

IN THE LABOUR COURT OF SOUTH AFRICA
REPORTABLE

CASE NO **D1719/02**

DATE HEARD : 2004/02/05

DATE DELIVERED : 2004/02/05

In the matter between:

AMALGAMATED PHARMACEUTICALS LIMITED Applicant

and

H GROBLER N.O. First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION** Second Respondent

S SHEZI Third Respondent

Fourth Respondent

Fifth Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE MADAM JUSTICE PILLAY
ON 5 FEBRUARY 2004**

MR F A BODA

MR P O JAFTA

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JUDGMENT5 FEBRUARY 2004PILLAY J

[1] The applicant seeks to review the award of the first respondent Commissioner on the limited issue of the remedy of reinstatement awarded.

[2] The third, fourth and fifth respondents, (the individual respondents), were dismissed for misappropriation of company property. A polygraph test showed that they could be responsible for the serious stock losses suffered by the applicant.

[3] The Commissioner found as follows:

"In practice a polygraph does not serve to prove that someone is actually lying for the questions are often too broad to exclude that which is neither intended nor sought. And it most definitely does not prove that someone is guilty. *In casu* the respondent fell into the trap it set for itself. If the polygraph says the applicants are not being truthful and they are the ones who worked in the departments concerned, they had to be guilty on probabilities? 'Right', the respondent concluded. Thus the respondent came to the wrong conclusion for there is absolutely no evidence whatsoever before me to prove that the applicants were guilty of anything other than that they had failed to report the fact that Elias abused the system as and when he felt like it. They were not charged with having been disloyal - and their explanation as to why they did not report him was quite satisfactory and typical of a situation where a senior member of staff who is in a position of power abuses a system to the detriment of the workforce. This, together with the fact that they gave their evidence in a forthright, direct and honest manner, leads me to conclude that their dismissal was unfair."

[4] Mr *Boda*, for the applicant submitted that the award is reviewable because the Commissioner failed, firstly, to provide any reasons for the remedy awarded. (*Highveld Steel and Vanadium Corporation Limited v National Union of Metalworkers of South Africa and Others* (2004) 1 BLLR 11 (LAC) paragraph 60.) Secondly, she failed to consider that the applicant held a reasonable suspicion against the individual applicants. If she had done so, she would have found that the relationship of trust had broken down and would therefore not have awarded reinstatement, so it was submitted.

[5] The failure or omission by the Commissioner to provide reasons for her award does not *per se* render the award irrational and therefore reviewable on the grounds of a gross irregularity. The Commissioner's findings of fact which, I might add, are not disputed and the way she recorded them anticipate the remedy. Firstly, she rejects the polygraph evidence for the reasons stated above. Secondly, she accepts from the corroborated evidence of the individual respondents that they suspected that Iqbal Elias, the person in charge of the stock, abused the procedures which resulted in the stock losses. This acceptance is consistent with the concession by Elias himself that he did not follow procedures, that mistakes ensued and that he had asked the individual respondents not to check orders that he packed himself.

[6] It follows from the foregoing that the individual respondents had to be found not guilty. Furthermore, the concession, the evidence in rebuttal and the finding that the individual respondents gave their

evidence in a forthright, direct and honest manner established other equally probable causes for the stock losses.

[7] In these circumstances, the failure to furnish reasons for the remedy of reinstatement is not a gross irregularity.

[8] This case is distinguishable from that of *Highveld* above, firstly, because the facts anticipate the remedy. Secondly, *Highveld* is an appeal from a judgment of the Labour Court. This is a review of an award. The test for setting aside an award is limited to the grounds set out in section 145(2) of the Labour Relations Act No 66 of 1995 ("the LRA").

[9] Having regard to the decision in *Carefone (Pty) Limited v Marcus N.O. and Others* (1998) 11 BLLR 1093 (LAC), the award is justifiable on the basis of the material before the Commissioner.

[10] Even if the Commissioner was wrong in exercising her discretion in favour of reinstatement, and in my view I do not believe that she is, there is no basis for concluding that such an error is a gross irregularity.

[11] Turning to the second leg of the applicant's argument, once it was established that there were other possible causes of the stock loss, the applicant's suspicion of the individual respondents could not be reasonable. Furthermore, there could be any number of explanations for the fall in the stock losses since the dismissal of the individual applicants.

It would have been quite irrational in these circumstances for the Commissioner to have refused reinstatement.

[12] Whether there is or is not a reasonable suspicion and breach of trust is a factual inquiry and depends on the circumstances of each case. The facts in this case are distinguishable from the case relied on by Mr *Boda*, namely *Algorex (Pty) Limited v CWIU and Another* (1995) 10 BLLR 1 (LAC).

[13] The mere fact that the applicant does not trust the individual respondents cannot, without more, be a basis for holding that the employment relationship has broken. In a constitutional democracy implicit in the notion of fair labour practice is the obligation to balance the respective interests of the parties. To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrong doing is grossly unfair. The breach of trust, if there was such, was not caused by the individual respondents.

[14] In the circumstances, the application for review is dismissed with costs.
