IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 08/2004

SHOPRITE CHECKERS (PTY) LTD	**Appellant**
and	
COMMISION FOR RECONCILIATION, MEDIATION & ARBITRATION	**First Respondent**
ROMODIKE, W, N.O	**Second Respondent**
SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION	**Third Respondent**
NKUNA, S	**Fourth Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] On 15 November 2000, appellant charged fourth respondent, an assistant baker at its store in Louis Trichardt as follows:

> '1. Dishonesty, alternatively in breach of company rules in that you consumed company property without paying;
> 2. Breach of company rules in that you consumed food and drink in places not designated therefore.'

[2] On 13 December 2000 the fourth respondent was found guilty as charged at a disciplinary enquiry and subsequently dismissed. He challenged both the substantive and procedural fairness of his dismissal at an arbitration convened by first respondent and

presided over by second respondent.

[3] On 11 September 2001 second respondent found that fourth respondent's dismissal had been substantively unfair, on the basis that he was not guilty of the charges of misconduct brought against him. Accordingly he ordered his reinstatement.

[4] On 23 October 2001 appellant launched an application for review to set aside second respondent's award in terms of section 145 of the Labour Relations Act 66 of 1995 ('The Act'). On 26 September 2003 Revelas J, in the Labour Court, handed down a judgment in which she found that, while second respondent's findings on guilt were open to attack on review, the sanction of dismissal was unfair in the circumstances. Accordingly, she substituted second respondent's award of reinstatement to that of a final written warning. With leave of the court *a quo,* appellant has come before this court on appeal against this decision.

The substance of the dismissal

[5] On appeal, Ms Sikhakhane counsel for fourth respondent, conceded that the appellant had proved the charges against her client. Accordingly, the case turned exclusively on the nature of the appropriate sanction.

[6] This concession was wisely made. The evidence of Mr van Staden, the administration manager of appellant and Mr Mthombeni, the store manager, confirmed that appellant had installed surveillance video cameras in the store during October 2000. Fourth respondent was clearly captured on these video cameras contravening store policy on two separate occasions. On 7 October 2000 the video shown to second respondent revealed that fourth respondent had eaten a plate of pap and that, before he consumed the pap, he had ensured that the roller door was closed so that no one could see his actions.

[7] On 11 October 2000 the video revealed fourth respondent removing a piece of bread from the preparation table of the deli, a department of the store in which he did not work. He consumed the bread after having opened and looked into the

"pap cooker" in the deli to see if the pap was ready. Less than an hour later, having placed a plate of pap on a trolley in the preparation area of the bakery, fourth respondent proceeded to eat the pap while in the process "blocking the whole view of the food with his back", according to the testimony of Mr van Staden which was uncontested. Further, as Mr van Staden testified, he was found "peeping around to see if someone was coming" Mr van Staden also confirmed that fourth respondent was careful not to consume any food when other people passed by him. Two hours later fourth respondent sat down at the preparation table and ate pap from a dish or container, having decanted it from another container.

[8] The fourth respondent's developed a defence to the theft of the three helpings of pap and the piece of bread as well as the prohibited consumption thereof in the preparation areas in the bakery and the deli. He claimed that he had purchased the pap from Ms Mudumela, an informal food trader, who delivered the food to him at work. Hence he denied that he had stolen pap from the store. While the piece of bread that fourth respondent consumed belonged to appellant and was consumed without permission having been obtained, he claimed that he had eaten it in "the process of testing the bread which had been baked the previous day for [the deli staff…] to prepare sandwiches". He further testified that Mr Mthombeni had given employees, such as fourth respondent in the bakery and deli, permission to drink tea and coffee and eat at their work places. Accordingly, he had not contravened any rule by virtue of his conduct depicted on the video.

[9] The evidence of Ms Mudumela proved to be of no assistance to fourth respondent. She was not in a position to confirm whether fourth respondent was involved in consuming her pap during the incidents captured on the video on 7 and 11 October 2000. She was not able to confirm that the plate and bowl from which fourth respondent ate, and which was depicted on the video, belonged to her.

[10] Fourth respondent also gave contradictory versions regarding why he had proceeded to the deli on 11 October 2000, including that he had attempted to assist the deli staff in serving customers, that on the request of the deli supervisor he had tested bread, that he had to check the "pap cooker" and that "he had to check the yeast that was kept in the deli fridge".

[11] The finding by second respondent that fourth respondent was not guilty of eating in the prohibited area and therefore not guilty of dishonesty in consuming the pap and bread which belonged to the appellant was based on an uncritical acceptance of fourth respondent's testimony which, as I already noted, was unsatisfactory in the extreme. In addition, the evidence of both Mr Mthombeni and Mr Van Staden was clear: there was no basis for the contention that employees in the bakery and deli area, who were allowed to drink tea at their workplace, were also entitled to eat at the same time. Such conduct was contrary to the clear, published rules of appellant. None of this evidence was taken into account by second respondent.

[12] The inability of Ms Mudumela to provide any substantial support for the version of fourth respondent was also ignored in the findings of second respondent.

[13] When the matter came before Revelas J, she found:

"The arbitrator may be wrong in the conclusion based on the evidence before her, but it is not necessary for me to make a finding as to whether she was incorrect or correct with regard to her findings on the evidence. I still need to consider whether the dismissal was fair and whether it was indeed the appropriate sanction even if I agree with the applicant's contentions. It is quite trite that employers in a retail business suffer huge financial losses as a result of shrinkage caused, *inter*

alia, by their staff who steal from them. It is also trite that dismissal would, in the vast majority of cases, be the only appropriate sanction. Yet I believe that this was a case where dismissal should not have been imposed."

[14] In my view, Revelas J erred in adopting this approach. For the learned judge to deal with the question of a sanction for dismissal, the prior question, namely whether the dismissal was fair, had to be answered. On the basis of the evidence as I have outlined it, the dismissal was substantively fair. There was also no objection to the procedural basis of the dismissal. Having so found that the dismissal was fair, Revelas J could then have properly moved on to deal with the appropriate sanction.

The appropriate sanction

[15] Mr Myburgh, who appeared on behalf of the appellant, produced a meticulous and carefully researched set of arguments concerning the question of the appropriate sanction. He submitted that the decision by Revelas J not to dismiss fourth respondent because of the relatively small value of the items which was stolen and the nine years of an unblemished service record of fourth respondent was at odds with the jurisprudence of this court.

[16] In brief, this court has consistently followed an approach, laid out early in the jurisprudence of the Labour Court in Standard Bank SA Limited v CCMA and others [1998] 6 BLLR 622 at paras 38 - 41 where Tip AJ said: "It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."

[17] That decision was followed by Mlambo J (as he then was) in Metcash Trading Limited t/a Metro Cash and Carry and another v Fobb and another (1998) 19 ILJ 1516 (LAC) at para 16 - 17 where the learned judge found that in relation to the consumption of one 250 ml bottle of orange juice "theft is theft and does not become less because of the size of the article stolen or misappropriated".

[18] In Leonard Dingler (Pty) Ltd v Ngwenya (1999) 20 ILJ 1171 (LAC) an employee was found guilty of removing a few bale boards from the premises, each bale board being worth no more than R8.50. He was dismissed. When the matter came before this court, Kroon JA said the following at para 78: "Was dismissal of the respondent an unfair sanction? I am persuaded that this question falls to be answered in the negative. It is true that the respondent had a long record of service (7 years 10 months…) with no

previous record of a disciplinary offence. On the other hand, Oosthuizen testified that the appellant experienced theft by its employees on a large scale. It follows that a measure of deterrence is called for. The respondent's conduct was not only dishonest but was premeditated, planned and persistent. The overlapping triad of misconduct, incapacity and operational necessity … was present. Moreover, regard may further be had to the manner in which the respondent conducted his case in the court *a quo*. It embraced a false accusation of perjury against, inter alia, a director, of the appellant and a charge against him that for ulterior motives he made a false accusation the subject of disciplinary proceedings against the respondent. No viable employer – employee relationship remained."

[19] A similar approach was adopted in Rustenburg Platinum Mines Ltd (Rustenburg Section) v National Union of Mine Workers (2001) 22 ILJ 658 (LAC). In this case an employee had been employed on the mine as cleaner in the kitchen for some fifteen years. She was dismissed for attempting unlawfully to remove meatballs from the kitchen. The mine had a strict policy on theft or the unauthorized possession of company property. All employees were aware that they were dismissible offences. The court confirmed the finding that she was guilty of the theft of the meatballs and found the dismissal, in these circumstances, to be justifiable, commenting: "Particularly is this so in the light of her working with or in the proximity of food which can easily be stolen." (at para 22.)

[20] A similar approach was also adopted in Lahee Park Club v Garratt [1997] 9 BLLR 1137 (LAC) at 1139 in which this court confirmed the dismissal of the secretary of the sports club with an unblemished service record of seven years for writing off a subscription of a member valued at R60 as a favour to such member.

[21] The principle on which these decisions are all based is encapsulated in a *dictum* of Conradie JA in De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and others (2000) 21 ILJ 1051 (LAC) at para 22: "A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

[22] In the present case, the uncontested evidence revealed that, during October 2000, appellant's store in Louis Trichardt lost 2.95% of turnover due to shrinkage which equated to a loss of some R144 000. Mr van Staden's uncontested evidence was that employees were aware of the shrinkage problems and of the company rules designed to prevent or control such shrinkage. The shrinkage problem had been mentioned in several meetings, and after every stock take results were posted on notice boards. A feedback meeting was held with all employees during which the company rules were discussed. In the canteen notices were displayed and the contents thereof routinely

reinforced by the Store Manager. It was precisely because of its attempt to curb shrinkage that appellant had installed surveillance video cameras in the store.

[23] Mr Myburgh very properly referred this court to an unreported decision of the court in Shoprite Checkers (Pty) Ltd v The Commission of Conciliation, Mediation and Arbitration and 3 others (unreported decision of the LAC: Case no: JA 46/05). The approach adopted in this case appears to run counter to the court's jurisprudence as analysed as well as appellant's submissions. In this case an employee had been captured on the store video camera on three separate occasions eating in areas in which such activity was prohibited. He was subsequently charged with misconduct, found guilty and dismissed. It was common cause that the monetary value of that which was consumed was unknown. 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 thirty years of service and was a first offender. Accordingly the commissioner found that the sanction of dismissal was 'quite severe'. On review before this court, Zondo JP held at para 26:

> "I know that from the appellant's point of view this cannot simply be about monetary value of the food that fourth respondent ate. For the appellant, it is probably about a principle and the real problem of shrinkage that it and other similar business 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 this 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 R 33 000, 00 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"."

[24] This decision appears to adopt a different approach to the body of jurisprudence as analyzed in this judgment. However, in that case the employee had 30 years of unblemished service. While that employee contended that he had been authorized 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.

[25] 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 been 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 specialty 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.

[26] In the result, the appeal is upheld with costs and the order of the court *a quo* is replaced with the following order:

1. The review application is granted with costs.

2. The dismissal of fourth respondent is declared to be fair.

DAVIS JA

I agree

TLALETSI AJA

I agree

NDLOVU AJA

Date of Judgment: **20 June 2008**

Date of Hearing: **29 May 2008**

Appearances

For the appellant	**Advocate A T Myburgh**
Instructed by	**Perrott, Van Niekerk, Woodhouse, Matyolo Inc**
For the respondent	**Advocate N Sikhakhane**
Instructed by	**Legal Aid Board Louis Trichardt**