

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR211/03

In the matter between

**MARKHAMS, a division of
FOSCHINI RETAIL GROUP (PTY) LTD**

Applicant

and

KOMOTJO MATJI N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

THANDO DHLAMINI

Third Respondent

JUDGMENT

JAMMY AJ

1. The Third Respondent, at the time employed by the Applicant as a sales associate at its Eastgate Store, was dismissed on 6 December 2001 on a charge, found to have been proved, of –

“Serious misconduct arising out of an incident that took place in Clicks on 18/11/2001 that resulted in your admission of guilt to theft”.

2. The fairness of that dismissal was disputed, the matter was referred for conciliation to the Second Respondent and, when it remained unresolved, was referred for arbitration before the Third Respondent in his capacity as a Commissioner of the Second Respondent.
3. In his award, the subject of this application, the First Respondent records that the Third Respondent's version of the events in the store "was that she had actually paid for those goods by cheque". Following a purported analysis of the further evidence presented on both sides, he concludes that –

"The burden or onus of proof in this case is upon the Respondent. It is required that the Respondent must prove on a balance of probabilities that the Applicant is guilty of all elements of the misconduct with which he has been charged. In the event of any doubt as in the present case, the Applicant should be entitled to the benefit of doubt. After careful consideration and analysis of the evidence at my disposal, it is my finding that the Respondent has failed to discharge the onus upon itself of proving that the dismissal of the Applicant was for a fair reason related to her misconduct".

4. The essential element of misconduct in the charge against the Third Respondent was, as I have indicated, one of theft, sourced in her wilful attempted removal from the store of goods for which she had not paid. The First Respondent's finding, in that context, that in the face of her evidence that she had in fact paid for them, the charge against her had not been proved is, as the Applicant submits, untenable on any analysis.
5. In the first instance, the video evidence, found by the First Respondent to be "not helpful" is, on the Applicant's analysis as confirmed by its witnesses during a showing of the film in the course of the arbitration,

incontrovertible in that context. Secondly, the transcription of the arbitration record, indicates unambiguously that –

- 5.1 when confronted by the security guard as she attempted to exit the store, the Third Respondent attempted to bribe him;
 - 5.2 when questioned by the company's senior area manager she informed her that she had forgotten to pay for the items in question;
 - 5.3 on her own evidence, when confronted in the store, the Third Respondent attempted to explain to the manager of the store that she had not checked the till slip and thought that she had paid for everything. She then offered to pay for the items in question;
 - 5.4 at no stage was it contended or suggested by the Third Respondent, as the First Respondent records, that the items in question had been paid for. The contrary is in fact the case and, on the evidence, the Third Respondent at no stage attempted to dispute the fact that she had not paid for them. Not only was that the case at the time of the incident but her acknowledgment of that fact was confirmed by her in the course of the hearing of her disciplinary appeal.
6. When assessed against this evidence, the First Respondent's finding of fact that in her evidence in chief the Third Respondent contended that she had actually paid for the goods in question, defies explanation. Equally incomprehensible, in my view, is his conclusion that, on a balance of probabilities, the Respondent had not proved that the Applicant was "guilty of all the elements of the misconduct with which she has been charged" and that she should be "entitled to the benefit of doubt". What he records as his "careful consideration and analysis of the evidence at my disposal", if indeed that is what he properly undertook, could and should have left him in no doubt that its probative weight indicated an emphatic discharge by the Respondent of the onus of proof

which he emphasises. In any event, as the Applicant correctly submits, that is not the test properly to be applied in civil proceedings such as these and by importing the element of “doubt” into his assessment of the probabilities, the First Respondent has manifestly mistakenly applied the standard of proof applicable in criminal matters as opposed to civil litigation, where it has no relevance.

7. In these circumstances I have no hesitation in holding that, in the context of the well-established principle defined in a line of cases in the Labour Courts, the First Respondent’s award is not justifiable on the evidence properly before him.

See *Carephone (Pty) Ltd v Marcus N.O. and Others (1998) 11BLLR 1093 (LAC)*; *Shoprite Checkers (Pty) Ltd v Ramdaw N.O. and Others (2001) 22ILJ 1603 (LAC)*

8. I am further of the view that no good purpose would be served by the reversion of this matter to the Second Respondent to be arbitrated afresh by a Commissioner other than the First Respondent. I have little doubt were that course to be followed, with the evidence in this arbitration being adduced in its totality once again, the inevitable conclusion would be no different from that which I have now myself reached, namely that the adverse disciplinary finding against the Respondent was justified and that her dismissal in the circumstances was warranted.
9. For these reasons the order that I make is the following:
 - 9.1 The First Respondent’s award dated 20 January 2003 in the Second Respondent’s case number GA185/02 is reviewed and set aside.

- 9.2 The First Respondent's order, in the context of that award, that the dismissal of the Third Respondent was substantively unfair and that she was to be re-employed, is substituted by an order in the following terms:

"The dismissal of the Applicant was substantively fair".

B M JAMMY
Acting Judge of the Labour
Court

Date of hearing: 13 August 2003

Date of Judgment: 28 August 2003

Representation:

For the Applicant:

Attorney R Moultrie: Bowman Gilfillan Inc.