REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

Case no: JR 2172/2011

In the matter between:

PHINEAS LEDWABA	**Applicant**
and	
MR JOSEPH MPAHPULU *N.O.*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Second Respondent**
EDGARS	**Third Respondent**

Heard: 21 October 2015
Delivered: 23 October 2015
Summary: (Review-proof of policy-nature of charges)

JUDGMENT

LAGRANGE J

[1] The applicant is a former store manager, who was dismissed after being found guilty of the following charges:

> "Failure in your duty to demonstrate acceptable conduct in that on 10 January 2011 at Jet Festival more you failed to arrest a shoplifter and accepted payment in the form of cash and a cell phone from her. Such conduct is in breach of the arrest policy."

[2] The arbitrator upheld the dismissal. In the course of the arbitrator's decision he found that the employer had failed to provide a policy governing the arrest of customers, which it claimed existed. However the arbitrator concluded on the evidence:

> "It may have been true there was no policy with regards to dealing with customers that are found stealing but it was clearly an established practice for them to be apprehended and handed over to the police. The applicant admitted to having done that many times before."

[3] In brief, for the sake of contextualising the dispute, the uncontroversial facts of the matter may be summarised as follows:

3.1 A shoplifter was apprehended with 4 pairs of shoes with a total price of approximately R720.

3.2 The store manager on his version attempted to call the police but was unable to get through to them.

3.3 The store manager received R800 from the shoplifter and return the shoes to the store.

3.4 The store manager also retained the shoplifter's cell phone which was sold to another employee within a few days.

3.5 The shoplifter was released after handing over the money and her cell phone, and was not given any of the goods she had attempted to steal.

[4] Although he did not dispute receiving the money and the cell phone or that the suspect was released, he claimed that all of this was the doing of the security officer who apprehended the suspect. Despite the fact that he agreed that the security officer had no power to decide to release the suspect, he did not report it to his superior because the security officer had

assured him that the suspect was due to return. The thrust of the security officer's evidence was that when he had taken the suspect to the applicant, she had offered to pay for the goods and when she did so the applicant decided not to phone the police but when she obtained the R800, he asked for an additional R800. Because she was unable to pay the additional amount he demanded that she leave her cell phone as security.

[5] The nub of the applicant's case on review is that the arbitrator failed fundamentally in his duties when he proceeded to find the applicant guilty despite the employer not being able to prove the existence of the rule which had been broken. The applicant is correct that under s 188(2) of the Labour Relations Act, 66 of 1995 ('the LRA') an arbitrator determining the fairness of a dismissal must have regard to the test for substantive fairness set out in item 7 of Schedule 8 to the LRA which includes item 7(b) that states anyone considering the fairness of a dismissal should consider "…if the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace;…"

[6] The applicant focuses on the last sentence in the charge pertaining to the existence of the policy and argues that the arbitrator committed a reviewable irregularity by effectively proceeding with the rest of the enquiry having found that the employer had failed to prove the existence of an arrest policy applicable to customers. It is established law that the framing of charges in disciplinary hearings does not have to meet the precise standard of criminal charges:

> "[37] In dealing with the point *in limine*, one should not lose sight of the purpose of the charge-sheet, namely to ensure that the dismissed employee is made aware of the allegations he is to face in the disciplinary hearing. Disciplinary charges are not intended to be a precise statement of the elements of an offence. The charges need only be sufficiently precise to allow the charged employee to identify the incident which forms the subject-matter of the complaint in order for him or her to prepare a suitable defence. (See *Korsten v Macsteel (Pty) Ltd & another* [1996] 8 BLLR 1015 (IC) at 1020; and *Dywili v Brick & Clay* [1995] 7 BLLR 42 (IC) at 47B-C.) Such right to prepare for the employee should not be rendered illusory by

an inadequate charge-sheet. (See *Police & Prisons Civil Rights Union v Minister of Correctional Services & others*(1999) 20 ILJ 2416 (LC) at 2426C-F.)"[1]

See also ***Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others***.[2]

[7] What the arbitrator found effectively was that there was a standard practice, though not a rule reduced to writing, which was adhered to in the case of customer arrests. Moreover, the second portion of the charge relating to accepting cash and a cell phone from the suspect is clearly identified in the charge as part of the unacceptable conduct. The applicant preparing himself to defend the charges could hardly have believed that he did not have to explain why he had received money even though the goods had been recovered and why he retained her cell phone, so it is hard to see how he could have been prejudiced in defending himself. That conduct, on the face of it was unacceptable, whether or not there was a policy governing arrest procedure in relation to customers, and clearly was a substantive part of the misconduct he was charged with. Indeed he did try and offer some justification for his actions in this regard but this was not believed by the arbitrator.

[8] In the circumstances, I do not believe the arbitrator misdirected himself. He dealt with the gravamen of the charges against the applicant and it is a distortion and gross oversimplification of the charge to try and reduce it to a question of a breach of a written arrest policy.

[9] This being the crux of the review, the applicant has failed to lay a basis for setting the award aside.

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[1] ***Zeelie v Price Forbes (Northern Province)*** **(2001) 22 *ILJ* 2053 (LC)** at 2062-3.

[2] **(2011) 32 *ILJ* 2455 (LAC)** at 2467, para [32]

Order

[10] The review application is dismissed.

[11] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M M Mitti of Mitte Attorneys
THIRD RESPONDENT:	V Reddy of Norton Rose Fullbright