

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C109/2010

In the matter between:

NITROPHOSKA (PTY) LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

DANIEL DU PLESSIS, N.O.

Second Respondent

B L JACOBS

Third Respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION AND BACKGROUND

1. This is an unopposed application to review and set aside an arbitration award (“the award”) issued by the second respondent (“the commissioner”) under the auspices of the first respondent (“the CCMA”). It deals with the procedural fairness of a dismissal in the absence of a formal disciplinary hearing.

2. In terms of the award, the commissioner found that the applicant's dismissal of the third respondent (the employee, "Jacobs") was substantively fair but procedurally unfair. The applicant was ordered to pay him compensation in an amount of R69 600, 00 (about 3 months' salary). The review application is concerned with the commissioner's finding on procedural unfairness and the concomitant award of compensation.
3. The relevant facts preceding the dismissal, which were common cause between the parties, may be summarised as follows:
 - 3.1. The employee was previously employed by the applicant as a regional manager, responsible for the Swellendam area. Only three people worked in this regional office, namely Jacobs, his wife and Mrs Singleton.
 - 3.2. In or around March 2008, it emerged that Mrs Singleton had perpetrated fraud and theft against the applicant. Effectively, she had given the applicant's customers her banking details for the purposes of making payments, as opposed to the applicant's banking details.

- 3.3. Upon further investigation, it transpired that the fraud had been conducted over a number of years and on a massive scale.¹
- 3.4. It was also established that Mrs Jacobs had shared in the spoils by receiving payments amounting to not less than R300 000, 00 from Mrs Singleton.
- 3.5. Both Mrs Singleton and Mrs Jacobs were subsequently convicted in criminal proceedings of fraud and theft. Both left the employ of the applicant.
- 3.6. Jacobs was dismissed on account of his gross neglect and dereliction of his duties as a senior manager. (It was never the applicant's case that Jacobs had participated in the fraud.)
4. The commissioner's findings on the substantive fairness of the dismissal are instructive. In essence, the commissioner held that:
- 4.1. Most of the facts were common cause;
- 4.2. Jacobs conceded that he had not done his job properly;

¹ Investigations revealed at least 232 fraudulent transactions over a period of 3 years. Over R1,8 million had been stolen.

- 4.3. It was clear that he had neglected his function as regional manager;
- 4.4. He had not bothered to control files and he did not go through financial statements;
- 4.5. If he had done his job properly and gone through client files, even only through a selection every now and then, he would have detected the fraud.

THE PROCEDURE FOLLOWED

- 5. Upon the initial discovery of the fraud, the applicant's managing director (Dr Beyers) met with Jacobs at the applicant's Swellendam office. This meeting took place on 6 March 2008. At this point, Mrs Singleton was the only suspect.
- 6. Two days later (8 March 2008), Jacobs met with Beyers in Stellenbosch. Jacobs confirmed that his wife had also been involved in the theft and fraud. He tendered to resign on the basis that he was the person with overall accountability. The office fell under his control and was his responsibility. Jacobs acknowledged that there could be no trust relationship under these circumstances. Beyers indicated that, before any decision was taken, all the facts should be unearthed

through an investigation.

7. The criminal investigation ensued, as referred to above.
8. On 5 March 2009, Jacobs addressed a letter to Beyers, in which *inter alia* he conceded that:
 - 8.1. he did not know how the fraud could have been carried out “under his nose” without his knowledge;
 - 8.2. he had failed as a manager;
 - 8.3. he doubted his ability to work with people and felt unable to carry out his duties.
9. Mrs Jacobs entered into a plea agreement with the state which was finalised at the end of June 2009.
10. Jacobs met with Beyers and the other company directors on 16 July 2010, in order to discuss *inter alia* the continuation of Jacobs’s employment with the applicant in light of what had transpired. At this meeting, Jacobs stated that he was at a crossroad. If the trust relationship was broken, there could be no workable solution. (“As daar

nie vertrouwe in hom is nie, dan sê hy loop die pad na die ander kant toe, dank an daar nie 'n werkbare situasie wees nie.”)

11. At the conclusion of the meeting, Jacobs was requested to put his views on the matter into writing. Jacobs produced a letter on 20 July 2009. This document contained a proposal as to how Jacobs could repay the R300 000 due to the applicant in terms of his wife's plea agreement. However, it did not deal with the primary issue,² namely the trust relationship going forward, at all.
12. A third meeting to discuss the matter took place on 30 July 2009. Jacobs was informed that the parties had to consider the full conspectus of circumstances, including the impact of his conduct within the company and in the eyes of the public and clients in particular. Specifically, the parties discussed the impact of the abovementioned events on the employment relationship. Jacobs was informed that, in the applicant's view, a continued trust relationship was not possible.
13. Jacobs requested the opportunity to consult with a labour advisor before responding, which he then did. With the assistance of his advisor, Jacobs addressed further submissions in writing to the

² Beyers testified that he had expected Jacobs to place on record whether or not he saw a viable employment relationship, based on trust, going forward, and to provide reasons for his view.

applicant on 5 August 2009, in which he stated, in response to the discussion that had taken place on 30 July 2009:

“Ek het niks verkeerd gedoen nie en bestaan daar [*sic*] geen substantiewe billike rede waarom die diensooreenkoms tussen myself en Nitrophoska beëindig moet word nie.”

14. Aside from this bald denial, which was in marked contrast to the stance he had previously adopted, Jacobs advanced no reasons as to why he allegedly considered the trust relationship was not at an end.
15. Under the circumstances, the applicant responded in writing on 14 August 2009. Jacobs was informed *inter alia* that the applicant had considered his submissions but remained of the view that, as a result of his neglect of duty, the employment relationship could not continue.

WAS A FAIR PROCEDURE FOLLOWED?

16. The Code of Good Practice: Dismissal (Schedule 7 to the Labour Relations Act 66 of 1995 (“the LRA”) (“the code”) sets out the guidelines for a fair pre-dismissal procedure. In essence, the employee should be given an opportunity to state his case. The employer should conduct a form of investigation; however, this need not be formal inquiry.

17. The code was intended to do away with the rigid “criminal procedure style” provisions that had proliferated under the previous dispensation. Regrettably, the flexibility introduced by the code has not always been recognised by arbitrating commissioners. Halton Cheadle, in his article “Regulated Flexibility: Revisiting the LRA and the BCEA”³ points out that:

“Despite the clear direction given in the code, employers, consultants, lawyers, arbitrators and judges have continued to over-emphasize pre-dismissal procedures and in so doing have imposed an unnecessary burden on employers without advancing the protection of workers.”

18. These views were elaborated upon by the Labour Court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others*⁴ where Van Niekerk J held that there was clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial.⁵ Regarding the requirement to be heard prior to dismissal:⁶

“When the code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against the employee, which need not be a formal

3 (2006) 27 *ILJ* 663 p 687 para [85]

4 (2006) 27 *ILJ* 1644 (LC)

5 1652G

6 1654A

enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”

19. These principles have even greater application where senior managerial employees are involved. It has been held that the form of observance of the *audi alteram partem* rule may be relaxed in the case of a senior manager.⁷
20. In the present matter, the commissioner held that the procedure followed was unfair on one narrow ground: Jacobs did not know what the allegations against him were.
21. Having regard to the evidence that served before the commissioner, the finding that Jacobs was unaware of what he had allegedly done wrong is entirely unjustifiable in relation to the evidence him.
22. From as early as March 2008, Jacobs conceded that, as the accountable manager, he had failed in his duties towards the applicant. He was perfectly aware of what standard he was required to meet, and how he had fallen short. This concession was repeated in writing in his letter dated 5 March 2009.
23. In that letter, Jacobs writes:

⁷ *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brundson* (2000) 21 ILJ 501 (LAC) paras 61-62 and 76. See also *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC)

“Ek weet tot nou toe nog nie hoe so-iets onder my neus kon plaasvind sonder dat ek dit nie [sic] agtergekom het nie. Ek moet as die verantwoordelike bestuurder op Swellendam, die verantwoordelikheid van hierdie problem die res van my lewe met my saamdra... Ek twyfel in my eie vermoë om met mense te werk en voel onbekwaam om my pos te vervul.”

24. It was accordingly common cause between the parties that Jacobs had neglected his duties as a manager, and there was no dispute concerning the relevant facts giving rise to this conclusion. Even if it may have been preferable, there was no need to hold a formal inquiry into these allegations.
25. All that remained was to determine what the impact of the misconduct should be on the employment relationship. In this regard, Jacobs was aware from the outset that his misconduct was severe enough to destroy the requisite trust relationship between the parties.
26. Specifically, Jacobs was told to put any representations in writing following the 16 July 2009 meeting with the applicant's board. He failed to address the issue of the ongoing trust relationship in his response at all.

27. Jacobs was presented with another opportunity to state his case at the meeting on 30 July 2009, in the full knowledge that the applicant was contemplating his dismissal. He was thereafter given time to consult a labour advisor and made further representations in writing (although these effectively amounted to a bald denial).
28. At no stage (prior to the CCMA proceedings) did Jacobs complain that he was unaware of what case he had to answer. Jacobs's submissions were taken into account by the applicant's board prior to its decision. However, the applicant remained of the view that the trust relationship had irretrievably broken down.
29. Under these circumstances, it is inconceivable that Jacobs was not aware of the allegations against him. He had an opportunity to state his case, albeit that formal disciplinary "charges" were never laid against him.

CONCLUSION

30. In light of the foregoing, I agree that the commissioner's finding that

Jacobs was unaware of the case against him, and that the dismissal was procedurally unfair on this ground, was grossly unreasonable and unsustainable in relation to the evidence before him.

31. The commissioner's finding on procedural unfairness accordingly falls to be reviewed and set aside. It is submitted that this finding should be substituted with a finding that the dismissal was procedurally fair.

32. Mr *Stelzner*, who appeared for the applicant, indicated that he would not persist in his prayer for costs, given that the application was heard on an unopposed basis.

33. I therefore make the following order:

33.1. The arbitration award of 21 December 2009 under CCMA case number WEC 12523/09 is reviewed and set aside.

33.2. The award is substituted with a finding that the dismissal of the employee, Jacobs (the third respondent) was fair.

33.3. There is no order as to costs.

ANTON STEENKAMP

Judge of the Labour Court

Date of hearing: 2 March 2011

Date of judgment: 4 March 2011

For the applicant: Adv Robert Stelzner SC

(heads of argument having been drafted by

Adv Graham Leslie)

Instructed by: Frikkie Erasmus