



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C483/19

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER MTUNZI NDULAMA N.O.

Second Respondent

LERATO IRENE EVODIA MOLEBATSI

Third Respondent

Date heard: 6 August 2020

Delivered: 28 October 2020 by means of email of the scanned judgment

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review an arbitration award under case number FSBF302-19 dated the 17 June 2019. In his award, the second respondent (the Commissioner) found that the dismissal of the third respondent was procedurally and substantively unfair and retrospectively reinstated her.

- [2] The third respondent (Molebatsi) began employment with the applicant in 2002 and was an assistant manager at applicant's Heidedal store when she was dismissed on the 14 January 2019, after being charged with the following:

"Gross negligence arising out of you undermining the purpose of the Company's procedures in that on 14 December 2018, you were in charge of the Twilight shift at the store and the store under your control suffered stock losses due to unauthorized removal of company property by the staff of the Twilight shift. You failed to secure the doors and to do your rounds to check on employees which resulted in them leaving the store with unpaid goods and the company suffered a direct financial loss."

- [3] Molebatsi was the manager on duty on the twilight shift on 14 December 2018. Her responsibilities as a manager included securing the store before the twilight shift commenced work, ensuring that the store's service departments, in particular its bakery, fruit and vegetable and deli were properly prepared and replenished with stock, and that the groceries and non-food departments were stocked for trading next day. She also had to supervise the twilight shift team so as to ensure they attended to their duties. The supervision of the staff involved regularly walking the aisles of the large store to monitor the teams' performance and to ensure the staff were performing their duties. It was her responsibility to ensure the applicant's stock was secure.
- [4] On the 14 December 2018, after normal trading hours, Molebatsi checked the doors to the store to ensure they were locked. She discovered that the front entrance doors to the store would not lock from the inside with the keys available to her. They would only lock from the outside. She instructed one of the two security guards on duty to remain permanently stationed at the stores front entrance. This meant that the security persons patrolling the shop were cut by half.
- [5] It was common cause at the arbitration that during the 10 hour shift Molebatsi only checked the twilight teams once. It was also common cause that she did not have a vantage point to view the aisles from where she was working in the

bakery. The applicant discovered that there was widespread pilfering and theft from the store by the staff on duty when it reviewed its security camera footage.

- [6] In his Award, the Commissioner found inter alia as follows in respect of the substantive fairness of her dismissal:

“On a balance of probabilities, I am of the view that the applicant was not grossly negligent when theft was committed at the store. The Respondent’s third witness described the duties of a Manager on the twilight shift and it was not in dispute that she was indeed performing some of those duties. The Respondent’s third witness further testified that she had discretion on which of the functions she could perform at a time and that she was performing one of those on the day. It would be unreasonable to expect her to perform all her duties at once.”

- [7] The transcript reveals the following exchange during cross-examination of Mr Macheng, the third witness of the Applicant.

“MR AUSTEN: ...Tell me, if, it is the prerogative and the sole decision of that Manager on duty that night to make certain decisions, or to take certain action during that time. Is that correct?

MR MACHENG: Yes

MR AUSTEN: So it’s her discretion if she makes rounds or not, or did the rounds. and come back to one department, and see this department is running behind And it’s her discretion to assist, because tomorrow is hectic, it’s her discretion to assist, correct.

MR MACHENG: It’s her decision.”

- [8] The above exchange does not assist Molebatsi’s case in my view. It is submitted on behalf of the applicants that the finding that Molebatsi could not perform all her duties at once and that she was entitled to exercise her discretion in what duties she performed is not one that a reasonable decision maker could make. It is argued that the Commissioner failed to appreciate that by dedicating herself essentially to the bakery for almost 10 hours she was neglecting her other duties, specifically those that related to the protection of Applicant’s stock. I must agree.

It would seem to me that her obligations in that respect would be heightened given her knowledge that only one security guard was doing the rounds in the store that night. The fact that she did not have view of the aisles from the bakery because of a promotion cannot also not be seen as a mitigating factor in her failure to walk the aisles save for once.

- [9] The Commissioner further found in relation to the substantive fairness of her dismissal that Molebatsi's actions did not amount to gross negligence:

"[45] It was not in dispute that the keys could only lock from the outside and that the Applicant alerted security of this and requested for one of them to be at the door, at all times. I cannot see how her actions would be seen as gross, especially taking into account the preventative measures she undertook."

- [10] Under cross-examination Molebatsi's was asked about her vigilance that night:

"MR STANDER: Okay Now I want to put something to you, don't you think that is a very, the fact that the door couldn't lock, you should have gone out more to see what is happening because the door couldn't lock. Rather than stay in one department the whole time, and not be aware when your staff is ...(indistinct).

MS MOLEBATSI: ...(Indistinct) question, referring to what Mr Macheng said when it was questioned, that as a Manager on twilight regarding, at that time are you not allowed, am I not allowed to use my own discretion, or focus on the more crucial department at a time, and his answer was yes. And, second of all, I understood that, hence why we have the security in the store, and the security are entrusted to safeguard our property, our asset, as the company, as well as us, the staff, that would not be a problem, and they should be trustworthy to an extent that whenever they see Lerato doing something, they can come and say, Ms Lerato, I saw Mr(indistinct) doing so and so. So ja.....

COMMISSIONER: I didn't quite get the answer sorry.

MS MOLEBATSI: Alright What I said to Mr Ruan, Mr Stander, is that referring to the question that was ask to Mr Macheng, when Mr Henry asked him, as the Manager on Twilight, or night shift, in, would he correct saying that at the time

you focus on a department that needs attention at the time, and Mr Macheng, he said, yes, as the Manager you are allowed to use your own discretion, and focus on a more ...(indistinct) department at the time. In this case the bakery was a problem.

So, second of all, my second answer is that, say that the company has fired the security, which their responsibility is to basically safeguard the company's asset, as well as our lives, the staff in the premises I would have thought they should be more reliable and trustworthy, to an extent that if ever, even I myself, as the Manager, if I'm doing something wrong, they would be able to report me to the, to my senior that we are unhappy about Ms Lerato, because she is also doing one, two, three."

[11] Molebatsi was also asked during her years of experience since 2002, how many times had she seen that the staff and security steal from the company. She stated:

"MS MOLEBATSI: I'm going to be really honest. At the time when you were staff, you don't care, you think like a staff. Everything in the, on the store, they want to just, to get it in....(indistinct), but I cannot quite count the times, but I know it happened, because in instance, you will find the security has been stealing."

MR STANDER: So, you knew security staff isn't 100% trustworthy, correct?

MS MOLEBATSI: I cannot say about, I cannot say about the security, because the security is there to safeguard the ...(indistinct) the company's asset, as well as myself. That's why everyday I'm searched by the very same security, who is searching you....."

[12] In the Court's view, the evidence that Molebatsi was aware of both staff and security stealing from the store should have been taken into account in the Commissioner's finding that the negligence of Molebatsi could not be considered to be gross. This together with his acceptance of the "discretion" point as mitigating, renders his decision on substantive fairness as one that a reasonable decision maker could not reach.

[13] In as far as the issue of procedural fairness is concerned, the Commissioner considered the evidence of Mr Veimas, the Chair of the disciplinary hearing, the Branch Manager at Shoprite Mangaung. The Award records the following:

“[15] The applicant was issued with a notice of suspension on 18 December 2018 and the disciplinary hearing was convened on 20 December 2018. The notification of the findings were handed to the Applicant on 24 December 2018 and the final summary was issued to the Applicant on 14 January 2019.

[16] Under cross-examination, he submitted he had done a lot of disciplinary inquiries in the past. During the disciplinary hearing the Applicant requested to ask questions to the initiator but he refused because it was not discussed with him before the hearing. He conceded that the information she wanted to ask could have been important.....”

[14] The transcript of the cross-examination of Veimas reads inter alia as follows:

“MR AUSTEN: Alright. Now specifically to that two points, Mr Veimas, and on the day of the hearing, did Ms Lerato here ask if she could ask questions to the Initiator?

MR VEIMAS: Yes, Sir.

MR AUSTEN: What did you tell her?

MR VEIMAS: That I’m not going to allow it.

COMMISSIONER: Just a second. You may proceed.

MR VEIMAS: First, how do I allow the accused to question the Initiator, and the second reason was that it was not discussed with me prior to the sittings, that she’s going to question the Initiator.

MR AUSTEN: In that instance, as the Initiator is her direct Branch Manager, wouldn’t you have thought that this information that he is pertinent to this case, as he had direct knowledge of what happened.

MR VEIMAS: Yes, but then it was supposed to be requested by her prior to the sitting, to question the Initiator.”

[15] The Commissioner’s finding regarding procedural fairness was as follows:

“[36] The evidence showed on a balance of probabilities that the Applicant was prejudiced by the refusal of the Chairperson for her to ask questions at the disciplinary hearing. In fact the Chairperson of the disciplinary hearing conceded to such and much more during cross-examination. He further conceded that his failure to allow her an opportunity to ask questions amounted to gross irregularity. He conceded that if he allowed her to ask those questions, he would have had a broader knowledge of the matter. He further conceded that disciplinary hearing was irregular and that he made a mistake.

[37] During the proceedings, there was no objection raised or argument canvassed to indicate that the Applicant was not allowed to ask questions to the initiator. The only submission made by the Respondent was that she ought to have requested prior approval. However, when dealing with someone who is not represented and whose livelihood is at stake, it would have been better for the Chairperson to either postpone the matter or hear arguments on why she wanted to ask these questions.

[38] In light of the Chairperson’s concessions and evidence presented to me, I am of the view that the Applicant’s dismissal was procedurally unfair.”

[16] Under re-examination, Mr Stander for the applicant referred to the questions asked by Molebatsi which she had handwritten and were part of the bundle of documents before the Commissioner. Stander referred to the questions and asked Veimas whether the issues raised by her were proven at the disciplinary hearing. In answer, Veimas stated inter alia that the ‘evidence’ that was submitted by the Initiator proved that the procedures required on twilight shift were not followed.

[17] The statement made by the initiator, Mr Macheng, was treated as evidence by the Chair of the disciplinary hearing. The only other witnesses for the applicant called at the disciplinary hearing were two employees working with Molebatsi in

the bakery on the night in question who gave evidence of her whereabouts on the night.

[18] The re-examination of Veimas is dealt with in submissions before me. On behalf of the applicant it is argued that his evidence under re-examination¹ is that Molebatsi was allowed an opportunity to ask the questions she had wanted to direct to the initiator through him and that these were in fact answered. This assertion is not born out by the referenced transcript of the arbitration proceedings.

[19] It is further submitted that the Commissioner committed a reviewable irregularity by applying a higher standard for procedural fairness than that required by the Code of Good Practice. I do not agree. The applicant is a very large concern and the disciplinary hearing was conducted in a way that prevented Molebatsi from questioning the Initiator whose statement was treated as evidence by the Chairperson. The right to ask questions of a witness is a most basic requirement of fairness and Molebatsi was denied this right.

[20] In all the above circumstances, I order as follows:

Order

1. The Award under case number FSBF302-19 is reviewed and set aside and substituted as follows:

1.1 The dismissal of Lerato Irene Evodia Molebatsi was substantively fair but procedurally unfair.

1.2 The applicant is to make payment of an amount equivalent to two months of her salary to Ms Molebatsi as compensation for her procedurally unfair dismissal, being an amount of R31 599.38 (thirty one thousand five hundred and ninety-nine Rand and thirty eight cents).

1.3 The payment is to be made within 15 days of this Order.

¹ The pages of the transcript relied on are the re-examination of Wymer



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation:

For the Applicant: Cliffe Dekker Hofmeyer Inc

For the Third Respondent: M.E. Austen Attorney