REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 1496/15

In the matter between:

OCEANSIDE 145 CC TRADING AS SASOL RUIMSIG	**APPLICANT**
and	
DISPUTE RESOLUTION CENTRE A DIVISION OF THE MOTOR INDUSTRY BARGAINING COUNCIL	**FIRST RESPONDENT**
COMMISSIONER PRINCE KEKANA N.O.	**SECOND RESPONDENT**
JAMES MAFEREKA	**THIRD RESPONDENT**

Date heard: **22 August 2017**

Date delivered: **22 August 2017**

Edited: **26 April 2018**

JUDGMENT – *EX TEMPORE*

MYBURGH AJ

[1] This is an application in terms of section 145 of the LRA to review and set aside an arbitration award issued by the commissioner in terms of which she found the dismissal of the employee by the employer to be substantively unfair and awarded him three months' remuneration as compensation.

[2] The employee worked as a merchandiser at the employer's convenience store which is attached to its petrol station. He was dismissed on 16 October 2014 after having been found guilty at a disciplinary enquiry of gross negligence (relating generally to his merchandising duties), insubordination (relating to his failure to heed an instruction to carry out stock-takes) and poor time-keeping (relating primarily to him coming late for work).

[3] At the ensuing arbitration, Mr Ramlakan testified for the employer – he being the owner of the business. The employee then gave evidence in his defence.

[4] On 13 July 2015, the commissioner issued his award in which she held as stated above. As far as the commissioner was concerned, the employer "failed to prove that the employee committed any misconduct", and "did not discharge the onus to prove that the dismissal was substantively fair".

[5] The commissioner came to this conclusion on the basis of the following three paragraphs:

> "[23] The employer also had to prove that the employee contravened a rule in the workplace. The employer failed to call the two managers who gave the instructions and observed the misconduct. Ramlakan's evidence was mainly hearsay and I attach no weight to it. The employee proved that there were two merchandisers doing the same duties. The employer failed to prove that the misconduct, if any, was

committed by the employee and not the other merchandiser. The employer was further inconsistent in charging the employee only and not the other merchandiser for stock that allegedly accumulated for two weeks, neglected by both merchandisers.

[24] The employee's version was probable that only managers place stock orders and also had the authority to mark stock down. The two managers were not disciplined for overstocking, failing to mark the stock down and also for poor management of the store. If it is true that damage and expired stock accumulated for two weeks under their watch and stock losses were high, they should be the first to be held accountable.

[25] The employer failed to produce alleged proof that the employee was not adhering to times. The employee's version is probable that he reported for work in time and also worked until late on some days."

[6] To my mind, the award is bristling with misdirections and errors. Amongst other things, Mr Ramlakan had personal knowledge of the employee's alleged misconduct – his evidence was not hearsay and could not simply be disregarded, as the commissioner did. Furthermore, the commissioner made findings of inconsistency in relation to the second merchandiser and two store managers, which issues were not properly advanced during the course of the arbitration.

[7] But to my mind, the most material flaw in the award is that the commissioner failed to deal with the second charge relating to the employee having been insubordinate in not undertaking stock-takes. Instead he dealt only with the first charge (gross negligence) and third charge (poor time-keeping). In my view, had the commissioner applied his mind to the second charge, he would have concluded that the employee was guilty and would have upheld his dismissal on this charge alone – this in the light of the fact (as found by the commissioner in paragraph 26

of his award) that the employee was on a valid final written warning at the time for the same misconduct. To my mind, on the evidence presented, the commissioner could not reasonably have come to a different conclusion.

[8] It follows from the aforegoing that it is unnecessary for me to assess the reasonableness of the commissioner's conclusions in relation to the first and third charges.

[9] In the result, the following order is made:

1. The arbitration award issued by the second respondent on 13 July 2015 is reviewed and set aside;

2. The arbitration award is substituted with an order that the dismissal of the third respondent by the applicant was fair;

3. There is no order as to costs.

A Myburgh

Acting judge of the Labour Court of South Africa

Appearances

For the applicant: A Mihaleto (Du Randt Du Toit Pelser Attorneys)

For the Respondent: M Sekhethela

Instructed by: Wits Law Clinic