

*IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Cape Town)*

Case No : C194/98

In the matter between:

MORKELS STORES (PTY) LTD Applicant

and

DAVID WOOLFREY N.O First Respondent

JOHN BARENDSE Second Respondent

REASONS FOR JUDGEMENT

REVELAS J :

[1] This is an unopposed application for the review of an arbitration award, delivered by the first respondent, in favour of the second respondent on 2 April 1998. The application is brought in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("the Act").

[2] The second respondent was dismissed by the applicant during November 1997, following charges of intimidation, and the breaching of picketing rules allegedly perpetrated during a protected strike.

[3] The applicant and the South African Commercial Catering and Allied Workers Union("SACCAWU") agreed

to certain picketing rules which provide that access to and exit from any service centre or store will in no manner whatsoever be rendered impossible. There was also a rule that employees and customers will not be interfered with and a further rule that picketing will at all times be conducted in an orderly and lawful manner and that neither party will display a hostile attitude or use insulting language.

[4] The strike in question was a nation wide strike. Some employees engaged in strike action committed a number of serious breaches of agreed picketing rules in the period of 11 to 16 September 1997. At the applicant's outlet. The applicant thereafter conducted investigations into a hundred cases where a serious transgression of strike rules had been committed. Fifty disciplinary enquires were held, nine of which resulted in the dismissal of employees. The second respondent is such an employee. The second respondent did not oppose the application and therefore, the aforesaid facts as they appear in the founding papers of the applicant are undisputed.

[5] The second respondent was reliably identified as having played an active part in the following incidents, the facts of which were before the first respondent:

1. The second respondent and another employee succeeded in intimidating a truck driver and preventing him from off loading his delivery at the applicant's premises.

2. The second respondent stopped a Mrs Theron and her customer from leaving the premises and retaining them against their will for approximately ten minutes.

3. The second respondent refused to allow a Mr Morton access to the applicant's premises in order to collect a vehicle, and persisted in such refusal, contrary to the advise of SACCAWU and an instruction from Mr Harvey who was a deponent to the applicant's founding papers.

[6] According to the applicant, the facts as placed before the first respondent show that the second respondent was guilty of not one, but three serious breaches of picketing rules, some which amount to intimidation, a very serious offence in my view.

[7] The second respondent's conduct was aggravated by the senior position which he held within SACCAWU and the fact that prior to the commencement of the strike, he attended a meeting where Mr Harvey specifically went through the strike and picketing rules with him and made him aware of the fact that SACCAWU had assented to these.

Furthermore, certain of the acts complained of were in defiance of a court order granted on 16 September 1997.

[8] It also appears from the award that the evidence led by Mr Morton was ignored.

[9] The first respondent made the following finding :

"There is no question that the conduct of the picketers was contrary to both the agreed picketing rules and to

accept the disciplinary norms. I am satisfied that the actions of the picketers was sufficiently serious to justify their dismissal. However, the employer chose not to take disciplinary action against the group. Instead it singled out individuals for discipline based on specific acts of misconduct. The employee was one of those whom the employer chose to discipline individually."

[10] In my opinion, an employer is not restricted to collectively disciplining employees, neither is an employer prevented from taking particular measures against specific individuals who have perpetrated specific acts of misconduct. Such individualised disciplinary action was held to be fair in RECKITT COLEMAN (SA) PTY LTD v CHEMICAL WORKERS INDUSTRIAL UNION AND OTHERS (1991) 12 ILJ 806 AT 814 J the court said the following:

"It has not been suggested that the appellant had any ulterior motive in disciplining those whom he chose to discipline and not disciplining those that were not in fact disciplined. Furthermore, as was recognised by the Industrial Court, it is not unreasonable to take disciplinary action against those individuals who could be identified. It is clear that the appellant had no evidence at his disposal to identify any other individual transgresses."

[11] When a commissioner sits as an arbitrator, arbitrating disputes under the auspices of the CCMA the following is of great importance:

[12] Save for the powers of review created by section 145 of the Act, the commissioner serves as the final arbiter in respect of all the legal and factual issues before him.

[13] Such a commissioner is enjoined, by section 138(1) of the Act to determine the dispute before him or her quickly and fairly and to deal with the substantial merits of the dispute. Commissioners are empowered to make determinations which are important and wide ranging consequences for parties. Commissioners are inter alia, empowered to reinstate employees in the employ of employers who dismissed them and to award compensation which often amounts to large sums of money, payable by the employer.

[14] The power to afford relief to an employee in a dismissal dispute, depends on the commissioner finding that there was no fair reason for the dismissal.

[15] In exercising such a power a commissioner is

assisted by a considerable body of jurisprudence that has evolved in this country in relation to unfair labour practices and unfair dismissals in general. Employers generally, do not dismiss employees for no reason. When an employer has chosen to discipline and ultimately dismiss an employee commissioners must be careful to take all the relevant factors into consideration, before deciding that an employer has dismissed the employee unfairly.

[16] Commissioners should also not readily substitute a employers' decision to discipline with their own opinions as to what should have been decided, without giving due consideration to applicable principles and facts.

[17] Equally, employees are entitled to expect commissioners to take all circumstances into consideration in coming to a finding that their dismissals were indeed for a fair reason.

[18] In other words, both employers and employees are entitled to expect commissioners to make findings in accordance with the facts and labour principles in a manner which is consistent, fair and logical.

[19] Employers cannot be precluded from taking disciplinary action against individuals, properly identified as having conducted acts of misconduct simply because given the nature of the strike action and the number of employees involved, the employer is unable to identify all of the individual transgresses.

[20] As shown, a hundred investigations were held and they did not all have the same result, which indicates that the applicant did not view all the breaches of picketing rules in the same light, as suggested by the first respondent's reasoning.

[21] In the matter of CAREPHONE (PTY) LTD V MARCUS NO AND

OTHERS 1998 (10) BCLR 1326 (LAC) it has been held that an award in arbitration proceedings before the CCMA, may be reviewed on the various grounds as set out in section 145 of the Act.

[22] It was also held in this judgement, that an arbitrator may not, when making an award, exercise his

powers in conflict with constitutional values which include the right to administrative action which is justifiable in relation to the reasons given for it. Consequently, an award that is not justifiable, having regard to the factual material which was placed before the arbitrator, will be reviewable. The test ultimately adopted by the Labour Appeal Court in the CAREPHONE matter is similar to that found in SHOPRITE CHECKERS (PTY) LTD V CCMA AND OTHERS (1998) 5 BLLR 510 (LC) where, at 5181 Pretorius A J said the following:

“Applying this test an administrative decision will be reviewable where the conclusions reached by the administrative officer are not capable of reasonable justification when regard is held to the factual premises on which they are based.”

[23] The first respondent finds that the conduct of the picketers complained of is dismissable, but finds that the applicant acted unfairly because the applicant did not act against the entire group. The first respondent does not deal with the three specific incidents involving the second respondent, for which the group of picketers weren't collectively responsible, only the second respondent. This reasoning does not make sense.

[24] On the undisputed facts placed before me, it appears that the first respondent did not come to a justifiable conclusion, on the evidence before him.

[25] Consequently, the review falls to set aside.

[26] As all the relevant facts were before me, no purpose would be served in remitting the matter to the CCMA.

[27] In the circumstances, I made the following order:

The arbitration award issued by Commissioner David Woolfrey of the Commission for Conciliation, Mediation and Arbitration under case number WE 7315 is set aside.

E REVELAS

For the applicant

Marais Muller Inc

For the Second Respondent

No appearance

This Judgement is also available on the Internet at the following Website:

<http://www.law.wits.ac.za/labourcrt>