IN THE LABOUR COURT OF SOUTH AFRICA

DURBAN

Case no: D06/2019

Not Reportable

In the matter between:

NANDO'S SCOTTSVILLE — Applicant

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — First Respondent

NICCI WHITEAR-NEL N.O — Second Respondent

NTOKOZO SANDILE GWALA — Third Respondent

Heard: 2 March 2022

Delivered: 14 April 2022

JUDGMENT

ALLEN-YAMAN AJ

Introduction

[1] In this application the applicant seeks to review and set aside the award issued by the first respondent under KNPM 1990-18. If it is found that the award is to be reviewed and set aside, the applicant seeks that the matter be remitted to the first respondent to be determined *de novo* by a commissioner other than the second respondent or, in the alternative, that this court substitute its own determination in favour of the applicant, being an order that the dismissal of the third respondent be declared to have been substantively fair.

[2] The application is opposed by the third respondent.

[3] The award in question is one in which the second respondent found that the third respondent's dismissal had not been the appropriate sanction for the infraction in question, as a result of which finding she awarded him reinstatement, without retrospectivity.

Background

[4] The applicant is Chicken Land (Pty) Ltd, which trades under the name of Nando's, throughout South Africa and internationally. The applicant operates a franchise, the business of which it is to sell cooked chicken and related food items to the public through its various restaurants. The events which resulted in the termination of the third respondent's employment took place at the store at which he was employed, in Scottsville.

[5] The third respondent was employed by the applicant in April 2014. At the time of his dismissal he held the position of front griller. In addition to his functions as an employee, the third respondent was a Nando's Community Forum Representative. In such latter capacity, the third respondent would act as a go-between between employees and management of the applicant in dealing with employees' various issues from time to time.

[6] The applicant's first witness, Mr Doctor Matsapa, testified that the third respondent had been cross-trained to work in areas of the store other than front griller; for example in the food preparation station, the dining area, and the cash desk.

[7] It was common cause that on 8 April 2018 the third respondent had taken two individual slices of carrot from the bain-marie and had eaten them. The third respondent's actions were not known to the applicant's management at the time thereof but were discovered some time later during the course of an investigation regarding a different issue. The applicant waited a period of some three and a half months before having taken action against the third respondent.

[8] When the applicant ultimately took a decision to take action against the third respondent it did so by suspending him at the beginning of July 2018 and asking him to explain his conduct; in the first instance verbally and in the second instance by way of a written statement. On 11 July 2019 the applicant called him to attend a disciplinary hearing in respect of an allegation of misconduct.

[9] The relevant portion of the charge sheet given to the third respondent reads as follows,

'At the disciplinary enquiry you will be afforded the opportunity to respond to the following allegations against you:
Gross Misconduct: Unauthorised Consumption of Company Stock – In that it is alleged that you were dishonest by consuming company stock being vegetables whilst on duty on the 08/04/2018 at Nandos Scottsville.'

[10] On 30 July 2018 the chairman of the disciplinary hearing concluded that the third respondent had been guilty of the infraction complained of and found that the employment of the third respondent should be summarily terminated.

[11] The applicant accepted the chairperson's recommendation and notified the third respondent of his dismissal the following day.

[12] The third respondent referred a dispute to the first respondent in which he challenged both the substantive and procedural fairness of his dismissal.

[13] The second respondent was appointed to arbitrate the dispute. At the conclusion of that process she handed down the award which forms the subject matter of the present application, finding that the dismissal of the third respondent had been substantively unfair, and awarding him reinstatement.

Grounds of Review

[14] The applicant's application is premised upon the assertions made by it that the second respondent applied her mind incorrectly to the evidence before her, as a result of which she reached a conclusion that would not have been reached by any reasonable commissioner.

[15] The applicant challenges the second respondent's finding that the misconduct in question excluded an element of dishonesty. Had she found that dishonesty had in fact been present in the act of misconduct she would not have concluded that the trust relationship was not broken, as a consequence of which she would not have awarded the applicant reinstatement.

Analysis

[16] As stated above, it was common cause that the third respondent ate two slices of carrot, directly from the bain-marie. It was also common cause that the third respondent had not obtained any authorisation to have done so from anyone in authority prior thereto.

[17] It was also not in dispute that the applicant's Disciplinary Code prohibits the unauthorised consumption of the applicant's stock. This particular infraction, found listed as transgression number 22, categorises this type of misconduct as a breach relating to *'dishonesty, theft, unauthorised possession or fraud,'* being a Level 4 (very serious) offense, and recommends the sanction of dismissal for a first offence.

[18] Having admitted that he had eaten the two slices of carrot in question, the applicant explained that he had done so in the circumstances of having tasted them for the purpose of determining whether the carrots were of a suitable standard to be served to the applicant's customers.

[19] He recorded the events of 8 April 2018 in a written statement dated 5 July 2018 which he provided to the applicant,

'I cooked vegs on the oven when I took them out the were not cooked right, they had ice in the middle, (indistinct) me taking a carrot I was testing it I can (indistinct). I didn't know by that I'd be fired.'

[20] His version of the events of the day given at the disciplinary enquiry was recorded in slightly more detail by the chairperson thereof, Mr Geoff Cochran,

'5. SUMMARY OF THE EMPLOYEE'S CASE

The employee lead (sic) his own testimony.
The employee explained he does not remember the incident very clearly as this was some time ago but he has been reminded by the CCTV,
The employee stated he cooked two packets of veggies in the Bain Marie in the oven and the process is to remove these out when the oven buzzes.
The employee stated he has been with the company a long time and usually works the front grill cooking chicken but he had (by his own request) recently moved to this station.
The employee stated he therefore is not familiar with cooking veggies, and when he took these out, they had ice on them.

Another employee had observed these veggies being taken out and he had seen the ice on them.
The employee explained that they are taught to serve what is correct only and therefore he tested this product by tasting it and taking a bite.
The employee stated that this veggie he tried was hot and he therefore bit it and then left it and took another later to test again.
Another back griller employee came to see what was up and the employee then explained to her he will stake a second taste to now see if the product was in fact cooked.
The employee acknowledged that each time he faces a problem, he will call the manager on duty, but on this occasion could not remember if he did call a manager or not. He could not even remember if it was a female or male manager on duty.
The employee referred back to the CCTV footage and explained that he was only trying to see if the product was correct and trying to serve the correct product.'[1]

[21] He reiterated this version of events at the arbitration.

[22] On the basis of the established prohibition against consumption, and the fact that the applicant admitted to having eaten the carrot slices in question, the second respondent concluded that the third respondent had breached a rule regulating conduct in the work place.

[23] That is not, however, where her enquiry ended. She correctly observed that,

'5.5 In the applicant's case however, his charge sheet goes beyond the offence as described in the disciplinary code and he is charged with being 'dishonest' in consuming company stock.'[2]

[24] The second respondent was not satisfied that the applicant had demonstrated that the third respondent, in having acted as he did, acted dishonestly. This is the first of the second respondent's findings which the applicant contends is unreasonable.

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[1] Record, Documents, pages 72 - 73
[2] Pleadings, Award, page 21

[25] In these proceedings he applicant has advanced two distinct arguments in regard to the issue of dishonesty.

[26] On the one hand it contends that the mere consumption of company stock without authorisation or approval demonstrates an intention on the part of an employee to deprive the applicant of its property, and accordingly the element of dishonesty is inherently present in every act of unauthorised consumption. As the disciplinary code draws no distinction between tasting and consumption, unauthorised consumption includes an element of dishonesty. Accordingly, the second respondent ought not to have considered the issue of dishonesty as a distinct enquiry beyond her having already determined that the third respondent had committed an act of unauthorised consumption.

[27] On the other, the applicant argues that the element of dishonesty was established on the evidence on a balance of probabilities, and the second respondent ought to have concluded that the third respondent's conduct, in having consumed the two slices of carrot, was in fact dishonest.

[28] The first proposition must fail for at least two reasons. The first is the manner in which the charge sheet was drafted. The second relates to the historical consumption by the applicant's managers of 440 ml beverages in circumstances in which they were only permitted a 330 ml allowance.

[29] In so far as the charge sheet was concerned, the applicant saw fit to include therein the allegation that the third respondent had conducted himself dishonestly by having consumed the two slices of carrot without authorisation. This can mean nothing other than that the converse situation may arise; that unauthorised consumption may occur in situations in which an employee does not act dishonestly. Had the applicant been satisfied that unauthorised consumption of any of its products, for whatever reason, constituted an act of dishonesty then it would have been unnecessary for it to have included this particular element in the charge itself.

[30] That dishonesty is not an inherent element of unauthorised consumption is evinced by the applicant's own treatment of its managers. The evidence demonstrated that at a point in time (before the incident relating to the third respondent) store managers were entitled to consume a 330 ml cooldrink with their staff lunches. Apparently as a consequence of some confusion (which was not explained) many (if not all) store managers throughout South Africa were labouring under the impression that they were entitled to consume a 440 ml cooldrink with their staff lunches. This they did, having rung up the 440 ml cooldrink on the cash registers. None of the managers who were confused by the policy were disciplined, let alone dismissed, for having consumed on an unauthorized basis in excess of 110 ml cooldrink over an extended period of time. This was so because the applicant had accepted that the unauthorised consumption in question had occurred as a result of some type of misunderstanding. The applicant accepted that such misunderstanding negated the possibility of dishonesty on the part of the managers.

[31] It is accordingly not open to the applicant to accept that in certain instances unauthorised consumption does not include an element of dishonesty (there presumably having been a *bona fide* reason for the confusion in the minds of the managers) and yet, in the case of the third respondent, argue that unauthorised consumption on its own *ipso facto* demonstrates dishonesty.

[32] The second respondent concluded that the third respondent had not acted with any dishonest intent. The applicant asserts that the second respondent erred by concluding that it had not established any dishonesty on the part of the third respondent. The applicant suggests that the third respondent had been dishonest as evinced by:

1. His failure to have notified management of the problems with the carrots,
2. His failure to have rung up the carrots,
3. The fact that the alleged problems with the ovens were not supported by any evidence,
4. That the procedure for cooking vegetables does not allow an employee to taste the food,

5. The third respondent's version that many other employees tasted the food they were preparing for checking purposes was not put to the applicant's witnesses,
6. That as a NCF Representative he was aware of the rules,
7. The fact that the third respondent, in his referral to the second respondent, claimed that the chairperson of the disciplinary enquiry had been biased and as no bias was established at the arbitration, this *'demonstrates the level of dishonesty adopted by the third respondent.'*

[33] It is correct that the third respondent did not notify a manager that there was a potentially a problem with the carrots. That, however, demonstrates merely a possible breach of the rules, and does not on its own demonstrate dishonesty. The third respondent's unchallenged evidence was that he had drawn the issue of the icy carrots to the attention of his colleague, Mr Shoshe, who had himself felt the temperature of the carrots with his own hand. This was corroborated by the video footage presented in evidence.[3]

[34] The fact that the third respondent did not ring up the two slices of carrots equally fails to demonstrate dishonesty on his part. The converse inference which can equally be drawn by his omission to have done so is that it is indicative of his own belief that he had not been required to do so, and had accordingly done nothing wrong.

[35] It is correct that no evidence was presented which demonstrated that the ovens had malfunctioned on that particular day. That in and of itself does not dispose of the issue of dishonesty in circumstances in which no evidence was presented which demonstrated that the only possible cause of icy carrots was a faulty oven. Where any number of possible causes may have been present, the fact that one such possibility was not proven did not negate the third respondent's uncontroverted evidence that the carrots appeared icy, and that he had at the time discussed the very issue with two of his colleagues.

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[3] Record, Transcript, page 168, lines 6 - 21

[36] It is correct that the Grilled Roast Vegetables procedure manual does not expressly state that the tasting of vegetables is permitted. It also does not prohibit the tasting of vegetables. That the Grilled Roast Vegetable procedure manual is silent on the issue does not establish any dishonesty on the part of the third respondent.

[37] The applicant's assertion that the third respondent had not put his version that everyone tasted the food, and that it was the norm, to its witnesses is correct, but must nonetheless be seen in the context of his opening statement At the very outset of proceedings, in his opening statement, the third respondent stated as follows,

'If whoever is looking at the, at the footage was not just looking for one person which is Ntokoza Gwala why didn't that person see the girl who was cooking the pap tasting it, because each and every day when you are cooking the pap we do taste it. Every day, every employee taste the pap and even the initiator of the, of my case uhm he always tasted the products, he always tasted, more especially the pap and the rice.'[4]

[38] Whilst this version was not put to the applicant's witness in cross-examination, it cannot be said to have been a version which the third respondent had evolved in his evidence pursuant to the close of the applicant's case by virtue of the fact that he had addressed it directly at the outset of proceedings. Like the other issues raised by the applicant and already dealt with, it does not establish any dishonesty on the part of the third respondent.

[39] It is the applicant's position that the third respondent, as NCF Representative, must be aware of the rules of the applicant. The issue of the applicant having been an NCF Representative was certainly dealt with in the course of the arbitration, but there was no evidence led by the applicant which demonstrated that his occupancy in such a position placed him in a more knowledgeable

[4] Record, Transcript, page 153, lines 3 - 8

position in regard to the applicant's rules than any other employee. By all accounts, the function of the NCF Representative appears to be no more than that of an employee representative, appointed to assist the applicant's employees with any work-related issues which they may experience from time to time. The third respondent's occupancy of such position takes the argument that the third respondent acted dishonestly no further. As it was, the only rule in question was that of unauthorised consumption, which the third respondent did not dispute existed. All that was disputed was the motive by which the breach of the rule had occurred.

[40] The final issue raised by the applicant which it suggests is demonstrative of the third respondent's dishonesty is the fact that in his referral form in which he referred his dispute to the first respondent he alleged that the chairperson of the disciplinary enquiry had been biased.

[41] The second respondent did not deal with this issue, presumably because it is one of procedure. As she had awarded the third respondent re-instatement she was not permitted to consider the question of compensation. The applicant argues that the allegation itself demonstrates the third respondent's propensity for dishonesty.

[42] Mr Cochran's own evidence demonstrated his bias without the need on the part of the third respondent to have cross-examined him on the issue. Upon being questioned as to the acceptability of the third respondent's explanation as to why he had tasted the carrots, he stated as follows,

'It is absolutely not allowed, uhm having worked with Nandos probably six years with them being members to the Guardian Employers organisation I have had quite a few dealings with them in terms of matters similar. It is absolutely not allowed for employees to consume any food, this being because that is Nandos product, they are a food industry. It is absolutely disallowed to consume any food. If there is a question as to whether something may be cooked or consumable or underdone or whatever the reasoning might be, the employees must call a manager, inform the manager and they would either waste the product or I guess deal with in the manners they have to see

whether it needs to be (inaudible). Certainly not allowed to try and taste or take any food item. I could even add there I know of prior cases where even waste product coming in off tables is not allowed for employees to eat. Chips where a customer has left chips on their plate and it comes back to the kitchen, so it is a very well-known rule and it is a very well regulated rule in this business.[5]

[43] The statements so made by the chairperson of the third respondent's disciplinary enquiry were not made with reference to any evidence which had been before him at such enquiry, but were made with reference to his own views, opinions and past personal experiences. In rejecting the third respondent's explanation out of hand, he did so on the basis of those views, opinions and past personal experiences. This is not what is expected of a chairperson of a disciplinary enquiry who is required to make a determination as to guilt and, if necessary, appropriate sanction by reference to the evidence presented, and not to his or her own personal experiences and beliefs.

[44] There is accordingly simply no basis upon which the third respondent can legitimately be accused of having acted dishonestly by virtue of the fact that he complained of bias on the part of the chairperson of the disciplinary enquiry.

[45] The charge, as drafted, required there to be an assessment of whether the unauthorised consumption was effected with dishonest intent, and the second respondent was accordingly required to give this issue due consideration. This she did.

[46] Having done so, she found that there had been no dishonesty present in the conduct of the third respondent. This finding was one which was inherently reasonable in consideration of the evidence which was before her.

[47] Having concluded that, although the third respondent had breached a rule in the workplace but that such breach had not been actuated dishonestly, the second respondent proceeded to consider whether dismissal had been the

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[5] Record, Transcript, page 204, lines 2 - 17

appropriate sanction. She found that it had not been. It is the applicant's further case in this application that the relief of reinstatement was inappropriately awarded.

[48] The applicant challenges this finding, arguing that the very act of unauthorised consumption is dishonest, and destroys the relationship of trust between the parties. It contends that, in the present circumstances, the relationship of trust between it and the third respondent has been broken beyond the possibility of repair as a result of the third respondent's dishonesty.

[49] As did the second respondent, I do not find that the act of unauthorised consumption took place in circumstances which the third respondent's conduct could justifiably be categorized as having been dishonest.

[50] The applicant goes further to state that even without the presence of dishonesty, the trust relationship was broken as third respondent was aware of the rules of the company and seriousness of consuming company stock.

[51] The principle of law in which the circumstances in which a dismissal will be justified was stated clearly in De Beers Consolidated Mines Limited v CCMA and Others [2000] 9 BLLR (LAC) per Conradie JA,

'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.'[6]

[52] It is correct that the third respondent committed an infraction in terms of the applicant's disciplinary code, and in terms of that code, the breach of such an infraction is regarded by the applicant as very serious.

[6] At paragraph 22

[53] If the second respondent ought to have found, on all the available evidence, that the trust relationship between the parties had been irreparably damaged as a consequence of such infraction, then it would follow that the only appropriate sanction was that of dismissal.

[54] Three witnesses testified on behalf of the applicant. Each of them testified as to the alleged breakdown in the trust relationship.

[55] The evidence of the initiator of the disciplinary enquiry, Mr Matsapa, cannot be categorized as unequivocal on this particular issue, as the below mentioned extract from his evidence in chief demonstrates,

'Respondent Representative: What is the prescribed sanction for this offence?
Mr Matsapa: It is very serious level 4.
Respondent Representative: Why does the company view this offense as so serious?
Mr Matsapa: It is serious because it is level 4 and it is only, it takes you to inquiry and if you find guilty in as far as dismissal, because they stated on again the house rules there is no unauthorised consumption of (inaudible) is allowed.
Respondent Representative: Would you say the Applicant is in a position of trust?
Mr Matsapa: Yes I would trust him because of uhm schedule him working with products and … (intervened)
Respondent Representative: So is he in a position of trust in this work? Is his position have trust?
Mr Matsapa: When work, on his station when he was still working there?
Respondent Representative: Yes.
Mr Matsapa: Yes I will trust him.
Respondent Representative: Can the company still trust the Applicant?
Mr Matsapa: After this the trust has been broken.[7]

[56] The alleged seriousness of the infraction was said to be established with reference to the applicant's own code, i.e. it is serious because the applicant says it is serious, and it is serious because contravention thereof leads to dismissal. Such evidence was no more than self-serving, circuitous logic.

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[7] Record, transcript, bundle 1, page 176, lines

[57] At to the issue of the trust relationship itself, the questioning of the witness commenced with a leading question. When it became apparent to the applicant's representative that the answer which he was seeking to elicit was not forthcoming, he interrupted the witness to bring him back to the evidence he wished him to give. The concluding statement given in response to the direct question concerning the trust relationship was at odds with the previous statement made by the witness that he, *'will trust the third respondent.'*

[58] This evidence did not objectively and unequivocally establish the reason why the offense in question was to be regarded as serious, and nor did it substantiate the objective basis upon which Mr Matsapa allegedly could not trust the applicant.

[59] Although Mr Matsapa did not go so far as to concede that he did in fact still trust the third respondent under cross-examination, the concessions elicited from him by the third respondent are telling,

'Mr Gwala: Ja and then you said our working, working relationship, you said you trusted me even to work with me. It is on record and then Conrad asked you that do you think the company still trust Ntokozo Gwala then you said no because Ntokozo Gwala broke the trust, the company can no longer trust him. So what, what I ask myself is if you as my (inaudible) as a person I worked with in the company for two years, if you still trusted me, it is simple, it simple say in your eyes our relationship was not broken down, or it was maybe, was our relationship broken down after I tasted the ... (intervened)

Mr Matsapa: After consuming the stock yes because it was the company stock.

Mr Gwala: Yes okay and then you left, you, when you stopped trusted, trusting me you waited, you still worked with me from, because the incident happened in April 2018, you worked with me and then you decided to suspend me in July 2018. Now you are saying you did not trust me anymore but yet you worked with me almost four months, how is that possible?

Mr Matsapa: There was a grievance going on when the evidence and the footage was found, we could not do two cases at the same time, I referred back to the HR what needed to be done.

Mr Gwala: And then?

Mr Matsapa: Then the answer was the grievance need to first be done investigated and feedback be given before another case can be, can take place. That is why it took so long.

Mr Gwala: Doctor, if there is a pending case, you said you know all the, I mean the what you call it, you know the policies and protocols of the company.

Mr Matsapa: Some of them (inaudible).

Mr Gwala: Okay where is it written maybe in your, in your policies and protocols that if there is a pending case you have to wait until you finish that case?

Mr Matsapa: Like I said, I referred back to HR, I did not take those calls by myself and decide to wait until the other case ended.'[8]

[60] After which the third respondent referred the witness to clause 4.2.1 of the applicant's disciplinary code,

'Mr Matsapa: The matter of disciplinary is strictly a function of line manager with the assistance or guidance of human resource department. Management should ensure that where disciplinary action is necessary or warranted such action should be instituted as soon as reasonably possible after the conduct in question or after management becomes aware of such conduct.

Mr Gwala: Your house your disciplinary policy says the management, when the management becomes aware of such conduct okay thank you. Uhm it is clear Doctor to you that I was not a danger to the business and you were happy and satisfied with my services from April 2018 to July 2018? And Doctor when I remember very clear … (intervened)

Commissioner: Allow, let him answer.

Dr Matsapa: That it is clear that we were not in danger?

Mr Gwala: The business was not, was not in danger since you left me working for four months.

Mr Matsapa: Like I said Ntokozo after the investigation were done we were dealing with case I referred back to HR and say we will keep in contact with HR manager.

Mr Gwala: You do not trust me to have been, okay you already answered that sorry. Doctor, according to my knowledge during that four months when I was working with you our relationship did not have a problem, we were working as usual. You did not tell me that I was investigated or whatsoever. And Doctor what shocks me is, is that

[8] Record, transcript, bundle 1, page 186, line 17 – page 187, line 24

during that time I was helping you when you were running the business, not only by doing my job as a front griller, but I was helping you. I remember those days when I use to come in early … (interevened)

Commissioner: But what is your question for the witness?

Mr Gwala: My question is, I am just reminding him that uhm, does he remember … (intervened)

…

Mr Matsapa: When you used to come early, I remember you use to come early.

Mr Gwala: And work for free, do you remember that day when I, I worked for an hour for free when I was helping you, do you remember that? When I can and I volunteered from 14:30 to 15:30, my shift was 15:30 I came to help you.

Mr Matsapa: I remember.

Mr Gwala: You remember, you remember when I was assisting you with the staff when they were doing wrong things, trying to correct them to do right things, do you remember that?

Mr Matsapa: Mhm.

Mr Gwala: Okay if, if Doctor you were asked or if you will give your opinion am I or was I a bad person, or ja was I a bad person when I was working with you? Work relation, like work related.

Mr Matsapa: Ntokozo you are not a bad person when you were working with me, the thing is if there is something wrong that is identified need to be dealt with. It does not mean if you are a hard worker you do something wrong because of your working hard that, that need to fall away. Even hard workers, people that the company believes in them, if they do something wrong in a disciplinary meeting and will take action. If they are found guilty then (inaudible).'[9]

[61] The applicant's second witness was Mr Cochran who testified that his own decision to impose the penalty of dismissal was based upon the following considerations,

'Respondent representative: Uhm then just in your view is the rule consistently applied in terms of the consumption of company stock?

Mr Cochran: Very much so, uhm I, this was not my first dealing with Nandos as I have said, I have dealt with them for a number of years not every day but for a number of

[9] Record, transcript, page 188, line 15 – page 190, line 20

years. They have probable been a member to the Guardian Employers organisation for about eight years. I have chaired a number of enquiries for them, I have conducted many CCMA matters for Nandos and their rule in respect of the consumption of company stock. There is absolutely consistently applied. As I gave the example earlier, I have dealt with the matter at another restaurant, I was originally based in Johannesburg and this was a Johannesburg based restaurant and that was with respect to staff consuming waste product coming off tables, back into the kitchen and that is not allowed either. The consumption of stock or food without food being a staff meal, is absolutely disallowed.

Respondent representative: Was the sanction of dismissal along with the company disciplinary code and consistent with past cases?

Mr Cochran: Correct, the consistency I think I have addressed it, it is very consistent with past cases, but the company also has a very complete disciplinary code. Uhm Nandos disciplinary code places their misconducts and, and their disciplinary actions into what they call levels, level 1's and 2's etcetera. That this would be seen as what would be an extremely, an extremely harsh misconduct and it would warrant the harshest sanction within this business.'[10]

[62] The applicant's final witness was Mr Santosh Maharaj, the applicant's HR business partner, responsible for the region of KwaZulu-Natal. He, like the applicant's other two witnesses, adopted the stance that unauthorised consumption of the applicant's products warrants dismissal,

'So yes to your point you know disciplinary action is to an extent to correct one's behaviour. but you have certain offences that now are deemed to be so serious that the trust relationship is considered to have been broken between employee and employer'[11]

[63] Mr Maharaj reiterated that the delay of some three months in having disciplined the third respondent was occasioned as a result of the applicant wishing to allow the grievance which was then being investigated to run its course.

[10] Record, Transcript, Bundle 1, page 207, line 6 – page 208, line 3
[11] Record, Transcript, Bundle 1, page 235, lines 19 - 22

[64] As was previously stated, the finding of the second respondent that the breach in question had not been committed with any form of accompanying dishonesty was one which was reasonable on all the available evidence.

[65] The issue of whether the trust relationship had broken down irretrievably was then to be assessed on the basis whether, as was asserted by the applicant's witnesses, the unauthorised consumption on its own would justify the sanction of dismissal.

[66] In this regard the applicant appears to have adopted the approach warned against in both Pick 'n Pay Retailers (Pty) Ltd v CCMA and Others (C566/2011) (delivered on 18 September 2014) and Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others (2015) 36 ILJ 2273 (LAC).

[67] In Pick 'n Pay Retailers (Pty) Ltd the Labour Court was required to determine in review proceedings the reasonableness of the commissioner's finding that the dismissal of an employee had been substantively unfair, that employee having been dismissed for having consumed company property without authorisation. The employee, a fruit and vegetable manager, had tasted two pieces of fruit and a small cup of fruit juice for the purposes of determining their suitability for sale to customers. The employee did not perceive what he had done as amounting to 'consuming' the company's product as he had not eaten it for the purposes of satiating himself, he had merely been testing it.

[68] This court, per Lagrange J, accepted that the employee was guilty of the infraction complained of and that the employer was entitled to regard the infraction thereof as serious,

'It is difficult to conclude that the applicant had not breached the rule against consuming company property without authority. As such, he was guilty of the charge. One may also accept that such rules are necessary to preserve the applicant's stock

and the casual consumption thereof to satisfy employee's personal needs does not have to be tolerated and an employer is entitled to treat it as a serious matter."[12]

[69] I, likewise, accept that the third respondent breached the rule (albeit not with any associated dishonesty), and that the applicant was entitled to regard the issue as serious, given that the rule exists to minimize stock losses.

[70] That having been said, in Pick 'n Pay (Pty) Ltd this court was critical of the approach adopted by the employer that, in all instances of a breach of the rule, dismissal was regarded as the only appropriate sanction,

'Then there is the question of his unblemished and lengthy service. It is readily apparent from Sterrenboom's testimony that this counted for nothing in the applicant's view. He reiterated the oft heard adage that the consequence of being found guilty of the office was that dismissal was the sanction in all cases. After nearly two decades since the LRA was enacted and six years after the Constitutional Court judgment in Sidomo and Another v Rustenburg Platinum Mines Ltd and Others,[13] *one might think that the precepts of Items 3(4) and 3(5) of the Code of Good Practice on Dismissal read with s188(2) of the LRA and the emphatic weight given by the Constitutional Court to the importance of having regard to a number of factors in deciding whether it is fair to dismiss an employee for misconduct would have dispelled the notion that a finding of guilty determines the sanction automatically. Regrettably, this case illustrates that this thinking is still prevalent and tenaciously adhered to.*

A related fallacy is that the only way in which a workplace rule can be meaningfully enforced is to dismiss the guilty party in every instance, without ever considering if a less serious sanction might be sufficient and justified in the circumstances of the case.'[14]

[71] A similar approach was endorsed by the Labour Appeal Court in Shoprite Checkers (Pty) Ltd. As per Landman JA, the following principles were stated,

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[12] At paragraph 46
[13] 2008 (2) SA 24 (CC)
[14] At paragraphs 48 and 49

'It is also necessary to make some further remarks as regards dismissal for a first offence i.e. 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.

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.'[15]

[72] In light of these principles, it cannot be found that the dismissal of the third respondent was the only reasonable sanction in the circumstances or that, conversely, the second respondent's conclusion that the third respondent's dismissal had been substantively unfair was one which was unreasonable.

[73] It is apparent that the applicant sought to adopt a zero-tolerance approach to unauthorised consumption. The need for the rule prohibiting unauthorised consumption cannot be doubted, but the need to take into consideration the reason for the breach should not have been ignored. The third respondent did not perceive himself to have been breaching the rule: he appears to have understood the rule to have been relevant to the consumption of food items for personal pleasure. On the contrary, his motive in having breached the rule was

[15] At paragraphs 17 and 18

not to serve his own needs, but was to ensure that the quality of the applicant's product was not compromised.

[74] There was no objective evidence to demonstrate that the relationship of trust between the parties had been irretrievably damaged, notwithstanding the conclusion to that effect attested to by the applicant's witnesses. The objective evidence demonstrated that the contrary proposition was true.

[75] The third respondent was permitted to work for an uninterrupted period of more than three months after the infraction had been discovered. I appreciate that the applicant's evidence was that it was felt that it would be best to allow the grievance which had then been lodged by the third respondent on behalf of various employees to be resolved before dealing with the infraction in question, however, the reason for the failure to have taken immediate action does not change the factual result thereof. For a period of more than three months, with full knowledge of the infraction, the applicant allowed the third respondent to continue to perform his duties, unhindered. Although no evidence was tendered by either party regarding the functions which the third respondent had actually performed in that time, the evidence of Mr Matapa was that he was trained to prepare food (thereby working with the applicant's products), assist at the cash desk (thereby handling the applicant's money), and assist in the dining area (thereby interacting with the applicant's customers). In circumstances in which the third respondent was freely allowed to undertake any or all of these activities on the applicant's behalf, it is difficult to agree with the applicant's proposition that the relationship of trust had been destroyed as a result of the infraction itself. It is equally impossible to agree with the applicant that the second respondent unreasonably took the three-month delay into account in arriving at the conclusion that the trust relationship had not been broken as a result of the infraction.

[76] It is the applicant's further contention that the finding of the second respondent ignored the applicant's evidence of a massive problem of shrinkage. Whilst it is correct that Mr Maharaj testified that the applicant suffers huge stock losses

as a result of unauthorised consumption, this evidence was never substantiated with any particularity.

[77] I accept that as a general proposition the applicant is required to put measures in place to protect itself from losses occasioned as a result of unauthorised consumption, and that the second respondent did not expressly deal with this factor in arriving at her determination that the dismissal of the third respondent had been substantively unfair. However, and even if this singular factor was not taken account by her, it does not mean that her ultimate decision was unreasonable.

[78] Having taken such factor into account in consideration of the second respondent's ultimate conclusion, I do not find that the unsubstantiated statements made by the applicant's witnesses to the effect that the applicant's business suffers huge losses as a result of unauthorised consumption of its products, would have the inevitable result that the third respondent's dismissal would be found to have been substantively fair.

Conclusion

[79] The second respondent conducted the enquiry which she was required to undertake. The findings and conclusions reached by her are conclusions which can reasonably be arrived at in consideration of the evidence which was presented at the arbitration. Her findings and conclusions are therefore those of a reasonable decision maker, and the award is accordingly not susceptible to review.

[80] The application falls to be dismissed.

[81] Both parties sought to be awarded their costs in the event of their success. Section 162 of the LRA provides that this court may make an order as to costs in accordance with the requirements of the law and fairness.

[82] It was argued, on behalf of the third respondent, that he has been obliged to incur costs in opposing this application, which costs he could ill-afford to pay, given that he has at all material times been unemployed. I have no reason to doubt the correctness of this proposition.

[83] There is, however, a further consideration to be taken into account in the award of costs in this court and that is that of the potential damage an order of costs may have to an ongoing employment relationship.

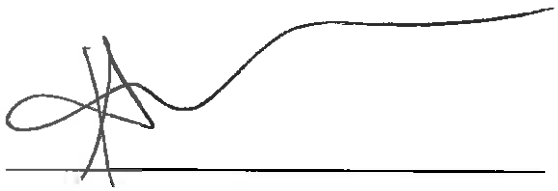
[84] In the present circumstances, the third respondent was dismissed almost four years ago and, after this period of time, is now to be reinstated to his former position. I am of the view that to make an order as to costs in his favour could potentially serve to hamper the re-establishment of a harmonious working relationship between the parties.

[85] In the circumstances, I am of the view that it would be appropriate that each party bear its own costs.

Order

1. The application is dismissed.

2. There is no order as to costs.



Kelsey Allen-Yaman
Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Mr D Berry, Guardian Employers Organisation

RESPONDENT: Mr D Crampton, briefed by Motloli Attorneys Inc