

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN

CASE NO: JR: 481/09

In the matter between:

BRYN MARK BRANDT

Applicant

and

THE COMMISSIONER: MATTHEWS

RAMOTSHELA

1st Respondent

COMMISSION OF CONCILIATION,

MEDIATION AND ARBITRATION

2nd Respondent

WEIR WARMAN

3rd Respondent

JUDGMENT

GCABASHE AJ

Introduction

1. This application for review, brought in terms of section 145 of the Labour Relations Act 66 of 1995, seeks to have the award of the First Respondent (the

Commissioner) reviewed on the basis that, considering the facts placed before the Commissioner, in his award he unduly deferred to the Third Respondent's judgment. In the result and in the context of the evidence led, the decision of the Commissioner fell far short of the required standard of rationality and reasonableness.

2. In brief, the background to the dismissal of the Applicant is that he was employed by the Third Respondent as a Service Centre supervisor at its Rustenburg branch for a period of approximately 15 months. The Third Respondent is in the business of manufacturing, assembling and repairing slurry pumps.
3. The dispute thus concerned the Applicant's knowledge and understanding of the standard procedures applied in the management, recordal and maintenance of stock levels. The evidence of the Third Respondent was that he failed dismally to perform in terms of the required standard, essentially because he did not follow available guidelines in the form of the procedures which were applied at all branches of the company.
4. More specifically, the testimony of the Third Respondent's witnesses was that the Applicant's misconduct arose from the grossly negligent manner in which he conducted the business by failing to apply company procedures in the opening of job cards, the processing of waybills, the processing of proof of delivery documents, the allocation of parts for invoicing, warranty claims and job packs.

5. The Third Respondent further alleged that seniority of the Applicant as the service centre supervisor required him to be familiar with the set procedures. A material factor in the Third Respondent's case was the allegation that as a result of the Applicant's negligence in not maintaining proper records of the correct stock levels, it had suffered a loss of approximately R1 million.
6. In challenging his dismissal, the Applicant's first ground of review highlighted procedural irregularities. He alleged that the Commissioner failed to recognise that he, as a lay inexperienced individual, required guidance regarding the format of the proceedings, the presentation of his case, assistance in distilling what constituted submissions as opposed to evidence, how to deal with the relevance of documentary evidence and the manner in which to place that evidence on record. In the result the gravamen of the Applicant's complaint was that the Commissioner failed to ensure that the arbitration proceedings were conducted in a manner that was fair and proper.
7. With regard to substantive matters, the Applicant has taken issue with the Commissioners reliance on the version of the Third Respondent, and the acceptance by the Commissioner of the version put up by the Third Respondent. The charge, in a nutshell is that the Commissioner failed to consider the evidence of the Applicant or to accord due weight to it, despite its probity, and as a result, the decision taken was not rational or justifiable.

8. The Applicant disputed the allegations of the Third Respondent, averring that he had managed his area of responsibility on the basis of the procedures and practices he had found in operation. He submitted that the manner in which the control of stock was monitored and processed at the Rustenburg branch of the Third Respondent's business was no different to the manner in which all the other branches were operating.
9. In indicating to the Commissioner that the allegations of misconduct were unfounded, and that he exercised due care in the management of the Third Respondent's business, he challenged the material allegations of the Third Respondent that, *inter alia*,:
 - 9.1 he had failed to follow standard procedures, contending that when sent for on the job training at the Witbank branch the procedures followed were exactly the same as those of the Rustenburg branch;
 - 9.2 adequate training and support had been provided both to him and his staff, contending that such training was sporadic, inconsistent, and not commensurate with the requirements of the business;
 - 9.3 he was responsible for the loss of R1.2 million rand, submitting that prior to his employment, similar losses had been experienced by the company not only at the Rustenburg branch but at other branches as well; submitting that the stock transfer from his service centre to the sales

warehouse without a stock take being conducted impacted on the loss of R1.2 million. He alleged that the decision and execution of this stock transfer that occasioned the R1 million loss was done under the authority of the Rustenburg branch manager, one Kevin Green, and Wilkus Alberts the manager for the Southern African region;

- 9.4 the Applicant failed to provide order numbers for site work requested by a customer, yet the Third Respondent admitted that with site work (or field service) there are occasions that order numbers are not provided because “request for quote” numbers are utilised instead.

The Commissioner’s findings

10. Three broad reasons are advanced by the Commissioner for accepting the veracity of the Third Respondent’s witness that:
 - 10.1 the Applicant’s conduct caused the R1.2 million loss suffered by the company;
 - 10.2 the Applicant was fully trained in the requisite procedures, was fully aware of them, yet failed to conduct himself in terms thereof;
 - 10.3 there was sometimes a 100% compliance with the procedures which compliance supported the assertion by Third Respondent that the Applicant was fully aware of the correct procedures to be followed.

11. On the basis of these findings, the Commissioner was satisfied that on a balance of probabilities there existed a valid reason for dismissing the Applicant.

The obligation that rests on a Commissioner

12. The decisions of a Commissioner are administrative in nature. Consequently, the right to just administrative action, along with all the other rights in the Bill of Rights, must be accorded to parties to the arbitration processes of the CCMA. Administrative action must be justifiable in relation to the reasons advanced for the decision taken. Procedural fairness, including procedural fairness during the arbitration process is and antecedent and often an integral element to substantive fairness.
13. In my view these procedural aspects form part of the assessment of how reasonable the decision taken by the Commissioner was, given the standard discussed in the **Carephone**¹ judgment. This formulation of the criteria to assess the reasonableness of a decision has been extended and applied in various judgments, including *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*², as well as *Fidelity Cash Management Service v CCMA & Others*³.
14. Zondo JP in analysing the obligations that rest on a Commissioner faced with establishing whether a dismissal is fair or unfair, referred in the **Fidelity Cash**

¹ Carephone (Pty_ Ltd v Marcus NO and Others 1999 (3) SA 304 at 312 para [19]

² 2008 (2) SA 24 (CC)

³ [2008] 3 BLLR 197 LAC

Management Services⁴ matter to the **Sidumo** judgment, stating that a Commissioner “must:

- (a) take into account the totality of circumstances; (paragraph 74)
- (b) consider the importance of the rule that had been breached; (paragraph 78);
- (c) consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal;
- (d) consider the harm caused by the employee’s conduct;
- (e) consider whether additional training and instruction may result in the employee not repeating the misconduct;
- (f) consider the effect of dismissal on the employee;
- (g) consider the employee’s service record”

Analysis of the basis for the Commissioner’s award

15. The essential question is whether the award of the Commissioner is reasonable given the material made available to the Commissioner during the arbitration. When viewed against the **Sidumo** criteria set out above, I come to the ineluctable conclusion that the Commissioner failed to meet the standard of reasonableness and rationality in the decision taken in this matter.

⁴ Ibid p. 224 para [94]

16. The Commissioner failed to take into account the totality of the evidence placed before him or to properly consider the basis of the employee's challenge to the dismissal. He was most unhelpful in ensuring that the evidence that the employee, who incidentally was unrepresented and a complete lay person, wished to place on record was properly ventilated and responded to by the employer. On a number of occasions, instead of giving guidance to the employee, he actually prevented the employee from pursuing a particular line of questioning.
17. He relied on evidence that he regarded to be unchallenged and conclusive in circumstances where the probity and veracity of that evidence had been put into question. An illustration of this is the finding that the Applicant was fully trained on how to correctly apply the procedures. The Commissioner attributed the responsibility for the R1.2 million loss sustained by the Third Respondent exclusively to the Applicant, despite evidence of the possible impact of the stock transfer, or the fact that there appeared to be systemic issues in the Third Respondent's business that led to annual losses of this nature.
18. Though there was evidence of a lack of training placed before the Commissioner, there was no consideration of whether additional training might not assist the Applicant in avoiding similar difficulties at the workplace. The effect on the Applicant of a dismissal was not considered, nor was his service record, despite evidence of complimentary comments from his employer.

19. The Applicant has raised concerns with regard to both the substantive and procedural fairness of the arbitration process. The Court in **Carephone (Pty) Ltd v Marcus NO and Others**⁵ expressed this constitutional principle by stating in relation to section 33 of the Constitution that:

“The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons for the award must be given publicly and in writing; that the award must be justifiable in terms of those reasons; and that it must be consistent with the fundamental right to fair labour practices.”

20. I have taken into consideration the possibility that the procedural fairness issue raised and the substantive merits of this case are so intricately linked that the procedural unfairness of the process, which is material to a just outcome, has resulted in a fundamentally tainted and flawed decision on the merits by the Commissioner.
21. As stated in the **Fidelity Cash Management Service**⁶ case, in relation to an assessment of the totality of the evidence before a Commissioner but not necessarily relied on by that Commissioner in the making of the award:

⁵ Supra -1999 (3) SA 304 at 312 para [19]

⁶ Supra at p. 226 H-I

“In many cases, the reasons that the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely, to support his or her decision or finding but which render the decision reasonable or unreasonable, can be taken into account”.

22. I have considered all the material that was properly before the Commissioner and concluded that he committed a gross irregularity with regard to the conduct of the arbitration proceedings.

23. I am of the view that had the Commissioner applied his mind to the totality of the evidentiary material properly placed before him, he would have come to the conclusion that the Applicant’s dismissal was substantially unfair. He drew conclusions that were not supported by evidence, ignored material evidence, and simply failed to appreciate material aspects of evidence placed before him. A different Commissioner could come to a decision, on the facts of this case, and conclude that the dismissal was substantially unfair. It is in the interests of both the Applicant and the Third Respondent that this matter be re-heard.

24. In the premises I make an order setting aside the award dated 28 January 2009 and refer the dispute back to the CCMA for the hearing to resume *de novo*.

25. I make no order as to costs.

GCABASHE AJ

18 DECEMBER 2009