

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D860/06

Not reportable

DATE: 25 February 2009

In the matter between

NTOMBEMHLOPHE A. NGOZWANE

APPLICANT

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

FIRST RESPONDENT

COMMISSIONER P VAN ZYL

SECOND RESPONDENT

RELYANT RETAIL LTD T/A SAVELL'S

FURNISHERS

THIRD RESPONDENT

JUDGMENT

25 FEBRUARY 2009

PILLAY D, J

This review can be decided on a singular issue, namely whether the arbitrator found the applicant employee was found guilty of an offence for which she was not charged. The employee was charged for:

“Dishonesty/fraud in that you wilfully and deliberately defrauded the company by claiming sales commission on your son’s name for sales that he did not do.”

The arbitrator found her guilty of dishonesty,

“...in changing the deal on the computer and that she had

done so to defraud the company in an attempt to get them to pay the commission to her instead of Gaylord.”

The arbitrator determined that the charge was wide enough to enable him to find her guilty in these terms. This Court agrees with the arbitrator. The employee’s defence raised at the arbitration was a technicality at best. She did not dispute that she changed the deal on the computer. Her only defence was that she could not be found guilty on that ground because she was not charged in those terms.

Assuming that the Court or the arbitrator were to accept that defence, the result would be to find her not guilty on the charges for which she was dismissed, reinstate her, re-hear the matter, which re-hearing might substantially traverse the same ground of evidence at a disciplinary hearing, and then possibly process the dispute through conciliation to arbitration, all of which might endure for another year, if not longer. That is clearly not the expeditious resolution contemplated in terms of the LRA or even the Constitution of the Republic of South Africa, Act No 108 of 1996. Fairness, the Constitutional Court has said repeatedly, is fairness to both the employer and the employee.

If the employee had any credible defence or explanation for effecting the changes, then the moment for tendering that defence was, firstly, when she was charged and secondly at the disciplinary enquiry. If it was not done by that stage, then definitely it should have been tendered by the time the dispute reached the conciliation and arbitration stages at the CCMA. This Court is in the dark as to what *bona fide* explanation she had. It is certainly not tendered in these papers. An honest witness who has an honest explanation will tender it at the first

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opportunity. The Court is not persuaded that the employee is an honest witness. In any event, there is nothing in the award in the light of the *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) judgment that renders it reviewable. The application for review is DISMISSED WITH COSTS.

Pillay D, J

Date of Editing: 22 May 2009

Appearances:

For the Applicant: Mr Jafta-Jafta Inc

For the Respondent: Adv C Nel instructed by Calitz Crockart & Associates

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TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber and proofreader, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

M NGOZWANE v SAVELL'S FURNISHERS

CASE NO : D860/06

PILLAY J OF ORIGIN : DURBAN

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**IN THE LABOUR COURT FOR
THE DISTRICT OF DURBAN**

HELD AT DURBAN

CASE NO : D860/06

DATE : 5 JANUARY 2009

BEFORE : PILLAY J

APPLICANT : M NGOZWANA

RESPONDENT : SAVELL'S FURNISHERS

ON BEHALF OF APPLICANT : MR P JAFTA

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ON BEHALF OF RESPONDENT :

MS C NEL

REPORT ON RECORDING

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