

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO : D570/2006

In the matter between:

KING & SONS (PTY) LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

PAUL SHABANGU N.O.

Second Respondent

RENNIE JASON DEAN

Third Respondent

JUDGMENT

PILLEMER, AJ:

- [1] The Applicant conducts business as a shipping agent. The Third Respondent was employed by the Applicant as an operations superintendent at its Richards Bay offices. He was dismissed for what was described as “gross negligence” on 5 January 2006. He disputed the fairness of his dismissal and sought redress by referring the unfair dismissal dispute to the CCMA in Richards Bay where he claimed compensation. The dispute was determined by arbitration after evidence was led before the Second Respondent who found in favour of the Third Respondent and awarded him compensation equivalent to five months

remuneration. The Applicant seeks in these proceedings to review and set aside the Second Respondent's award.

[2] The question that has to be asked by the court in a review such as this has been set out in the case of Sidumo & another v Rustenberg Platinum Mines Ltd & another [2007] 12 BLLR 1097 (CC) at paragraph [110] – “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

[3] Third Respondent's duties included making the necessary arrangements with the various role players for the loading of coal on ships that berthed in the Richards Bay Harbour. This is an industry where time spent in the harbour is extremely costly and where, by reason of the product and the volumes involved, an error can result in losses of millions of rand. Accordingly, while not that difficult, Third Respondent's job carried with it considerable responsibility and Applicant had to be able to rely upon him. Over weekends and on Public Holidays the Richards Bay Coal Terminal's offices are closed. A change to the loading rotation for a vessel due in port on 18 December 2005 was made and notified to the Applicant in the evening of 15 December 2005 at a time

when Third Respondent was on duty. The responsibility was his to give effect to that change by notifying all role players. That year 16 December, a public holiday, fell on a Friday. The Third Respondent went about his job and gave notification to all the role players of the change, but, in relation to the Terminal, he did this by merely sending an e-mail communication at about 19h15 on 16 December. He never checked that it had been received and would be acted upon before the loading of the vessel commenced on Sunday 18 December. As the Third Respondent's luck would have it the amendment to the loading rotation was in fact not picked up by the Terminal with the result that the Terminal, working off the incorrect schedule, initially loaded the incorrect grade of coal on the ship. Third Respondent was advised that there appeared to be a problem and, to his credit, he immediately dealt with the problem and his actions and those of others together with the cooperation of the owner were such that the potential loss that could have resulted, of some R5million, was thankfully averted.

[4] Arising out of these events the Third Respondent was charged with gross negligence, which is a specific form of misconduct recognised by the disciplinary code that

governed the workplace. Mirroring the wording of the code, the charge sheet described the alleged misconduct as follows: “Gross negligence – forsaking failure in duty that results in, or could lead to serious loss, damage or injury.” What this related to was explained in the charge sheet as “Failing to confirm with RBCT’s (a reference to Richards Bay Coal Terminal) weekend operational duty staff ... of. ...amended stow/load rotation received from the master on the 16th December 2005. Failed again on berthing to check whether RBCT received the amended stow/load rotation and that the vessel was planned to load accordingly”. The charge sheet goes on to set out that the consequence of the failure was that loading commenced with an incorrect grade and fortuitously it had been possible to avoid extremely costly consequences but that three hours of loading time had been lost. The last sentence of the charge sheet reads: “Due to the above and failing to follow normal agency procedures you have placed the company under tremendous risk.”

- [5] This was not the first occasion the Third Respondent had faced discipline for gross negligence. He had been found guilty a little less than a year earlier and had initially been

dismissed, but that sanction was altered to a final written warning. This warning was “current” in that less than a year had expired and was a factor that was taken into account in relation to the sanction of dismissal that was imposed by the Applicant following upon a finding that the Third Respondent was guilty.

- [6] The Applicant’s case as to what Third Respondent had done wrong was set out in the evidence of one of the witnesses it called, a Mr Van Rooyen, who explained it in the following terms: “After he received the e-mail from the Captain confirming his amended load rotation [he] should have made an effort to pass such information to the Terminal immediately. He failed to do a normal agency procedure and should have made contact with the terminal immediately upon receipt of the same”. Van Rooyen agreed that all the role players, apart from the Terminal, had been informed of the amended loading rotation and, the reason for the Terminal not having been notified, he said, was “because they were not notified via telephone”. It was put to him that they were notified by e-mail and he responded to that proposition by pointing out that 16 December was a public holiday and the following days the weekend when nobody was at the office implying that this was a useless step on the

weekend when the phone had to be used. He then summarises this line of reasoning as follows “So, for the Applicant not to inform the RBCT that was the downfall, because he did not confirm it, knowing that on weekends and public holidays they are not at the office.” Later he said “it is common knowledge to all agents that any deviation from the norm must be reported to them via telephone”. It was then put to him that there was no rule that a telephone call had to be made and in answer to this Mr Van Rooyen explained that the agents are given a list of weekend Terminal personnel who are on duty after hours who can be contacted in the event of changes and that list is sent out at four o’clock on a Friday afternoon. The cross-examination then raised the fact that an e-mail had been sent by the Terminal to the Applicant after the event which claimed that a “courtesy call” would have been appropriate. The point was made that the reference to a *courtesy* call implied that it is not a rule that there had to be such a call. Having earlier made the point that the stevedores and the Terminal were in contact and the stevedores had the amended loading rotation and should have drawn the error to the attention of the Terminal, the cross-examiner put the proposition that the e-mail that referred to a courtesy call could be interpreted as

being a concession by the Terminal “that it had been in the wrong but the Applicant should have phoned and then it would not have made the mistake”. To this Van Rooyen stated that he could not comment. The relevance of all this lies in the fact that the Third Respondent denied that there was any practice or rule that required him to make the call and his case was the e-mail was sufficient. He also contended that in any event the stevedores knew of the amended loading rotation and they should have confirmed this with the Terminal. His case therefore was that the potential disaster was not his fault and that he had not been at fault in failing to make the telephone call that Van Rooyen had said was expected of him.

- [7] The arbitrator found on this evidence that the phone call to the Terminal staff on duty over a weekend that had to be made if communication with the Terminal was necessary over week-ends and public holidays was “mere practice which had not crystallized into a binding rule” and he emphasises the point by using the phrase “hence the courtesy call”, presumably intending to stress the word courtesy. On this basis he records in his award that it is “doubtful that the [Third Respondent] contravened any rule

in the light of the status of the phone call that he was expected to make". There is no logic in having found that Third Respondent was expected to make the call, whether it is called a courtesy call or anything else, to then fail to take the further step in his reasoning and consider whether the failure to do what was expected of him in the given context amounted to gross negligence as it is understood in the code. It was a fundamental misdirection not to apply his mind to this question and thereby leave matters hanging simply because the call was described in an e-mail communication as a courtesy call as if this was the complete answer. Had he properly applied his mind the Arbitrator must have found on the evidence that Third Respondent knew that the Terminal was not open to the public on weekends; that Third Respondent had the contact details of the member of the Terminal staff on duty and whom he contacted immediately there was a problem on the Sunday; that he knew that the failure to comply with a changed loading rotation could have very serious financial consequences; and that there was nothing onerous in checking that the e-mail had been received by picking up the telephone. A reasonable person foreseeing the harm that could result if the e-mail had not been received and

acted upon when it is probable that it would not have been received would have taken the obvious and usual step to ensure it was drawn to the attention of the responsible person on duty at the Terminal over the weekend. His failure to do what was expected of him and which a reasonable person would have done was clearly negligent. In the context of the dire consequences that could flow as a result of his default, the negligence fell under the categorisation in the code of gross negligence.

- [8] The award is confusing and contradictory because, on the one hand, the arbitrator appears to find that the sanction of dismissal was inappropriate but that would only be of relevance if guilt was proven and yet, on the other hand, also seems to find that guilt was not established. I am satisfied that the arbitrator misdirected himself in relation to the finding that guilt had not been proven, if that is what he did find. He makes too much of the formal existence of a rule even though he correctly finds that the making of the telephone call was to be expected as he had to find because it is obvious that making the call was what the circumstances required. The Arbitrator ought therefore to have found that the charge of gross negligence, in the

special meaning it has in the code, was proved. The Arbitrator's failure to do so falls short of what was required of him on the Sidumo test rendering this aspect of his award liable to be set aside on review.

- [9] As I indicated earlier the main thrust of the reasoning in the award does seem to be premised on the notion that guilt was established. I say this because the arbitrator relies on the provision of the disciplinary code that provides in cases of gross negligence for a sequence of sanctions, a written warning for a first offence, a final written warning for a second and dismissal for a third. The arbitrator reasoned from this that the earlier guilty finding that resulted in a final written warning, being the first offence, ought to have resulted in a written warning and not a final written warning and, on this logic, the misconduct in issue in this case should have attracted the final written warning that comes with a second offence and not dismissal that can only be imposed as a sanction for a third offence. Implicit in this reasoning is a finding of guilt on a second occasion. I am afraid this approach is too technical and fails to consider relevant material. The reasoning overlooks the fact that the code is a guide and has no regard to the important feature

that Third Respondent accepted, and by all accounts was fortunate to have received, the sanction of a final written warning in respect of his previous disciplinary experience. It was a much more serious form of misconduct and resulted in a very substantial loss to the employer, where he escaped being dismissed by a whisker. The existence of this history and the final written warning cannot be wished away and there is no basis to downgrade the final written warning and pretend it was something else simply because it was given in relation to a first offence. The approach of the arbitrator fell short of that required of a reasonable arbitrator and constituted a serious misdirection undermining the reasonableness of the award.

[10] I accept that a case could possibly have been made that because the misconduct was not intentional and, as Mr Dalton for the Applicant testified, “there isn’t a man in shipping that hasn’t made one error”; dismissal could be found to be too harsh a sanction for failing to make a single telephone call. The arbitrator however did not approach the matter on this basis and did not ask himself the question the Constitutional Court in *Sidumo* said had to be asked in relation to sanction, after taking all circumstances into

account, namely whether the dismissal is fair. Had that question been asked then a reasonable arbitrator in my view would on analysing the relevant material find that the Third Respondent's slackness or lack of common sense in failing to ensure that his e-mail had been read and acted upon by the recipient went to the root of the responsibilities of his job. This feature renders his default fundamental to the employment relationship because it had the resultant impact of rendering it impossible for the employer to be able to continue to place reliance in him, more especially because the incident was the second of its kind and occurred after a previous incident where the outcome was a last chance as reflected in a final written warning. In that context, if one is to ask the question without giving any deference to the employer's decision or to the employee: "Was the decision to dismiss fair in this context i.e. did the misconduct destroy the element of trust essential for the employment relationship to continue?"; the answer, it seems to me, is self evident that dismissal as a sanction is fair and that the employer has good reason to believe that the employment relationship has been destroyed even though the error consisted of only not making one telephone call. On the face of it not making a telephone call appears to be a small

oversight, but in fact it goes much deeper because the need to make that call should have been obvious and the failure to do the obvious must undermine any confidence that he can be relied upon to do his job without putting the Applicant at considerable risk.

[11] In the result I find that the decision as embodied in the award that the dismissal was substantively unfair fails the Sidumo test; it is a decision that a reasonable decision maker could not reach. It follows that it falls to be set aside on review. There is no need to substitute the award with a finding that the unfair dismissal dispute is dismissed because that follows for the reasons set out in this judgment.

[12] The Order I make therefore is that:-

[12.1] the award of the Second Respondent under Case No. KNRB216-06 dated 19 July 2006 is hereby reviewed and set aside; and

[12.2] the Third Respondent is ordered to pay the costs of the application.

M PILLEMER

ACTING JUDGE OF THE LABOUR COURT

Date of Judgment: 11 July 2008.

APPEARANCES

For the Applicant: Attorney I Lawrence

For the Respondent: Adv M M Posemann instructed by Riaan Kruger and
Associates