



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

**CASE NUMBER: JR591/2008**

In the matter between:

**RFS CATERING SUPPLIES (PTY) LTD**

Applicant

and

**DENNIS MOFOKENG**

First Respondent

**COMMISSIONER DAVE WILSON**

Second Respondent

**COMMISSIONER FOR CONCILIATION MEDIATION**

**AND ARBITRATION**

Third Respondent

Date of hearing: 13 December 2011

Date of Judgment: 15 March 2012

Summary: Review Application

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**JUDGMENT**

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SESELE AJ

## Introduction

- [1] This is an unopposed review application in terms of Section 145 of the Labour Relations Act (the LRA) in which the applicant seeks to review and set aside the arbitration award issued by the second respondent (the Commissioner) under case number WE15514 – 07 on 29 February 2007 and that the first respondent be ordered to pay costs for the application.
- [2] The commissioner found that the sanction of dismissal imposed on the first respondent was too harsh, he was not given a final warning and that he could not have been on notice that his work was at risk. Furthermore, the commissioner viewed the first respondent's conduct as one of incapacity and could therefore be afforded the opportunity to improve his performance.
- [3] As a result of the findings, the commissioner ordered reinstatement limited to one month because of the first respondent's untruthful testimony.

## Grounds for review

- [4] The applicant contends that the commissioner accepted that the first respondent received counselling for poor work performance during June 2007. The commissioner, however, concluded that the first respondent had shown nothing more than an unwillingness to comply with the requirement for the job.
- [5] Whether the consultations were given for actual poor work performance or the unwillingness to comply with the requirements of his job, it is clear that the first respondent showed disregard to comply with his duties and follow instructions as required by his position.
- [6] The commissioner failed to accept that the first respondent received a final written warning at the disciplinary enquiry in September 2007. This, the commissioner concluded without providing valid reasons for same and

provided no basis for rejecting the evidence of Mr van Zyl that the first respondent received such warning.

- [7] The written warning issued to the first respondent was valid as evidenced by the first respondent's employment records and Mr van Zyl's evidence.
- [8] In *New Forest Farming CC v Cachalia others*<sup>1</sup> and If the Court finds that the final written warning given to the first respondent was questionable, the applicant contends that in certain circumstances it may not be necessary to warn an employee of the procedure or standard required when that employee knew or reasonably could be expected to know the standard required by the employer.
- [9] There is no dispute that the first respondent was a managerial employee in the position of receiving manager. The first respondent was previously in a more senior position of operations manager prior to his demotion to the position of receiving manager. As operations manager, the first respondent knew, or at least could reasonably be expected to have known the procedures and standards required by the applicant.
- [10] Even if it may be said that the first respondent was not aware of the standards and procedures, which the applicant submits it cannot be the case, the first respondent was counselled prior to his dismissal where he was, once again, appraised of what was expected of him, and was warned that failure to comply with the procedures would lead to disciplinary action.
- [11] The commissioner accepted that the applicant suffered financial losses as a result of the first respondent's breach of the systems and procedures in respect of receiving stock.

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<sup>1</sup> [2003] 10 BLLR 1051 (LC)

- [12] The length of service carries little weight where the employee shows no remorse or where the employee acted in a dishonest manner. (*Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*<sup>2</sup>).
- [13] The first respondent's misconduct did not relate to dishonesty. The commissioner, however, referred to the first respondent's dishonest evidence and only awarded one month's back-pay.
- [14] The commissioner acknowledged the first respondent's dishonesty in the award and then followed this with a ruling of reinstatement. This is not a decision that a reasonable decision-maker would make.
- [15] It is submitted that in the light of the lack of remorse shown by the first respondent or any acknowledgement that he acted incorrectly, an order of reinstatement is not one which a reasonable decision-maker would make.
- [16] The first respondent alleged the applicant's representatives and its witnesses lied to get rid of him. The accusation demonstrated the break-down of the trust relationship between the parties. No reasonable decision-maker would order reinstatement of the first respondent in the light of the accusation of this nature.
- [17] The commissioner's misconceived reliance on the first respondent's length of service when concluding that the sanction of dismissal was harsh. The commissioner failed to take into account the training given to the first respondent in his previous position, his previous poor work performance counselling where he was made aware of the procedures as well as the subsequent warning received by the first respondent.

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<sup>2</sup> [2008] BLLR 241 (LC)

- [18] The commissioner correctly concluded that the first respondent was guilty of the misconduct for which he was dismissed. The commissioner, however, erred in failing to apply his mind to all the facts in taking a decision as to the sanction which was imposed on the first respondent.

### Analysis

- [19] The test in review proceedings was established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*<sup>3</sup> is that an arbitration award is liable to be reviewed and set aside if the award is one which a reasonable decision-maker could not reach.
- [20] The first respondent had been the operations manager prior to being demoted to the position of receiving manager. The applicant counselled the first respondent prior to being dismissed. It therefore follows that the first respondent could reasonably be expected to have known of the standards and procedures during the fifteen years period that he had been working for the applicant given the seniority of his position. For the commissioner to find otherwise without reasons was in my view, contrary to the approach followed in the decision in *New Forest Farming CC* referred to in paragraph 8 above.
- [21] Applying the reasonable decision maker test in the *Sidumo* decision, it was clear that the commissioner failed to appreciate the following:- that the first respondent was previously counselled; that he was given a warning; that he had extensive experience in the sector and should have reasonably been aware of the standards expected of him; he was found to be untruthful in his evidence and was as such not offered the benefit of payment of arrear salary from the date of dismissal until the date of hearing; and that the Commissioner found no merit in the allegation that the first respondent was falsely accused.

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<sup>3</sup> [2007] 12 BLLR 1097 (CC)

- [22] The commissioner advanced no reasons for treating poor work performance as unwillingness to comply with the requirements for the job. At the same time the commissioner accepted that the first respondent was subjected to a disciplinary hearing during September 2007 for dereliction of duty and failure to adhere lawful and reasonable instructions. The commissioner accepted evidence pertaining to the hearing but rejected the applicant's version that the first respondent received a final written warning. The latter decision could not have been made by a reasonable decision-maker who in the first place accepted the evidence that there was a hearing held for the said misconduct and thereafter reject the version as to what sanction was imposed for the misconduct.
- [23] The commissioner's approach to the misconduct as one of incapacity for no valid reasons was not reasonable under the circumstances. The finding that the first respondent was guilty of charges preferred against him was such that the commissioner should have found that the dismissal was substantially fair.
- [24] The first respondent did not oppose this application. This is sufficient reason why there should not be a cost order against the first respondent.

### Order

I therefore make the following order:

1. The arbitration award made by the Commissioner under case number: WE15514 – 07 on 29 February 2007 is reviewed and set aside.
2. The matter is remitted to the third respondent for fresh hearing before another commissioner.
3. There is no order as to costs.

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SESELE AJ

## Appearances

For the applicant: Advocate S. Wainwright, instructed by Allardyce & Partners.

LABOUR COURT