**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 49/14

In the matter between:

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| **SHOPRITE CHECKERS (PTY) LTD** | **Appellant** |
| and | |
| **TOKISO DISPUTE SETTLEMENT** | **First Respondent** |
| **SHAAM GOVENDER NO** | **Second Respondent** |
| **NOTOMBENHLE MZOLO** | **Third Respondent** |

**Heard:** **14 May 2015**

**Delivered:** **24 June 2015**

**Summary: Review of arbitration award – appropriateness of sanction – employee dismissed for failing to declare personal goods – employer applying its zero tolerance policy and dismissed employee for first time offence for her failure to declare her goods – commissioners having wide power to assess the fairness of dismissal – application of zero tolerance policy depending on each circumstance – employer blurring the rule to declare any property to theft – employer's policy providing for mitigation of sanction upon production of a receipt that the property belonging to employee – employee's dismissal disproportionate – commissioner's award unreasonable – Labour Court's judgment upheld – appeal dismissed.**

**Coram: Davis JA, Ndlovu JA *et* Landman JA**

**Neutral citation: Shoprite Checkers (Pty) Ltd v Mzolo (LAC 49/14)**

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**JUDGMENT**

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LANDMAN JA

Introduction

[1] Shoprite Checkers, the appellant, appeals against the whole judgment of the Labour Court (Cele J) delivered on 12 September 2013, which set aside an award by Shaam Govender NO, a commissioner of the Commission for Conciliation, Mediation and Arbitration (the CCMA), and replaced it with an order that the dismissal of Ms Ntombenhle Mzolo, the third respondent, was substantively unfair. The appeal is with the leave of this Court.

The facts

[2] The third respondent commenced her employment with the appellant in June 2002. She progressed to the position of a supervisor. On 10 November 2009 when she left the store, she was found in possession of uncancelled/unpaid "Shield for Men", a roll-on deodorant, in her handbag. On 7 December 2009,,she pleaded guilty at a disciplinary hearing to the offence of being in possession of uncancelled/unpaid goods when leaving work. She gave evidence in mitigation of the sanction. The third respondent told the hearing that she had gone to see her doctor on 10 November and that the doctor had asked her not to apply deodorant when she came for an appointment. She put the deodorant in her handbag and forgot to clear it before coming into the store. She did not use deodorant every day and this is why she forgot to declare it. She was under the impression that

the company would give her a warning for the first offence of this nature and that she would only be dismissed if she transgressed for the third time.

[3] Under cross-examination, the third respondent admitted that she did not have a doctor's appointment for 10 November 2009. But she nevertheless decided to visit the doctor on that date. The doctor's note that instructed her not to use deodorant when she came for an appointment was dated 30 March 2009. She was dismissed from her employment with the appellant.

The arbitration

[4] The third respondent referred a dispute about her dismissal to the CCMA. The dispute was subsequently enrolled for arbitration. She was not permitted legal representation at the arbitration. The appellant was represented at the arbitration by its regional personnel manager. It is common cause that the only issue that the commissioner had to decide was whether dismissal was an appropriate sanction in the circumstances.

[5] The third respondent told the commissioner that she went to the doctor on the day in question. She was worried that she had cancer. On leaving the doctor, she used the deodorant and put it in her bag and forgot about it. It was discovered by a security guard when she left work that afternoon. She maintained that she had not yet been diagnosed as at 20 April 2010 and therefore did not know whether she had cancer. She had not gone for an X-ray. She produced the doctor's note referred to above.

[6] The third respondent insisted that the deodorant had been used and did not belong to the appellant. She said that if it was brought to the arbitration, this would be established.

[7] Under cross-examination, she conceded that the doctor's note was dated 30 March 2009. She was asked whether she knew that she had a doctor's appointment on 10 November 2009. She replied that she knew this, but she did not go to the doctor. Then she changed her version and said that she did in fact

go to the doctor on that date. Later, she again stated that she did not have an appointment with the doctor for that day.

[8] The third respondent acknowledged that she knew that the company rules, designed to counter shrinkage, required her to have items cancelled at the security office. She said she forgot to declare it. She said she would not steal a deodorant which is valued at R11.99. She has two children to support. It was put to her that the appellant did not allege that she stole the goods and she was given several weeks to bring proof of purchase of the deodorant and show it to the appellant.

[9] Mr Percy Molaodi testified at the arbitration that he was a fresh sales manager. He chaired the disciplinary hearing. He described the company policy about personal belongings. He said that if an employee is found with uncancelled goods, the penalty is dismissal. This penalty had also been applied at other branches. The third respondent was given an opportunity to bring proof of purchase, but she did not do so. He saw the deodorant. It was new and had not been used because he opened the roll-on to check this. He confirmed that he dismissed the third respondent.

[10] The commissioner was satisfied that as a supervisor, the third respondent was aware of the rule that she was required to declare goods in her possession. The commissioner did not accept her version that she had forgotten to declare the deodorant to the security staff when she arrived at work. The commissioner was satisfied that the appellant acted consistently and that employees who were found guilty of this offence were dismissed. The commissioner noted that this evidence was not challenged. The commissioner found that the sanction of dismissal was appropriate and therefore the dismissal was substantively fair.



The review

[11] The third respondent applied to the Labour court to review and set aside the award of the commissioner. The court *a quo*, noted that the third respondent pleaded guilty on the understanding that she would receive a warning. The court *a quo* found that the commissioner had not assisted the third respondent when it became necessary for her to challenge the version of Mr Molaodi. The court *a quo* regarded this as a very material omission on the part of the commissioner and that it was unfair to turn around and blame the third respondent for her failure to contest this evidence.

[12] It would seem that in addition to this irregularity, the court *a quo* disapproved of the reasoning and the conclusion reached by the commissioner in her award. The court *a quo* said:

> *'[21] In my view this application is meritorious. I am not satisfied with the fact that the third respondent proved the fairness of the dismissal. During the arbitration hearing, there was clearly a higher probability of the commissioner having to find here that dismissal was too harsh and the commissioner misdirected itself in the face of the evidence that was on record. The commissioner was dealing with an employee who had pleaded guilty, who clearly would have showed remorse in the circumstances and who clearly had been to a doctor at some stage in the morning of the day in question. To say her version was not reliable and was not probable because she had not taken the medical test is also a misdirection in that on her undisputed version she had been to a doctor that morning.*
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> *[22] As to the aspect of the applicant carrying a deodorant that she was not used to using, and that she had not used on that on the day, that is immaterial as she did undisputedly carry that deodorant. She did fail to cancel it. That is why she is guilty. We are not dealing with the issue whether she is guilty or not we are moving from the premise that she is guilty and we cannot use the material for returning the guilty verdict in determining the fairness of the sanction.*
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> *[23] The evidence on record satisfies me that the commissioner ought to have found that the dismissal was not a fair sanction. She ought to have found on the*

*contrary, that in the circumstances, a fair sanction would have been one of either a written warning or a final written warning, but not sanction of dismissal.'*

Evaluation

[13] Before evaluating whether the court *a quo* correctly set aside the award, it is necessary to place the nature of the offence in context and to make some general observations. In this case, the charge brought by appellant was not theft, but rather was based on a failure to account for the deodorant; that is a failure to cancel. It is important not to blur the distinction between the charge brought by appellant and a charge of theft.

[14] It is common knowledge that retailers are faced with what is termed shrinkage that is partly attributable to misappropriation of stock by their employees. Shrinkage has significant financial implications for retailers. One of the steps taken to counter shrinkage is to require employees, on entering the store, to declare (the terminology used is "cancel") their property unless it is obviously not company stock. A failure to do so constitutes a disciplinary offence. This rule also assists in countering a defence, if an employee is found in possession of stock and charged with theft, that the stock is the lawful property of the employee.

[15] Although the failure to declare the property takes place as a measure to counter theft, the offence created is not one of theft. A repeated breach of this rule may be made a dismissible offence, not because a breach of the rule constitutes theft, although it may lend support to a suspicion of theft, but because a repetition goes to show that the offender wilfully refuses to co-operate with this rule in countering shrinkage and is untrustworthy.

[16] It is difficult to appreciate how a single transgression of this rule, except as regards high value goods, is sufficient to warrant dismissal and all the unfortunate consequences that it embraces. In fact, the nature of the mischief which the rule is aimed at seems to only come to the fore once there has been a previous transgression.

[17] It is also necessary to make some further remarks as regards dismissal for a first offence ie a "zero tolerance" policy. A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.

[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. See the incisive contribution by André van Niekerk "Dismissal for Misconduct – Ghosts of Justice, Past, Present and Future" in Le Roux R and A J Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (Juta 2012) 102-119. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees.

[19] I now turn to the facts and circumstances of the dismissal of the third respondent. The evidence of the manager is that the appellant applies a strict policy and regards dismissal as the appropriate sanction for a single infringement of the rule relating to "cancellation" of goods. There is no evidence that this approach or policy is known to employees of the appellant. Secondly it is contrary to the appellant's code of conduct, handed in at the arbitration, which mentions the offence and then states that <u>it may</u> lead to a disciplinary sanction including dismissal.

[20] In this instance, although the manager says that dismissal is the sanction for a single transgression, he also says that on production of a receipt, showing that the goods were purchased, the sanction would be a final written warning. Leaving aside for the moment the import of proof of purchase, dismissal is not the only remedy that the appellant applies for a single transgression.

[21] I return to the appellant's approach to grant leniency if the offender produces a receipt ie proof of purchase of the stock either from the employer or another vendor. As the offence is not theft, the receipt goes only to prove a genuine lapse in compliance with the rule that is relevant as regards the appropriate sanction (if any). In this case, the approach of the manager seems to betray a view that failing to cancel the goods created the offence of theft which can only be mitigated by proving that there was no misappropriation of company property as the receipt shows that the possession and removal of the goods is lawful. The offence of failing to cancel goods is not tantamount to theft, although it is a useful countermeasure to theft.

[22] Even assuming that the appellant was pursuing a zero tolerance policy, it was not one that is appropriate for an infringement of this rule without further evidence from appellant for the justification of such an inflexible policy. In any event, the commissioner is required to consider whether the circumstances of the case warrant dismissal. If it does not, then irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction.

[23] Although the employee was not a good and truthful witness she pleaded guilty to infringing the rule. This is a mitigating circumstance. Her other circumstances indicates that a final written warning is called for as opposed to dismissal. Her dismissal for a single transgression was, in these circumstances, unfair. The award of the commissioner is not one that a reasonable commissioner would have made. The commissioner should have replaced the sanction with a final written warning.

[24] I have reached the same conclusion as the court *a quo*, albeit for slightly different reasons and consequently the appeal must be dismissed.

The order

[25] I make the following order:

1. The appeal is dismissed.
2. There is no order as regards the costs of the appeal.

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Landman JA

Davis and Ndlovu JJA concur in the judgment of Landman JA

APPEARANCES:

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| FOR THE APPELLANT: | Ms Mairead Edwards of Mervyn Taback Inc |
| FOR THE THIRD RESPONDENT: | Adv D Brown |
| | instructed by Kgotleng Attorneys |