



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

Not of interest to other judges

Case no: JR 475/2013

In the matter between

SHOPRITE CHECKERS (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

JANSEN VAN VUUREN NO

Second Respondent

RETAIL AND ALLIED WORKERS UNION

Third Respondent

NCUNA MC

Fourth Respondent

Heard: 3 September 2015

Delivered: 3 September 2015

Summary: Review of an arbitration award – the Commissioner applied the wrong tests and adopted a very narrow approach to the interpretation of the allegations of misconduct – award reviewable.

EX TEMPORE JUDGMENT

COETZEE AJ

- [1] This is an opposed review application to set aside an arbitration award reinstating the employee, Me MC Ncuna, after having been dismissed by the applicant for misconduct.
- [2] The parties to this matter are Shoprite Checkers (Pty) Ltd, the applicant, the Commission for Conciliation, Mediation and Arbitration, first respondent, Commissioner Jansen van Vuuren, second respondent, Retail and Allied Workers Union, third respondent and Me Matapela Catherine Ncuna the fourth respondent.
- [3] The first application was to condone the late filing of the record of the arbitration by the applicant. This application initially was opposed. The third and fourth respondent withdrew the opposition to the application for condonation and I am satisfied that condonation should be granted. The late filing of the record is condoned.
- [4] The applicant in the review application sets out the grounds for review which essentially are that the Commissioner became involve in the arena to an inappropriate extent. Secondly that the Commissioner applied incorrect tests in assessing the evidence and therefore arrived at a conclusion that was unreasonable. A further ground is that a very technical approach to the allegations of misconduct was taken by the Commissioner which resulted in an injustice to the applicant.
- [5] The fourth respondent was an employee of some years standing with the applicant.
- [6] She was charged with the following allegations of misconduct:

'Firstly, you circumvented your responsibility of a manager and/or transgressed Shoprite's standing procedures by handing the store keys to a member of a service supplier to open the store in you stead which could have resulted in losses and third party liabilities'.

Secondly: 'You made racial remarks towards fellow members of management, 21 February 2012 and 23 February 2012 which is a clear contravention of the company rules'.

Thirdly: 'You behaved in a manner unbecoming a Shoprite employee by making racial remarks towards fellow members of management on 21 February 2012 and 23 February 2012'.

- [7] She was found guilty of these allegations of misconduct in the subsequent disciplinary inquiry. She referred an alleged unfair dismissal to arbitration.
- [8] On arbitration the Commissioner made a number of findings resulting in an award that she was substantively unfairly dismissed.

The facts:

- [9] The fourth respondent was a senior employee in the ranks of a manager and she had the duty to reopen the store on a specific Monday morning.
- [10] This duty arose from the fact that she had closed the store on the previous day and therefore had a set of keys to use the next morning at 06:00 in the presence of another manager and the chief security officer to reopen the store.
- [11] Earlier during this morning she felt indisposed but was of the view that she would still be able to go to the store and open the store and thereafter attended a medical practitioner.
- [12] About an hour before the store had to be reopened, she decided that she was not feeling well enough. She then got hold of the chief security officer who she knew would be travelling past her residence to the store. He is a service supplier to the applicant.

- [13] She asked him to collect her set of keys and to take the keys to the store.
- [14] There was a dispute as to whether she handed him the keys with the intention to go and open the store with the other manager on duty or whether it was merely to convey the keys from her residence to the store so that someone else, another manager, could assist the second manager to open the store.
- [15] The strict rule was that the store had to be opened in the presence of three people: two managers with their own sets of keys opening two different locks on the store door and in the presence of a security officer.
- [16] She sent a text message to the second store manager who received the text message while waiting at the store for her to arrive and to come and assist him in opening the store.
- [17] The security official took her keys to the store and handed those to the second manager. The second manager then obtained permission to open the store with both sets of keys and in the presence of the security officer.
- [18] This is the incident that gave rise to the first allegation of misconduct.
- [19] The second allegation of misconduct relates to racial remarks allegedly made by the fourth respondent.
- [20] Two incidents were referred to. The one was that she allegedly referred to a baby in the store as 'that thing' which was construed to be a racial slur. Her explanation was that she had referred to a toy on a shelf and not the baby.
- [21] There were more than one person present at the time and the centre of focus was the baby. It is highly unlikely under those circumstances that someone would, out of the blue, refer to a toy in the store as 'What is that thing?' On the probabilities she had

not been referring to a toy. I am however not convinced that the Commissioner was incorrect in finding that it was not a racial slur if in fact it had been made.

[22] I do not believe that the employer discharged the onus to show that it was meant and intended to mean or was understood to be a racial slur. The Commissioner was correct in finding that the fourth respondent was not guilty of this allegation of misconduct.

[23] The second incident of racism refers to a meeting at the office between the fourth respondent and one Herbert.

[24] Herbert's evidence was that they were discussing a schedule and there was some disagreement amongst them about it to the extent that it almost ended in an altercation. When he left the fourth respondent called him a "coloured bastard". There can be no doubt that such a statement is a racial slur.

[25] In her oral evidence she denied the altercation and that she ever made this allegation.

[26] When presented with her prior written statement, she tried to avoid the consequences of her statement. In her statement she referred to the altercation but she denied the slur. This makes her denial of the slur suspect as she had to concede she admittedly lied about the altercation.

[27] The Commissioner considered the evidence of Herbert and the fourth respondent. The Commissioner accepted that he had two conflicting or opposed versions of what occurred between the fourth respondent and Herbert.

[28] In his view the applicant's future was at stake and for that reason he was accepting her version above that of Herbert. He also reasoned that Herbert admitted that there was a third person present that could also testify on this issue and because the employer did not call that third person the commissioner drew an

adverse inference against Herbert from the absence of that witness.

[29] There are two aspects to this. The first is that if it was possible to resolve the dispute of fact on the probabilities. It was not necessary to use the next tool and that was to draw adverse inferences.

[30] On the probabilities, the version of Herbert is probably the correct version and that is simply so because of the denial of the fourth respondent that the altercation took place and when confronted with her written statement she had to admit that she did not present the correct evidence on this issue and therefore tried to cover her own position by denying having made this particular allegation.

[31] There is no indication as to why Herbert would have falsely accused her of having made the slur. On the other hand she had all the incentives in the world to protect her own position by denying that she had said it. The Commissioner adopted the wrong test, to protect her, and thereby avoided dealing with the facts of the matter.

[32] The Commissioner in respect of the three allegations of misconduct held that the employer did not discharge the onus in proving those allegations.

[33] His reason mainly was that in respect of allegation 1 the employer had to prove that the keys were handed over and that she did so with the intention for the chief security officer to open the shop. In the absence of any one of those two elements the charge had not been proven. That is not the correct approach. It is an over technical approach to this allegation of misconduct. The mere handing of the keys to the chief security officer constituted misconduct.

- [34] The allegation of misconduct covered a number of things: that she circumvented her responsibilities as a manager, that she transgressed Shoprite's standing procedures by handing the store keys to a member of a service provider, and in addition to that, for him to open the store. Such an interpretation is in line with the approach that allegations of misconduct should not be regarded in a too technical light. The commissioner construed the allegation of misconduct in a very technical and constrained manner.
- [35] The commissioner's reason for finding the fourth respondent not guilty on this allegation of misconduct cannot stand as reasonable.
- [36] The fourth respondent's representative submitted that there was no rule that the fourth respondent could not hand the key to a security service provider. The argument goes that on page 70 of the record there is a document that shows who are authorised and who are not authorised to have the keys to the shop and that under the name of Ms Fagera, who was authorised, there also appears the name of the security officer as an authorised person.
- [37] There was no oral evidence on this issue and secondly the name that appears there is R Ntabineng while the name of the security officer was Cecil of the same surname.
- [38] In respect of the second allegation of misconduct, the Commissioner similarly took a very narrow approach to the allegation of misconduct and required of the employer to prove more than one instance of racial remarks in order to succeed. Secondly he interpreted the allegation that the slur had to be made to more than one person too. This, again, is an overly technical approach to the allegation of misconduct.
- [39] The employer clearly succeeded in showing that there was at least one incident where a racial slur was made and to whom it was made. There was no need in order for the employer to succeed, that the employer had to prove more than one incident.

[40] The employer, the applicant in this matter, argued that the Commissioner acted improperly and that his conduct constitutes an irregularity in the way that he conducted the arbitration proceedings.

[41] That may very well be so. It is a case where the Commissioner became involved in issues to the extent more than one would readily accept to be his function. This however, to me seems to be one of those process-related issues that did not affect the outcome of the arbitration.

[42] I am not of the view that the proceedings were affected to the extent that it is necessary to have a new or a fresh arbitration in this matter.

[43] I have considered whether the award is one that a reasonable Commissioner could not have arrived at. However, in assessing the approach of the Commissioner and the outcome according to the Commissioner, I am of the view that it is an unreasonable outcome.

[44] The Commissioner failed in applying the correct tests in assessing the evidence and assessing whether the evidence substantiated the allegations of misconduct. In doing so he arrived at an unreasonable conclusion. The allegations of misconduct are of a very serious nature. The evidence has shown that the consequences of non-compliance with the policy on the possession of the keys could have resulted in serious consequences to the applicant and that this alone would have been a breach of the trust relationship.

[45] Secondly, this court has always taken a serious view with regard to racial slurs and that in itself would also constitute a dismissible offence, unless there are very strong mitigating factors of which none have been raised, as the allegation was denied.

[46] I first want to deal with costs.

[47] I have been asked to make a cost order on the basis that the review should not have been opposed. None of the other factors that may influence a cost order have been raised before me. I do not believe that the opposition was misguided and therefore I am not inclined to make any cost order.

[48] I make the following order:

[48.1] The arbitration award GHATW4138/2012 dated 10 February 2013 is reviewed and set aside and substituted by the following:

'The dismissal of the applicant was substantively and procedurally fair'

[48.2] There is no order as to costs.

Faan Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant[s]: MS Edward

Instructed by: Mervyn Attorneys

For the Respondent: Mr Khoza

Instructed by: Carrim Attorneys

LABOUR COURT