

**IN THE LABOUR COURT OF SOUTH AFRICA HELD IN  
JOHANNESBURG**

Case no: JR 1333\05

In the matter between:

**NEW CLICKS SA (PTY) LIMITED**

**Applicant**

**and**

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**First  
Respondent**

**ZOLISWA TSHETSHE**

**Second  
Respondent**

**SOUTH AFRICAN COMMERCIAL  
CATERING AND ALLIED WORKERS UNION**

**Third  
Respondent**

**JERRY SHAI AND OTHERS**

**Fourth to  
Eight  
Respondents**

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**JUDGMENT**

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**MOSHOANA AJ**

**Introduction**

[1] This is an application brought in terms of section 145 of the Labour Relations Act, 66 of 1995 as amended.

**Background facts**

[2] The individual respondents were employed by the applicant in the receiving department. On or about 10 March 2004 at or

about 11H30, two pallets, each consisting of forty boxes, were delivered to the applicant. At or around 15H00 of the same day, one Sithole Khumalo discovered a shortage of eight boxes in the course of conducting an audit in the receiving department.

- [3] A physical search was conducted and an inventory count was conducted. None of that revealed the missing boxes. The applicant obtained statements from eight employees in the receiving department. Each of those employees, including the dismissed respondents gave account of what happened.
- [4] The applicant also obtained statements from some security guards. The applicant called upon all the eight employees in the receiving department to undergo polygraph tests. Two employees agreed to undergo the test. The dismissed respondents refused to do so. The two employees who underwent the test passed it. The dismissed respondents were then charged with gross misconduct and dismissed.
- [5] Aggrieved by their dismissal, dismissed respondents through their union referred a dispute of unfair dismissal to the first respondent. The first respondent, then appointed the second respondent to arbitrate the dispute. On or about 03 May 2005, the second respondent issued an award, and found that on the balance of probabilities, the applicant has failed to discharge the onus to prove that the employees were dismissed for a fair reason relating to conduct. The first respondent then ordered reinstatement with back pay.

Aggrieved by the award, the applicant brought this application.

### **The challenge**

[6] Without necessarily abandoning the other grounds raised in the papers and the heads of argument, Mr Watt-pringle SC for the applicant pursued three grounds namely:

1. The award is not reasonable.
2. The remedy of reinstatement was inappropriate, regard being had to the provisions of section 193 (2) (b) of the LRA.
3. Absence of the record.

### **The grounds considered**

[7] I shall in turn consider each of the three grounds pursued by Mr Watt-pringle SC at the hearing of this application.

#### **1. Is the award reasonable?**

The short answer to this is that it is reasonable. There is absolutely no merit in the submission by Mr Watt-pringle SC that a reasonable commissioner would not have issued the award. Having looked at the award again when this judgment is being prepared, I find it to be a reasoned award, to a point of saying it is correct in all respect though I am not required to go that far.

**See: Palaborwa Mining Co Ltd v Cheetham & Others (2008) JOL 2130I (LAC).**

**Sidumo v Rustenburg Platinum Mines (2007) 28 ILJ 2405 (CC).**

**Fidelity Cash Management Service v CCMA and Others DA 10\05 yet unreported.**

## **2. Appropriateness of the remedy of reinstatement**

Mr Watt-pringle SC argued that, once the second respondent determined that the dismissal was unfair, she sought to have applied her mind to the question whether reinstatement is appropriate given the fact that the applicant did not trust the dismissed respondents. He pegged his submission on the provisions of section 193 (2) (b) of the LRA.

The section provides thus:

*193 (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—*

- (a) ...*
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.*
- (c) ...*
- (d) ...*

- [8] As a point of departure the section recognises that reinstatement is a primary remedy.

**See: SAA v Bogopa & Others 2007 (8) ILJ 2718 (LAC) at 2714 para 65.**

**SAAPAWU Free State & Others v Fourie & Another (2007) 1 BLLR 67 (LC).**

**Kroukam v SA Airlink (Pty) LTD 2005 12 BLLR 1172 (LAC).**

**Amalgamated Pharmaceuticals LTD v Grobler NO & Others (2004) 6 BLLR 537 (LC).**

- [9] In Mr Watt-pringle's submission, the fact that the applicant's witnesses testified that the dismissed employees were not to be trusted is such circumstances contemplated in section 193

(2) (b) which would render continued employment intolerable. That being the case, so the argument went, then the second respondent was precluded by operation of law to reinstate.

[10] I do not agree. In all circumstances of dismissals for alleged misconduct, employers more often than not would immediately lose trust in a dismissed employee. In my view such trust is lost the minute an employee is brought before a disciplinary inquiry. So if section 193 (2) (b) were to be interpreted to mean that because at one point, the employer has had a strong suspicion that an employee is guilty of misconduct then such renders continued employment intolerable, then the primary remedy will never be afforded to an employee dismissed for misconduct.

[11] In my view, the section must be interpreted to mean that evidence need to be led to substantiate the fact that continued employment would be intolerable. Such may include but not limited to evidence of a fall out between the dismissed employee which is caused by a factor independent of the allegations of misconduct or closely connected to the misconduct alleged.

[12] This must be so, in that once a commissioner finds that the misconduct alleged has not been proven, then the cause of intolerability would be naturally removed. However, if an employer leads evidence to suggest that despite the finding of misconduct there exists circumstances and not allegations that would render continued employment intolerable.

[13] Again care must be exercised by employers to leave it for the commissioner as it is argued in this matter to phantom that

the continued relationship would be rendered intolerable. It is the duty of an employer to present evidence that will suggest that the continued employment will be intolerable.

[14] Another situation would be where a commissioner finds that a misconduct has been committed and such a misconduct does not warrant dismissal, but there was evidence that the said misconduct serious as it may not be had rendered continued employment intolerable.

[15] Therefore in such situations, a commissioner may justify refusing the primary remedy by taking into consideration such circumstances as supported by evidence. Of course given the fact that reinstatement is a primary remedy, the commissioners should sparingly and after careful consideration of all circumstances invoke the provisions of section 193 (2) (b) of the LRA, to deny the remedy.

[16] Otherwise, commissioners might find themselves in the situation that prevailed pre-**Sidumo**, if too much weight is given to the circumstances.

[17] All in all, I am saying for section 193 (2) (b) to defeat the primary remedy, there must be convincing reasons for such. Accordingly, this court should not readily review the decision of commissioners to not have refused reinstatement when there is some evidence by the employer that the employee is not to be trusted anymore.

[18] On the contrary, a decision to refuse the primary remedy is reviewable if no cogent reason supported by evidence is given for it. Such in my view would be an unreasonable award.

[19] In fact the LAC in **Kroukam** said, therefore this court or an arbitrator has no discretion whether or not to grant reinstatement. Faced with such true statement of law, I cannot see how the refusal to reinstate could have been justified.

[20] Such similar argument was rejected by this court in **Amalgamated Pharmaceuticals supra**. At para 13 of the judgment the following was said:

*"The mere fact that the applicant does not trust the individual respondents cannot without, more, be a basis for holding that employment relationship has broken down'... To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair".*

[21] I must add to deny individual employees job security albeit with capped compensation, offends the very basic principle upon which the right to fair labour practice is founded. Accordingly, this ground must fail too.

### **Absence of the record**

[22] It does appear that there is a growing trend that absence of the record is used opportunistically to have awards reviewed.

**See: Uee—Dantex Explosives (Pty) LTD v Maseko & Others 2001 (7) BLLR 842 (LC).**

[23] In the matter before me there seem to be a dispute between the parties that the record is incomplete. The respondents submitted that the missing portions were adequately

reconstructed by the typed notes of the second respondent. The applicant without suggesting that any of its grounds are germane from the missing records argued that the typed notes are cryptic and for that reason the record is incomplete and therefore the award should be reviewed and set aside on that ground.

[24] It ought to be emphasised that in **Uee—Dantex** matter the commissioner failed to keep a record. The court there said in appropriate cases, which was one before it, an award is reviewable on that ground alone.

[25] In the matter before me, there are records which the applicant laboriously relied on portions thereof to substantiate its grounds of review. The commissioner filed written notes for the missing portions of the record. Therefore the respondent cannot be accused of failing to keep proper records. It ought to be emphasised, in instances where the court adopted the approach to review and remit due to incomplete record, such were cases where a reviewing party would have been severely prejudiced to show the defect as the record is not there. In such cases, the reviewing party is given the benefit of the doubt as it were.

[26] But where a reviewing party like the applicant before me was able to demonstrate its grounds on portions of the records available, such a party is not prejudiced and should not gain advantage simply because certain portions not germane to its grounds are missing.

[27] All in all, I am saying, it will not always be the case that where the record is incomplete then review should be granted

simply because, an attempt to reconstruct took place and the record is still inadequate though no reliance would be placed on the inadequate portions of the record. If it were so then gates would be open to unscrupulous review litigants much to the chagrin of other litigants, in instances like this poor employees who have a perfectly reasonable and valid award.

Accordingly this ground must fail. As for the remaining grounds, foreshadowed in the founding affidavit and the heads of argument, such lacks merit. They too must fail.

### **Order**

[28] In the result, I make the following order:

1. The review application is dismissed with costs.

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Moshoana AJ  
Acting Judge of the Labour Court  
Johannesburg

### **Appearances**

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| For the Applicant  | : Mr Murray        |
| For the Respondent | : Union official   |
| Date of hearing    | : 22 February 2008 |
| Date of Judgment   | : 27 February 2008 |

