IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1888/08

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED	Applicant
and	
COMMISSIONER G SEBOTHA N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
JOSEPH KENALEMANG LESELE	Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an unopposed application to review and set aside an arbitration award issued by the first respondent (the commissioner), on 4 August 2008 under case number NW1585/08 in terms of which he found that the third respondent's dismissal was excessive and ordered that he be re-employed by the applicant with effect from 15 August 2008.

2. The third respondent was employed by the applicant on 16 November 1982. Before his dismissal, he was employed as a bakery controller in the applicant's Annan Drive store in Carletonville. On or about 2 February 2008 he was found in possession of sunlight bath soap (soap) worth R6.99. He was on 6 February 2008 charged with the following:

"Misconduct in that on 02-02-2008 you were in possession of unpaid, uncancelled stock that you were not the lawful owner of and of which you did not declare".

He appeared at a disciplinary hearing on 11 to 13 February 2008 and was found guilty of the charge against him. He was dismissed on 13 February 2008. He referred an unfair dismissal dispute to the second respondent, the CCMA claiming that his dismissal was substantively unfair. After conciliation failed, the matter was referred to arbitration.

The arbitration proceedings

3. The applicant called two witnesses at the arbitration proceedings. The first witness was Lesego Jeany Pheto (Pheto). She testified that she was a front administrative manager for the past three years. She was an investigator at the disciplinary enquiry. She investigated the matter because the third respondent had paid for all the groceries except the soap. She viewed the video footage and cross questioned the witnesses and got statements from the security and the cashier. The third respondent did not follow the staff buying procedure which is the first rule that he had contravened. When he was searched, he only then wanted to declare the soap that he had tried to remove which belonged to the applicant which was unpaid for. An employee must ensure the goods are paid for at the till point. There is a till slip for goods worth R209.35. These are the goods that he had declared to the cashier. There were nine products except the bags. There were a 2-litre grape juice and eight 2kg mixed portions. He was charged because the soap was found in his possession which did not appear on the till slip. He did not declare for it to be paid. The rule was made known to employees in each department. It applies to all employees and forms part of the terms and conditions of

employment of employees.

4. Pheto testified that rule 1 deals with conduct and performance and provides that "employees must comply with all the rules and regulations of the company and must carry out all reasonable instructions given to them by their superiors. Employees are expected to behave in a lawful and orderly manner at all times. Employees are expected to perform their duties to the best of their abilities and to meet all standards of performance required of them by the Company". Pheto said that the rule meant that employees must at all times do what is expected of them from the company. Rule 10 provides that "employees must declare all goods/merchandise which are brought into the workplace and have such goods cancelled by authorised personnel." What the rule means is that is that if a person brings something from outside, which is similar to what the applicant is selling in the store, it must be declared to the security to be cancelled. The third respondent did not cancel the soap. It was checked and was not on the list. He had said that he did not see it and it was a mistake. He wanted to pay for it to cancel it. It could not be cancelled because he had already passed the till point where he had to say that "here is my sunlight please pay for it or scan it" so that he could pay for it. Groceries are bought when a person goes home and when the person leaves the store, he must declare the groceries that he bought and security than checks it and it does not stay in the store since it is going to be removed. It is his responsibility to provide proof of purchase.

5. Pheto testified that rule 11 state that "employees must comply with the specific staff buying procedures in the workplace. It is the responsibility of employees to declare all goods/merchandise which have been purchased in the workplace and to have such

goods/merchandise checked and "cancelled" by authorised personnel before such goods are consumed or removed from the workplace. Employees must provide proof of purchase of goods in their possession whenever requested to do so by the authorised personnel. Employees must comply with the rules and conditions of the Company Buying Card. This card may only be used for the purchase of merchandise for the cardholder and his immediate family. The drawing of cash or any other misuse of the card is strictly prohibited". This rule states that if a person buys groceries he must declare all the goods which he purchased to the authorised personnel including the security guard with proof of purchase before those goods could be taken home or consume them. He cannot declare the goods that he did not buy at the security. He must declare it early in the morning when he reports for work to be cancelled. When he goes home he must show the goods that he bought and were cancelled.

6. Pheto testified that rule 13 provides that "employees may not be in possession of, or consume or attempt to consume, or remove from Company premises by any means or in any manner whatsoever, any Company, Supplier, Customer or other property of which the employee is not the lawful owner, including stock, without following the correct staff buying procedures or without the specific authorisation of management. Employees may not hold or store any company property, including stock, on the premises in places which are not recognised or designated as storage areas for that company property without the specific authorisation of management. Employees are expected to report to their manager any conduct by customers, suppliers and fellow employees which could lead to any loss being suffered by the Company." Pheto said that this rule applied to the third respondent because he was in possession of and he

wanted to remove from the company an item which was not paid for and of which he was not the lawful owner of and not with the specific authorisation. This resulted in a loss being suffered by the applicant. The lawful owner of the soap was the applicant. Rule 17 provides that 'employees must submit themselves and any bags, parcels etc. in their possession to a controlled search process whenever leaving or entering the workplace or any other time as required by management. The company reserves the right to search any locker, container, bag or package, which may be on the company premises. Employees must, before leaving the premises, ensure that they are not in unauthorised possession of any company property." When the third respondent was leaving, he was already at the staff entrance. This is where they leave or enter the store so he was at the gate and they were supposed to open for him to go outside. It was wrong because he was not the lawful owner of the soap. She was the investigator and prosecutor at the disciplinary enquiry and had asked for his dismissal because the rules were clear and they are being consistently applied. The trust relationship was also broken. The applicant did not suffer a loss because the security guard picked up that the soap that was not paid for but if the security did not pick it up, it would have suffered a loss and he would have taken the soap home. Even a person with a clean record and 25 years of service can be dismissed since the applicant employs 60 000 employees. So if one employee was to remove a soap by mistake, the applicant will close down. It was not an accident since he was ready to take the soap home. He was a controller and is supposed to be an example to his subordinates. With the 25 years of service he must have been aware of the company rules. The cashier was also charged for not having scanned the soap.

7. During cross examination it was put to Pheto that the third respondent saw the soap

and then showed it to the security. She said that if he saw the soap he should have given it to the cashier to scan it and that he had seen it at the wrong place. She was asked why he was not given an opportunity to go and pay for the soap because it was a mistake when he realised it. She said that he knew about the rule and he saw it and than he was supposed to declare it at the till point. She was asked whether she was saying that he wanted to steal it and said that she did not say that he stole or intended to steal it. He had attempted to remove it without proof of purchase. It was put to her that he did not hide the soap and had put it into the trolley and everybody could see it. Even the security confirmed that he took the soap out of the trolley which was not in his pocket or underneath his clothes. She said that she had a statement from the security guard and was going to call her as a witness and that he gave a different version.

8. The applicant's second witness was Connie Kunene (Kunene). She testified that she is the admin. manager since August 2006. She was the chairperson of the disciplinary hearing. On 2 February 2008, the third respondent was found in possession of the soap which he did not pay for or did not have a till slip for it. He was still at the till point with his groceries where he was supposed to have declared it or present all the groceries for payment. The unpaid product was found by security at the staff entrance. He was dismissed because he did not have proof of purchase of the soap and did not follow the staff buying procedures where it is stated that he must declare all items when making a purchase. The product was not cancelled since he did not have the slip as proof of purchase that it was bought by him. She was asked why if he said that he made a mistake he was still dismissed for having made that mistake. She said that

he had been with the applicant for 25 years and knows the rules and is in control of a department. The applicant suffered a financial loss as a result of the soap and he did not pay for it. She said that if 50 000 or 60 000 employees were to take soap of R6.99 without any proof of purchase, the applicant would lose its profits and all staff members would lose their jobs and the applicant would close down. It was put to her that he said that he made a mistake and had discovered the mistake at the staff entrance when he was leaving. She said that they consistently applied the rules on staff members and it is their responsibility to declare all purchases for payment. He had breached rule 11. Although he had 25 years of service with a clean record, the applicant could not afford to loose a single cent as they are working with money and goods. They need to make profits to open other stores as well. She considered the 25 years that he worked but as a result they had to employ more people and make profit. She read out the findings of the disciplinary hearing which is that he was guilty of the charge as he did not declare the soap for payment and it had been his responsibility to do so. She also found that the applicant had proved through video footage that the soap had not been paid for and a witness, Phumla Masala, a security guard from National Professional Services had testified that the soap had not been paid for. She found that the third respondent had worked for the applicant for 25 years and knew the staff buying procedures and during the hearing, he stated that his conduct had not been intentional. The applicant could not tolerate such misconduct in that he had been in possession of unpaid stock. It was his responsibility to present the soap for payment. He had placed items in a trolley and the other goods were placed in a bag while the soap was not taken out of the trolley. There was no way that he could have missed the soap.

9. Kunene testified further that she dismissed the third respondent for consistency and because the rules were displayed and the applicant could not afford to lose money. She also dismissed him to prevent shrinkage which cost the store about R5 million annually. He had been dishonest. She could not impose an alternative sanction such as a final written warning as his conduct had been deliberate. It was the security who had seen the soap under the plastic bag. A security guard named Phumla who had been stationed at the staff entrance was the one who had caught the third respondent and reported him. Phumla testified at the disciplinary enquiry.

10. During cross examination Kunene said that on the day of the incident there were four security guards on duty. She did not know whether there had been a security guard on the till and one at the staff entrance. No action was taken against the security guards as they were third parties and were not employed by the applicant. She does not know what happens at the store on a daily basis. She dealt with the security guard called Phumla, who was at the staff entrance. Her role was to look for under rings.

11. The third respondent testified in his defence. He said that on 2 February 2008 he purchased some groceries. He had bought 8 pieces of chicken, juice and planet cola. When he arrived at the till, he was going to use his staff card for payment and found that the till machine was out of order. He changed the till, paid and went out. At the till point there was the first security who searched the parcel. He went to the passage and the second security searched the groceries that he had bought. When he, the third respondent, looked underneath the bags of chicken portions, he found the soap. He asked the security to find out whether the soap appeared on the till slip. He told him that it did not. At that time the security supervisor was at the staff entrance. Phumla

the security guard handed over the slip to the supervisor and the soap. They then instructed him to knock off and go home. He reported for duty on Monday as usual. On Tuesday the case was opened.

12. During cross examination the third respondent said that he was a bakery controller which is the same as a supervisor for 25 years. He did not agree that he appeared on the video footage. He could not remember if he had admitted at the disciplinary enquiry that he was seen on the video. The video did not show that he paid for the soap. The till slip did not reflect the soap. It was put to him that he had pushed the trolley with the chicken, planet cola, the grape juice and that he was the controller and was asked why he did not recognize that he did not pay for the soap. He said that he did not see the soap since it was underneath the bag of chicken portions. It was put to him that he had paid for the chicken portions. He said that when the bags of chicken portions are sealed they cannot access the bar code and that is why the two packets were taken out so that they could scan the barcode. It was put to him that he had deliberately forgotten the soap underneath which was. He said that it was not deliberate and that it was a mistake. It was put to him that it was still wrong and that he had said that the security at the front end of the till point, did not check that the soap was not paid for. He said that the security checked and did not notice the soap. It was put to him that it was not the security's job to check if he bought all the goods and it was his responsibility to declare at the till point that he wanted to purchase. He was asked how it got into the plastic bag because he was pushing it in the trolley. He said that the soap was not in the plastic bag and was underneath the sealed bag. The soap was part of the groceries that he bought. A mistake happened. He admitted that

he was not the owner of the soap and this was the reason why after he had noticed it, he spoke with the security. It was put to him that he did not show it to the security and that the security had found it according to the applicant's witnesses. He repeated that he was the one who showed it to the security. He disagreed that he was telling lies. He was asked why after 25 years of service, he wanted the security to cancel something that he was taking out of the shop and not what he was bringing in. He repeated that it was a mistake. He could not see it and it was underneath the bag. He was asked why he wanted to declare it when he was leaving. He said that he realized and saw the soap when he was busy putting the chicken portions inside the plastic. In the passage only body searches are conducted and they show the security the till slip. It was put to him that he was contradicting himself since in the passage only body searches are done and that the security guard at the staff entrance is the one who stopped him from causing the company a financial loss. He denied it. He said that he knew that the soap was not his and that is why he asked the security guard to check to see if it were on the till slip. He thought that when he showed it to the security he would then allow him to pay for it. It was a mistake that he forgot the soap. At the first check point, he did not see the soap since it was underneath the bag. If he had noticed it, he would have returned to pay for it but he did not see it.

The arbitration award

13. The commissioner issued an award dated 4 August 2008. She dealt with the issue that she was required to decide and the evidence led. It is not necessary to repeat those. The commissioner said that it was not in dispute that the third respondent was found in possession of the soap, an item which was the applicant's. He was found at the staff entrance and the soap had not been paid for. He admitted that it was his

responsibility to see to it that the item was presented for payment, that he was also responsible to prove the purchase of the item to security at the checkpoint. He could not prove that he purchased the soap. The commissioner said that the applicant also presented evidence that the third respondent was dismissed for breaching the rules relating to staff purchase. He had failed to present the item at the till for payment. It was his responsibility to do so. He could not prove that the item was paid for when requested to do so by security. He was at the staff entrance which meant that he had intended to leave with the soap without having paid for it.

14. The commissioner said that the third respondent's evidence was that he had removed the soap from the shelves and placed it in a trolley with other items. He paid for the items but missed the soap because it was underneath the chicken packages. He realized only when he was at the staff entrance that the soap was under the chicken pieces. He was aware of all the rules relating to staff purchase because of his 25 years length of service and the fact that the rules were displayed.

15. The commissioner said that the chairperson of the disciplinary hearing testified that the third respondent's dismissal was based on the following facts: that the third respondent did not declare the soap for payment and that it was his responsibility to do so. He worked for the applicant for 25 years and knew the staff buying procedures and that it was recorded in the minutes that he did not do it intentionally. The commissioner said that in the chairperson's evidence she classified that the third respondent's action was intentional without evidence to that effect. The commissioner said that the fact that the soap was not paid for was common cause between the parties. It was also common cause that lack of payment led to breach of

several rules relating to staff purchase and the third respondent had admitted as much. The explanation given and the basis of the evidence including video footage did not show any intention of not paying. Knowledge of the rules is also not in dispute but the circumstances that led to the soap not being paid for could only be attributed to negligence and nothing else. The commissioner said that he found the fact that the third respondent had worked for the applicant for 25 years without a disciplinary record to mitigatory and the dismissal was too excessive.

16. The commissioner found that the sanction of dismissal was too excessive. The applicant's reasons for the dismissal being the loss to the company due to shrinkage could not be accepted to the facts of this case. The third respondent had also not shown dishonesty which would have been a basis for the applicant's reasons for saying that the trust relationship was irreparably broken down. The applicant was ordered to re-employ the third respondent with effect from 15 August 2008.

The grounds for review

17. The applicant contended that the commissioner's award is reviewable in terms of section 145(2) of the Labour Relations Act 66 of 1995 (the Act) and/or the principles of fair administrative procedure and/or in terms of the common law grounds of review and/or because her decision does not withstand the test on review for, *inter alia,* the following reasons:

    17.1 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted herself in finding on the one hand that the fact that the third respondent had been at the staff entrance meant that he had intended to leave without paying for the soap, and then on the other hand finding that there

had been no evidence to the effect that his conduct had been intentional and that his explanation and the evidence, including the video footage, had not shown any intention not to pay. The commissioner's finding was absurd and is not a decision that a reasonable commissioner could reach.

17.2 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted herself in finding that the circumstances that had led to the soap not being paid for could only be attributed to negligence and nothing else. This conclusion is unreasonable and there was no evidence to suggest that the third respondent had not acted intentionally. The evidence before the commissioner was that it was only when he had been searched at security that he wanted to declare the soap. He had not done so at the till point despite the fact that it was common cause that he was aware of the applicant's rules with regard to employee purchasing and the necessity for presenting goods for purchase and ensuring that he could produce proof of payment at security. The commissioner ignored the fact that he had been employed by the applicant for 25 years and that he was well aware of the rules. The probabilities favoured the version that he had acted intentionally and had hoped to get away with not paying for the soap, rather than the version that he had been negligent and failed to ensure that all of the items which he had placed in his trolley had been presented for purchase.

17.3 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted herself in finding that the fact that the third respondent had worked for the applicant for 25 years without a disciplinary record was mitigatory and that the dismissal was excessive. This finding creates the precedent that it is unfair for employees to dismiss employees who steal their

products if they have long service. For employees in the retail industry, which is plagued by shrinkage, this is a wholly untenable precedent, which, if left unchallenged, will serve to threaten the viability of the applicant's business, and, ultimately, the employment of its workforce.

17.4 The commissioner unreasonably failed and/or committed a gross irregularity and/or misconducted herself in failing to apply what is the jurisprudence of the Labour Appeal Court (the LAC) that particularly in the retail industry, theft warrants dismissal, despite long service and the negligible value of the item stolen. It is the prevailing jurisprudence of the LAC that dishonesty, particularly theft, serves to destroy the employment relationship, despite the negligible value of the item involved and the fact that the employee concerned has long service. Although the third respondent maintained that he had accidentally failed to present the soap for purchase, there was no evidence to suggest that this was indeed an act of negligence and not intentional, as he was well aware of the rules relating to staff purchasing and the consequences for breaching these rules. In the circumstances it was contended that the probabilities favoured the version that the third respondent was indeed in attempting to steal the soap when it was discovered in his possession during the search. The commissioner's decision is not one which a reasonable decision-maker could reach and for this reason, her award fell to be reviewed and set aside.

17.5 The commissioner unreasonably failed and/or committed a gross irregularity and/or misconducted herself in failing to take into account the reason why the applicant, an employer with an acute shrinkage problem, chose to dismiss employees found guilty of theft. It does so as a "sensible operational response

to risk management in the particular enterprise" to deter other employees from committing similar acts of misconduct in the future to protect the viability of its business. These are the issues that must be weighed in the balance by anyone tasked with deciding on the fairness of such a dismissal. Due to the fact that the commissioner failed to consider those material factors, her award falls to be reviewed and set aside.

17.6 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted herself in finding that the reason which the applicant gave for the third respondent's dismissal, that is, the loss caused to it by shrinkage, could not be applied to the facts of this case. This finding is absurd. Had the third respondent not been subjected to a search by security at the checkpoint at the staff entrance, he would have left the store with the soap which he had not paid for. This would have caused a loss to the applicant and would have contributed to the problem of shrinkage.

17.7 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted herself in finding that the third respondent had not shown dishonesty. This finding was also unreasonable. The applicant's evidence was that he had placed his purchases into his trolley and when he had arrived at the till point, he removed all but the soap from the trolley and had presented them for purchase. Due to the fact that he was aware of the rules relating to staff purchasing and of the consequences of breaching these rules, it would be fair to assume that he would have been careful to ensure that he presented all items for purchase to ensure that he could produce proof of payment should he be searched by the security. His allegation that he mistakenly or accidentally failed to present the soap for purchase because he did not see it as it was under

a packet of chicken pieces was improbable as Kunene's evidence that he had removed all of the items which he wished to purchase from his trolley except the soap and that there was no way that he could have missed the soap was never disputed by him. The commissioner's finding that he had not shown dishonesty was also unreasonable.

Analysis of the evidence and arguments raised

18. The commissioner was accused that she did not follow the jurisprudence laid down by the LAC when it comes to the issue of theft cases in the retail industry. There is no substance in the applicant's contentions. There are two recent LAC involving the same applicant like in the present matter which has got to do with the issue of shrinkages. These are *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2008] 12 BLLR 1211 (LAC) (the Zondo JP judgment) and *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2008] 9 BLLR 838 (LAC) (the Davis JA judgment). The first one was delivered by Zondo JP on 21 December 2007 and the second Davis JA on 20 June 2008.

19. In the Zondo JP judgment, the facts were briefly as follows: The employee, the fourth respondent, had been captured on the store video cameras on three separate occasions eating what the appellant had believed were its products and that he was captured on the camera doing so in areas of the appellant's premises in which the staff were prohibited from eating. The appellant instituted a disciplinary inquiry in which the fourth respondent was charged with three allegations of misconduct of eating the appellant's food without authorisation in areas where doing so was prohibited. He was found guilty of all the allegations of misconduct that he had faced and was dismissed. It was common cause that the monetary value of that which he consumed

was unknown but less than R20.00. When the matter went to arbitration, the commissioner found that a dismissal was not required to automatically follow the conviction of theft. The employee had 30 years of service and was a first offender. The commissioner found that the dismissal was quite severe. On review Zondo JP held at paragraph 26:

"In my view, this can simply not be right. Indeed, it can neither be justifiable nor reasonable. I know that from the appellant's point of view this cannot simply be about monetary value of the food that the fourth respondent ate. For the appellant, it is probably about a principle and the real problem of shrinkage that it and other similar businesses face every day. I am not ignoring any of this. I am mindful of it but, nevertheless, when all the relevant circumstances are taken into account, I am of the opinion that a reasonable decision-maker could not, in the circumstances of the case, have concluded that an employee who had a clean disciplinary record such as the fourth respondent and had 30 years of service should, in addition to getting a 'severe final warning' for this type of conduct, also forfeit about R33 000 for eating food that may well have cost less than R20.00. I do not think that a reasonable decision-maker could have sought to impose any penalty in addition to the 'severe final warning'."

20. The facts in the Davis JA judgment are that the appellant (the employer) charged the fourth respondent (the employee), an assistant baker as its store with dishonesty, alternatively in breach of company rules in that he consumed company property without paying and breach of the company rules in that he consumed food and drank in places not designated therefore. He was found guilty as charged at a disciplinary enquiry and was subsequently dismissed. He challenged both the substantive and

procedural fairness of his dismissal at an arbitration convened. The commissioner found that the employee's dismissal had been substantively unfair, on the basis that he was not guilty of the charges of misconduct brought against him and ordered his reinstatement. The Labour Court on review found that while the commissioner's finding on guilt was open to attack on review, the sanction was unfair in the circumstances. It substituted the commissioner's award of reinstatement to that of a final written warning. The appellant was granted leave to appeal. The LAC said the following at paragraphs 24 and 25 of the judgment when comparing it with the Zondo JP judgment:

"This decision appears to adopt a different approach to the body of jurisprudence as analysed in this judgment. However, in that case, the employee had 30 years of unblemished service. While that employee contended that he had been authorised to taste food in the areas where the video clip had showed him to have so eaten, and that on one of the occasions, he was eating his own food, unlike the present case, he had not gone so far as to produce manufactured evidence that manifestly was concocted in order to support his own mendacious account, as was evident in the present dispute.

In this case, the respondent had engaged in a breach of company rules on two separate days and, on these occasions, on one day. On 11 October 2000, he had consumed three separate bowls of pap. He had thus acted in flagrant violation of the company rules which had been implemented for clear, justifiable operational reasons. Other employees who had similarly found to have so acted had been dismissed. In unchallenged evidence, Mr van Staden testified about the breakdown in trust between the two parties.

'Because he is actually working or he has been trained to work in a specially

department where he is busy preparing food, and because of the incidents that happened which actually caused the shrinkage and with the high shrinkage in the store at the moment, we actually cannot afford to get him back in the store. (Indistinct) broke the trust relationship with the company."

In this sense, the facts are distinguishable from that of the Shoprite Checkers case, supra, and in keeping with the other decisions of this Court."

20. It is clear from the aforesaid LAC judgments that the length of service, the clean disciplinary record and whether a person acted in flagrant violation of the company rule are factors that play a role in the issue of sanction. This is obviously in line with the decision of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC). Most of the LAC judgments referred to in the Davis JA judgment were before the *Sidumo* judgment.

21. When the death penalty was abolished there was a furore that the crime rate would go up. All types of arguments were raised about how the Constitution was criminal friendly and crime victims unfriendly and that the victims of crime were not considered etc. The same furore arose when corporal punishment was abolished. It was also argued that teachers or educators would be left powerless in dealing with discipline. The same thing has happened when the issue of discipline at the workplace was dealt with by *Sidumo* and in particular the issue of sanction. There are various prophets of doom about what would be happening to discipline in the workplace. Some employers were able to dismiss employees on the basis of the reasonable employer's test. Most chairpersons of disciplinary enquiries endorsed employers decisions without any fail. Commissioners are not there to rubber stamp

decisions taken by employers. Commissioners are enjoined to decide whether an employee's dismissal is fair or unfair. The reasonable employer's test is no longer part of our law. All attempts, like in the present case to reintroduce the reasonable employer test under different pretexts or guises should be resisted. *Sidumo* has dealt with this once and for all. I would have thought that the law applies equally to both employers and employees. Dishonesty in the workplace remains that. It does not matter whether the employer is involved in the public or private sector or in the retail industry. The impression created in this case is that employers in the retail industry need special protection as opposed to those in the non retail industry.

22. The fact of the matter is that *Sidumo* has given clear guidelines about the issue of discipline and sanction in the workplace. The message as I understand it arising from *Sidumo* is that the employer cannot impose discipline as it used to do in the past. It does not give the employees the licence to commit misconduct at their whim in the hope that it would use *Sidumo* as a defence. It requires the employer to revisit its approach the issue of sanction at the workplace and apply the principles which have been given. Employers cannot approach the issue of sanction as if *Sidumo* does not exist. There must be a balance. Commissioners are not the agents of employers but are like umpires who must decide the issue of fairness. I would hasten to add that the role of the chairperson at a disciplinary hearing is also not to rubber stamp the decision of an employer. He or she is appointed to ensure that there is fairness. How often do you find that chairpersons are called upon to defend their findings and would go to great lengths to justify their decisions. These are issues that *Sidumo* requires employers and employees to look at. The CCMA and Bargaining Councils were clearly established to decide whether dismissals are substantively and procedurally

fair. Once they had found that they were unfair, they are then required to deal with the issue of relief. In doing so they are guided by precedents of both the Labour Court and LAC.

23. The test according to *Sidumo* in deciding whether an award is reviewable, as that the only question that needs to be asked is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply ensure that the commissioner's decision falls within those bounds. To succeed, the applicant must establish that the decision falls outside the bounds of what are reasonable.

24. As stated above, the reasonable employer test as a means of determining whether to interfere with a sanction imposed by the employer has been rejected by *Sidumo*. Clear guidelines have been given about what factors need to be considered in considering the sanction. The following quotation that appears at page 1131 at paragraphs 78 and 79 of *Sidumo* suffices:

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the

employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

25. It is clear from the evidence led that the third respondent was employed by the applicant as a bakery controller for 25 years when he was dismissed. It is common cause that on 2 February 2008 he had bought groceries to the sum of R209.35. The soap was not included in the groceries that he had purchased. On the said date he had passed two security checkpoints. At the third security check point he handed to the security guard Phumla a soap to the value of R6.99. He was subsequently charged with misconduct in that on 2 February 2008 he was in possession of unpaid, uncancelled stock that he was not the lawful owner of which he did not declare. He was found guilty and was dismissed. When the matter came before the commissioner, she asked about the charge and the applicant's representative informed her that the case was not about theft but that he did not declare the soap. She also said that the third respondent had said that it was an accident. She said that "mistakes do happen we admit but for a person who has been working so long in the company this is no excuse." The third respondent said in his opening address that "I challenge the issue that I am the one who showed the security the sunlight, which was under the plastic,

which was ..... (inaudible). And I asked the security to check if the item was paid for. He further said "also when we scrutinized the, viewed the video footage there is nowhere where it shows myself intending to steal". "I thought that the item was paid for".

26. The applicant's disciplinary code makes provision for different types of misconduct. Some would be dishonesty or theft, being in possession of unauthorised goods, failure to comply with the company's rules etc. It appears that the applicant had specific reasons why the third respondent was not charged with theft or dishonesty. Those reasons are best known to the applicant. He was not charged with dishonesty or theft. The following was said in *Sidumo* at pages 1130 to 1131:

"The commissioner gave three reasons for regarding the sanction as excessive and unfair. The first was that no losses were sustained. The second was that the misconduct was unintentional or a "mistake" and the third was the absence of dishonesty. He also took the view that the offence committed by Mr Sidumo did not go to the heart of the relationship of trust between Mr Sidumo and the Mine.

It is clear that there was no evidence presented that the Mine suffered any loss as a consequence of Mr Sidumo's neglect. It is true that losses could have been occasioned by his misconduct, but it is equally true, as submitted on behalf of Mr Sidumo, that no less was proven to have flowed from it.

In respect of the commissioner's finding that the misconduct was unintentionally or a mistake, it was correctly pointed out on behalf of Mr Sidumo that it was Mr Botes, in his evidence before the commissioner, who characterised his misconduct as "mistakes". It is true that Mr Sidumo did not conduct individual searches which were his main task. Therefore, to describe his conduct as a "mistake" or

"unintentional" is confusing and, in this regard, the commissioner erred.

In respect of the absence of dishonesty, the Labour Appeal Court found the commissioner's statement in this regard "baffling". In my view, the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine's valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.

The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training, are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo's attitude and efficiency. In my view, the commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of appropriateness of the sanction.

CCMA figures reveal that each year between 70 000 - 80 000 cases are referred to the CCMA for conciliation in respect of dismissals. Given the pressures under which commissioners operate and the relatively informal manner in which proceedings are conducted, and the further fact that employees are usually not legally represented, it is to be expected that awards will not be impeccable."

27. It is clear that the third respondent's defence to the charge was that he had made a

mistake and after he had passed the till point he found the soap under the chicken and gave it to the security to verify whether it appeared amongst the items for which he had paid. His version was disputed by the applicant and it was stated that the relevant security guard would be called by the applicant. The security guard was not called. The applicant was adamant that the third respondent was not charged with theft. The witnesses who testified for the applicant had not witnessed the incident but had relied on statements given to them by others. It gave hearsay evidence. It was crucial for the applicant to have called the security guard as a witness. The third respondent's version that it was a mistake was therefore uncontested.

28. The charge that the third respondent was dismissed for relates more that he had not declared the soap at the till point. This is also clear from Pheto's evidence during cross examination. She said that if the third respondent had seen the soap he should have given it to the cashier to scan it and that he had seen it at the wrong place. She was then asked why he was not given an opportunity to go and pay for the soap because it was mistake when he realised it. She said that he knew about the rule and he saw it and that he was supposed to have declared it at the till point. She was asked whether she was saying that he had attempted to steal and said that she was not saying so but that he had attempted to remove it without having paid for it. I simply do not understand how after he had passed the till point he was still expected to have declared it to the cashier.

29. The impression that one gets from the evidence of Kunene who was the chairperson of the disciplinary enquiry is that had the third respondent's conduct not been deliberate she would have imposed a final written warning. She had testified that she could not

impose an alternative sanction such as a final written warning as his conduct was deliberate. Evidence had to be led by the applicant that showed that his conduct was deliberate. The third respondent had testified that he was searched by security and that it was at the third check point that he saw the soap and then gave it to the security called Phumla. During opening address it was said by the applicant's representative that mistakes can be made.

30. Since the third respondent was not charged with theft, it is impermissible for the applicant to raise the issue dishonesty in an attempt to bolster its case. It is clear from the applicant's grounds of review that the applicant does not appreciate the facts led and what the charge was and the third respondent's defence. It is not true that the evidence as contended by the applicant that when the third respondent was searched that he wanted to declare the soap. He testified that he had asked the security to check whether it appeared on the till slip. The commissioner did not say that the 25 years was a mitigatory factor for theft but had said that the circumstances that led to the soap not being paid for could only be attributed to negligence and nothing else and his length of service and clean record was a mitigatory factor. The applicant clearly misconstrued what the commissioner said.

31. The applicant has overlooked the fact that the sanction of re-employment is an extremely harsh remedy imposed by the commissioner instead of the final written warning that the chairperson would have imposed. This case shows that the third respondent was punished as a result of his long service. The applicant's in their haste to teach him a lesson forgot what his version was namely that he had made a mistake. He was expected to be a super human being who does not make mistakes. This is disturbing to say the least. I have certain misgivings about whether the commissioner

should have found him guilty of misconduct bearing in mind what his defence was and the poor quality of evidence led before her. Since this is an unopposed review and no counter review application, there is nothing that this Court can do about this apparent injustice that was done to the third respondent. The sanction that the commissioner imposed was extremely harsh and appears to have been an attempt to appease the applicant.

32. In my view, having regard to the reasoning of the commissioner based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The Labour Relations Act 56 of 1995 (the Act) has given that decision-making power to a commissioner.

33. The application stands to be dismissed.

34. In the circumstances I make the following order:

34.1 The application is dismissed.

34.2 There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	ATTORNEY M DELANY OF PERROT VAN NIEKERK WOODHOUSE - MATOLO INC
FOR THIRD RESPONDENT	:	NO APPEARANCE

DATE OF HEARING	:	24 FEBRUARY 2009
DATE OF JUDGMENT	:	20 MARCH 2009