

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE

CASE NO. JR1950/02

In the matter between:-

MS PHOEBE MOLOPE

Applicant

and

COMMISSIONER B H MBHA

First Respondent

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

Second Respondent

MORKELS STORES

Third Respondent

J U D G M E N T

CORAM FARBER AJ:

On 19 September 2002 the first respondent, a commissioner of the second respondent, handed down an arbitration award in a dispute between the applicant and the third respondent. He determined that the dismissal of the applicant by the third respondent was procedurally and substantively fair. The applicant seeks to have that determination reviewed and set aside.

The background to the matter may be summarised as follows:-

During 1996 the applicant entered the employ of the third respondent as an administrative controller of its branch in Pretoria North.

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In 1999 she was promoted to the position of manager of that branch.

She was to advance further, for on 1 April 2000 she was appointed to the office of Area Manager Designate, with responsibility for four of the third respondent's stores located between Brits and Rustenburg. In this position she reported to Mr Peter Champion, the third respondent's regional manager.

On 21 September 2000 the applicant attended at the third respondent's store in Rustenburg for the purposes of performing what has been described as a "branch assessment". On arrival, she was told that management had decided that she was to proceed immediately to the third respondent's store in Brits and investigate certain transactions based on documentation with which she was to be provided.

Arising therefrom, the applicant immediately proceeded to the store in Brits. She set about her task, only to discover "that there were more questionable documents and/or transactions than anticipated".

Champion was on leave. The applicant consequently advised Mr Nienaber, the third respondent's general manager, of her findings. She requested the

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performance of a full assessment and audit of the store.

The applicant's recommendation was accepted and the requisite assessment and audit was conducted by one Diane Sikie, the third respondent's then divisional credit manager. She was assisted by Mrs Vivian Kritzing, the third respondent's regional credit manager.

Their investigations took place on 25 and 29 September 2000, on which latter date Sikie reported her findings in writing. Kritzing was intimately involved in the audit and assessment and was in a position to confirm the contents thereof.

The report, which was damning, reads as follows:-

"STOCK MANAGEMENT

A stock take was done which resulted in a shortage of R18 252,70. Part of this shortage is due to credit notes that date back to May and June that have never been processed and confirmed. The stock is nowhere to be found. This has also resulted in Customer's having two or three accounts appear on their statements as the new invoices were processed and completed.

The following damaged items are in the stock room:

930050, 930250, 900058, 172270.

The following Customer's property is in the stock room:

COD 65644 dated 22.4.00 - Westpoint stove

Invoice 14294 Customer P Mabala - Fridge & Stove.

Invoice 812929 Account 814844 - TV - the credit on this application was not approved but has been confirmed as delivered (preinvoicing).

COD 65... Deal preconfirmed, this fridge has been loaned to another Customer

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for a CP1 claim that was approved. Refer CP1 claim 3501 - this was approved by the Area Manager.

I have instructed the Manager to contact all these Customers to collect stock by 7.10.2000, if not Credit Notes will be processed.

The Terminal Operator has taken delivery of a Fridge and a Hi-Fi without the applications being invoiced. Both the Manager and the Area Manager are aware of this. To date these invoices have not been processed.

Dispatch and collection

There is more than one person responsible for receiving and dispatching of stock. The Terminal Operator has a full set of keys for the store with the Manager's Consent. I removed them from her and instructed the Manager to lodge them with the bank immediately.

The Stock Repair Voucher Procedure is not utilized. I have explained this to the Manager and the Terminal Operator.

Customers are paid cash for reversal of delivery charges. They were not aware there is a reversal book.

Manual delivery notes do not have the printed SOS delivery note attached.

Stock Transfer Notes have a print screen attached.

The Stock Take Preparation Checklist is not used before a stock take is done.

Not one book pertaining to stock has been checked and signed by the Manager.

The Terminal Operator does the stock takes, compiles all the reports and prepares the SAN as she was instructed to do so.

The Manager clearly has no control over Stock Management and displays a total lack of interest and knowledge.

Audit Trails

All Audit Trails are not checked and signed by the Manager. She admits that she has not checked Audit Trails since the store opened. These checks are done by the Terminal Operator. Audit Trails are two weeks behind. The Branch Delivery Control Report does not reconcile to the Undelivered File.

DEBTORS MANAGEMENT

The cod and 900 Account are filed every month without being actioned. The Manager claims she does not know how to reconcile these accounts despite the fact she was trained for two months.

The 900 Account has had a debit balance since May. There are no Reconciliation's on file.

The Area Manager only rectified some queries on the 22.9.00.

The cod Account has had a debit balance since July, once again no Reconciliation's on file. This was finally rectified on the 27.9.00.

Cash Control

No action taken on the Deposit Held Account since 27.9.00.

Deposits date back to April which all formed part of the queries on the 900 and cod Account.

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The Area Manager has not checked the Bank Summaries.
There are still many Manual Receipts that have no SOS copies attached.
The Manual Receipt Books have no indication of spot checks been done by the Manager or Area Manager.
The Relief Cashier Procedure is not adhered to. The stamped Deposit Slips are not attached to the Bank Summary but filed separate.
Cash taken for Manual Receipts is dropped but not given to the Security Company the next day.
No authority is obtained from the Area Manager for shortages.
Shortages are not questioned or actioned by the Manager.
Signing the Bank Summary is clearly a paper exercise for the Manager.

Expense Control

There is no control over Cash Payment Vouchers.
There are cash payment vouchers totaling R388..... that have not been processed.
The processing copies are filed separate and not with the Cash Audit Trail.
Blue copies are filed with the Bank Summary and not separate.
I rectified this with the Cashier.
The Manager has been claiming money for petrol since April for the collection of stock and attending training. No authority numbers have been obtained. She claims the Area Manager is aware of this.
Listed below is the amount she has taken:
September - R200.00
August - R600.00
July - R950.00
June - R1400.00
May - R860.00
April - R150.00
In June the Area Manager also claimed R200.00 for petrol.
There are cpvs where the money taken does not equal the Tax Invoices.
The Cashier over-banked her float, instead of declaring a shortage the next day a cpv was prepared for a further float of R125.00.
I rectified this with a Sundry Receipt and explained the procedure to the Cashier.
Customers are being paid by us to hire transport to collect their goods.
The Area Manager drew R60.00 on cpv Number 263645 dated 7.7.2000 to have shoes repaired.
The Manager had her Cell Phone repaired at our expense cpv Number 263562 dated 3.6.2000.
Refer to cpv Number 263463 R46.90 drawn for food for the Manager.
Refer to cpv Number 263684 R240.00 taken by the Area Manager.
For VIP Events no tax invoice.
The General Assistant is paid Spiv's when he writes a deal.
... payments to Sales staff is not controlled, no Invoice Numbers are indicated on the cpvs. No Spiv Control Sheets are used.

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Not all cpvs are approved by the Manager.

Agreements

The adherence to Credit Granting is poor. The completion and quality of agreements is also poor. Some Agreements not signed by the Customer.

Loan Agreements are incomplete.

The Terminal Operator mostly does the approval of credit.

Agreements are not filed in invoice or account number order.

Monthly Performance Tracking for the Sales Staff has not been done since the store opened. The Terminal Operator was last tracked in July. There are no goals on file for the out of line areas.

Conclusion

It is clear from the above that many breaches have occurred in this store. When I discussed these issues with the Manager she called the Terminal Operator to explain. She has no idea what is happening in her store. The staff is clearly confused. The Terminal Operator is seen as the Manager by the staff.

The Terminal Operator was able to answer all my questions regarding the stock.

It is clear she has been running the store in the Managers presence.

The Manager lacks management and leadership skills to a great degree, is unable to use her initiative and is of no support to the staff.

She blames the Area Manager and continued to state that she had not been trained properly.

I believe that majority of these issues could have been prevented by the Area Manager had she been more involved.

The staff lack knowledge with certain admin aspects and I would suggest that a Workshop Training Session is held."

Following thereon, the store's manager, one Hannie Schutte, and its terminal operator, Karen Kleinhans, were suspended pending the finalisation of disciplinary proceedings which had been instituted against them on the grounds of their gross negligence.

This hearing was scheduled to commence on 10 October 2000. Prior thereto, Schutte and Kleinhans resigned from the service of the third respondent,

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with the result that the hearing against them did not proceed.

On 10 October 2000 the applicant was suspended and notified of the third respondent's intention to institute disciplinary proceedings against her on the following charges:-

"1.GROSS NEGLIGENCE

It is alleged that you were grossly negligent in the performing of your functions as an Area Manager Designate, with particular reference to your responsibilities in the Brits branch for which you were responsible.

Staff removing stock from the store, of which you were aware, but failed to check if all policies had been complied with, evidences this. I.e. applications being invoiced, all credit granting criteria adhered to.

You failed to ensure that there was only one set of keys in the branch.

You failed to ensure that the staff performed their functions, e.g. balancing of 900/005 accounts, balancing of branch delivery control report to the undelivered file. No action taken on the deposit held account.

You failed to ensure that the credit granting policy and the completion of deals were maintained at an acceptable level.

You failed to ensure that performance tracking was carried out on all staff, every month.

Not one book pertaining to stock has been checked/signed by yourself.

You allowed customers to be paid cash for reversal of delivery charges.

You failed to ensure that all cash and banking procedures were adhered to in the store.

You failed to ensure that all expenditure in the store was for company purposes, and had the appropriate signatures.

You failed to ensure that all debtors systems assurance related issues were adhered to.

2.UNAUTHORISED USE OF COMPANY FUNDS

It is alleged that you utilized company funds for your own private use without authority: 1. Drawing company funds for your own private use - ref. Cpv 263645, for shoe repairs.

3.BREACH OF COMPANY POLICY

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It is alleged that in all the above instances a number of company policies were breached, which you allowed to go unchecked from the time that the store opened, despite your numerous visits to the store."

The hearing was scheduled for 20 October 2000, and in the notice convening it the applicant was, *inter alia*, advised that "you may call on a fellow employee from your operating unit to act as your representative".

It commenced on 20 October 2000 and was completed on 23 October 2000. The verdict returned was that the applicant has misconducted herself in the respects alleged in count 1 (gross negligence in the performance of your functions/duties as Area Manager Designate) and count 2 (unauthorised use of company funds). Misconduct based on the allegation embodied in count 3 (breach of company policy) was not sustained.

Count 1 attracted the sanction of "a final written warning with demotion". Count 2 was far more severely dealt with and attracted the sanction of "summary dismissal".

The applicant pursued an appeal, which appeal was dismissed on 30 October 2000.

The applicant then referred the matter to the first respondent for conciliation. To that end, a meeting took place on 26 January 2001. It was unsuccessful and

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the matter then proceeded to arbitration before the first respondent, who adjudicated thereon on 3 July and 9 September 2002. As previously indicated, he determined that the applicant's dismissal was substantively and procedurally fair. It is this finding which the applicant now seeks to impeach.

I turn to the question of substantive fairness.

As to count 1, the objective facts relating to the manner in which the affairs of the third respondent's branch in Brits had been conducted was not in issue in the arbitration. The applicant's defence was that in her position of Area Manager Designate she was, in relation to that branch (and the other branches which fell within her area of responsibility), only required to fulfil such functions and discharge such obligations as had been assigned to her on an ad hoc basis from time to time by Champion. She contended that she had no authority to act independently as was required of an Area Branch Manager. She further contended that she had never been asked by Champion to deal with any of the matters foundational to count 1. As such, she could not be held accountable for the acts of mismanagement articulated therein.

The first respondent rejected the very substratum of the applicant's case for reasons which I believe are substantial and compelling. They are as follows:-

On the evidence adduced before the first respondent, it is clear that the third respondent had not appointed an Area Manager in respect of the stores in question. It was hardly likely to have jettisoned the need for so important a controlling functionary, unless that role was required to be fulfilled by the applicant, albeit that she was then only the Area Manager Designate which, so it seems, was a probationary appointment which would crystallise into a full appointment by the end of 2000.

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On the undisputed evidence of Mr Burrows, Mr Ferreira and Mrs Kritzinger, an Area Manager and an Area Manager Designate are required to fulfil identical functions. It was common cause before the first respondent that an Area Manager was charged with the responsibilities and functions which underpinned count 1.

The performance of the applicant as Area Manager Designate was assessed by Champion. Such assessment covered areas which fell within the ambit of an Area Manager's functions and responsibilities. This tends to serve as a powerful indicator that the applicant in fact fulfilled those functions and responsibilities, or was at least required to do so.

During the course of her evidence before the first respondent, the applicant contended that the functions and responsibilities of an Area Manager Designate were never explained to her. This contention stood in sharp contrast to the evidence adduced at the disciplinary hearing as, on that occasion, Champion testified that he had in fact fully explained the position to the applicant. The applicant did not then contest Champion's assertion.

The applicant from time to time submitted written reports relating to the functions which she had fulfilled as an Area Manager Designate at the various branches under her ambit of responsibility. Many of the activities reported on related to the very functions which an Area Manager would in

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the ordinary course have been required to fulfil.

It was common cause that Champion, in conjunction with the applicant, had compiled what was described as a "branch check list". This document detailed the functions which the applicant was required to perform in her capacity as Area Manager Designate. A great number of the omissions identified in count 1 fell within the range thereof.

The applicant admitted that she held the responsibility normally associated with that of an Area Manager, but not the authority to act as such. This essentially represented a contradiction in terms which was not properly explained during the course of the hearing.

As to count 2, it was not in issue that money which had been withdrawn from a "staff account" maintained at the branch in question was used to pay for the repair of the applicant's shoes. Her case was that she was totally unaware thereof. On this score, she testified that on 5 July 2000 one Andries, a store assistant employed at the branch, advised her that he was going to the shops. He asked her if she required anything. The applicant enquired whether there was a shoe repair shop in the vicinity. When she was told that there was in fact one, she produced a pair of shoes from the boot of her motor vehicle, gave it to Andries and asked him to hand it in for repair. Andries apparently did so and on his return to the branch he advised the applicant thereof, indicating that the repairs would cost R60,00. The applicant advised Andries that she would leave that amount with Thabitha, a cashier employed at the Brits store, and that when the shoes were ready for collection he was to collect the money in question from her so that payment for the repair might be made. The applicant later on that day handed Thabitha the sum of R60,00. On 10 July 2000 the applicant again visited the branch. On that occasion, Andries advised her that the shoes were ready for collection. Later that day they were handed to her by the manager of the branch.

The first respondent rejected the applicant's version for what I consider to be

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substantial and compelling reasons. They are as follows:-

It was common cause that the branch's funds were in fact used to pay for the repair of the applicant's shoes. A "cash payment voucher" which was signed by Thabitha and the branch's manager reflected the withdrawal thereof from the branch's funds. There was really no need for any of this had the applicant in fact placed Thabitha in funds to pay for the repairs.

During the course of her evidence before the first respondent, the applicant quite firmly and unequivocally testified that she had handed the funds in question to Thabitha. During the course of her evidence during the disciplinary hearing, she was somewhat uncertain as to whether she had in fact left money at the branch, and if so, with whom. She at that hearing ultimately identified the manager as the person in question.

The applicant, on her own version, concluded an agreement in relation to the repair of her shoes with Andries. He was to take possession thereof, to then deposit them for repair, and to collect and pay for them. There was no real explanation as to why in these circumstances the applicant did not simply hand the sum of R60,00 to Andries. Instead, she involved a person entirely extraneous to the transaction as the repository thereof.

In summary then, I am in no doubt that the first respondent's findings in regard to the substantive fairness of the applicant's dismissal was rationally connected to the evidence which was placed before him. Count 2 was particularly serious,

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involving as it did a breach of trust. It was not for the first respondent to even begin to second guess the penalty of summary dismissal which the third respondent imposed in respect thereof.

No case for interference has been established on this leg of the case.

The question of procedural fairness stands on a different footing. According to the applicant, she had secured the services of Joyce, the third respondent's Regional Credit Manageress, to represent her at the disciplinary enquiry. Joyce had withdrawn from acting on the evening of 19 October 2000. The applicant immediately telephoned Champion to advise him of this fact and to request a postponement of the hearing. He advised her to raise the matter at the enquiry on the following day. According to the applicant, she advised the enquiry that her representative had withdrawn on the previous day and that in consequence she sought a postponement of the matter.

Her request was not acceded to. So much is common cause. However, according to Ferreira who chaired the enquiry, the applicant in moving for a postponement did not mention that her representative had only withdrawn on 19 October 2000. The minute of the enquiry records that in her reference to the withdrawal of her representative, the applicant mentioned Tuesday, 17 October 2000. Ferreira stated that the declination of the postponement was based on three considerations, namely that the applicant had received ten days notification of the hearing, that she had not requested a postponement prior to the hearing itself, and that in the event of a postponement senior personnel would have been substantially inconvenienced.

The first respondent dealt with the matter on a somewhat different basis. On this score he said the following in his award:-

"The Applicant's gripe as far as the procedure is concerned is that she was never afforded an opportunity to have a representative at her hearing. This must be viewed against the backdrop that she had ten day's notice before the hearing. This must also be viewed in relation to her testimony at this arbitration. It will be recalled that she testified to the effect that her alleged representative only contacted her on Thursday the 19th advising her that she was not going to be available at the hearing on the next day. This is contradicted by what is recorded on the minutes. On page 5 of the minutes it is recorded that the Applicant actually testified that her representative contacted her on Tuesday. Even if one were to hold that this contradiction is not material however looking at the entire record of the hearing it is clear that the Applicant was afforded an adequate opportunity to present her case. The record of the hearing also shows that she effectively cross-examined all the witnesses who testified on behalf of the company."

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I am, with diffidence, unable to subscribe to the approach adopted by both Ferreira and the first respondent in regard to the question of a postponement.

It is now clearly established that one of the requirements of a procedurally fair and just hearing embraces the entitlement of an employee to be represented thereat by a co-employee or a trade union official or a lawyer. [*NUM v Blinkpan Collieries Ltd* 1986 ILJ 579 (IC); *NUMSA v Elm Street Plastic t/a ADV Plastics* 1989 ILJ 328 (IC); *ACTWUSA v JM Jacobsohn (Pty) Ltd* 1990 ILJ 107 (IC); *Ibhayi City Council v Yantolo* 1991 ILJ 1005 (E); *Trauschweitzer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools* 1991 ILJ 1099 (IC); *Tonga v ICA Group Ltd ta Renown Meat* 1994 ILJ 669 (IC); *Lamprecht v McNeillie* 1994 ILJ 998 (A); *Dywili v Brick & Clay* 1995 7 BLLR 42 (IC); *NUMSA v Steloy Stainless Precision Casting (Pty) Ltd* 1995 7 BLLR 87 (IC); *Cuppan v Cape Display Supply Chain Services* 1995 ILJ 846 (D); *Dladla v Administrator, Natal* 1995 ILJ 1418 (N); *Holgate v Minister of Justice* 1995 ILJ 1426 (E); *Myburgh v Voorsitter van die Schoemanpark Ontspanningsklub Dissiplinêre Verhoor* 1995 9 BCLR 1145 (O); *Coin Security Group (Pty) Ltd v TGWU* 1997 10 BLLR 1261 (LAC); *Van Jaarsveld* 1993 *De Jure* 176; *Olivier* 1996 DR 669.]

Representation is not a matter of discretion. Nor is it tied to the exercise of a prerogative or an indulgence. It is a matter of entitlement and it will generally require very weighty considerations before an employee falls to be deprived of the right foundational thereto.

On this score, it seems to me to matter little whether the applicant's representative withdrew from acting on 17 or 19 October 2000. In each instance, the withdrawal would, in relation to the proximity of the hearing, have been

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extremely late. I say this because of the serious nature of the complaints which had been proffered against the applicant, their complexity and the time which was fairly required for preparation so as to permit of meaningful representation. In this context, the date on which the applicant was advised of the hearing is wholly irrelevant. What is relevant was the withdrawal of her representative in relation to the proximity of the hearing. On any basis, it was "late".

Nor does the fact that the applicant did not request a postponement in advance of the hearing carry weight. On her version, she raised the matter at the first available opportunity. In all events, I know of no rule or principle which required her to raise the matter before the hearing, other than perhaps by virtue of "good etiquette". A failure in etiquette does not warrant a declination of a postponement. The inconvenience which it is said might have been occasioned to members of the disciplinary panel in the event of a postponement is in my judgment a mere "make weight" when considered against the applicant's entitlement and its fundamental importance.

The consideration of the first respondent that the applicant appears to have conducted her defence with competence and that she had every opportunity of doing so is, with respect, equally misconceived. The applicant was, as a matter of right, entitled to representation. Her adequacy and competence is no substitute therefor.

Ferreira's approach was wholly misconceived. The first respondent thought to have found accordingly and his attempt to justify the fairness of the procedure adopted was equally misconceived.

I am thus of persuasion that the dismissal of the applicant was tainted by procedural unfairness.

The applicant thought in my view to succeed to that extent. It is accordingly not necessary to consider the other instances of procedural unfairness relied upon by the applicant in seeking to impugn the integrity of the hearing.

The procedural unfairness which I have identified was only cured during the course of the arbitration, almost two years after the dismissal. The applicant may well have a substantial claim for compensation against the third respondent. She at the time of the dismissal earned a basic monthly salary of R6 500,00. She may have received other benefits. The question of compensation is best considered by

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the first respondent in light of such evidence which he may be disposed to hear in relation thereto.

Although the applicant has only been partially successful in the matter, such success is substantial. Costs ought consequently to follow the event.

The following orders will issue:-

The decision of the first respondent in upholding the dismissal of the applicant on the basis of procedural fairness is set aside.

It is declared that the third respondent acted procedurally unfairly in dismissing the applicant.

The matter is remitted to the first respondent for the determination of the compensation, if any, payable by the third respondent to the applicant arising from the provisions of paragraphs A.1 and 2 hereof.

The costs of the application are to be paid by the third respondent.

Save as aforesaid, the applicant's application is dismissed.

To the extent that it may be rendered necessary, it is consequently declared that the applicant's dismissal was substantively fair.

**G FARBER
ACTING JUDGE OF THE
LABOUR COURT**

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DATE OF HEARING:
11 NOVEMBER 2004

DATE OF JUDGMENT:
01 FEBRUARY 2005

MR KHOZA ADV HEIDI BARNES

Applicant's Representative

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