no order as to costs.

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DB NTSEBEZA

Acting Judge of the Labour Court of South Africa

Appearance:

Applicant:	Ms L. Araujo
Respondent:	Perrot, Van Niekerk & Woodhouse Inc
Applicant:	Mr T. Ramogale
Respondent:	COGIWUSA
Appearance:	13 June 2002

Date of Judgment: