

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT PORT ELIZABETH**

**Case Number: P155/98**

In the matter between

**Food and General Workers Union**

**1<sup>st</sup> Applicant**

**M M Mpendu**

**2<sup>nd</sup> Applicant**

and

**J Labuschagne**

**1<sup>st</sup> Respondent**

**The Director, the Commission for**

**2<sup>nd</sup> Respondent**

**Conciliation, Mediation and Arbitration, Eastern Cape**

**The Commission for Conciliation, Mediation**

**3<sup>rd</sup> Respondent**

**And Arbitration, Eastern Cape**

**Picardi Rebel Liquors**

**4<sup>th</sup> Respondent**

**JUDGMENT**

## **LANDMAN J**

[1] The Food and General Workers Union has applied to review an award by a commissioner of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). The commissioner declined to reinstate Mr Mpendu, a member of the union, in his employment with his former employer Picardi Rebel Liquors.

[2] Picardi Rebel Liquors has filed a notice in terms of which they abide by the decision of this Court. That of course does not relieve the Court of the burden of deciding whether or not the review should succeed because an unopposed review is not the same as a default judgment. In this instance I am required to apply my mind and decide whether or not the arbitration award is reviewable on the grounds set out in s145 of the Labour Relations Act 66 of 1995.

[3] Very briefly, the facts which served before the commissioner were that Mr Mpendu was employed at the company's store in August 1996 as an assistant to the empties' controller. He was later promoted to controller in February 1997. His duties consisted of receiving and counting the return of empty crates and bottles from customers. He would thereafter issue a slip recording the returns, and the value to the customer, who would then present the slip to, and receive payment from, one of the store's cashiers. Till records of payment for empties would assist in the determination and control of the stock of empties that, at any given time, should be on hand.

[4] The commissioner heard evidence and analysed the evidence and the arguments that were made in regard to that evidence. He held:

The chairman of the disciplinary inquiry ignored, correctly, the hearsay evidence of the cashier that Mr Mpendu himself collected the payment of R654 for the empties allegedly received from Thabata. I am satisfied that the admissible evidence presented at this hearing established an overwhelming probability that Mr Mpendu's issue of slip 367636 on 11 November 1997 was a falsification and that the payment by the cashier of the amount of R654 constituted a fraudulent loss to the company. There has been no refutation of the company's evidence that Thabata was not a regular customer of Thamsanqa store and that he informed the company that the empties were not his. There had been opportunities, at the enquiry, an appeal and this hearing, for Mr Mpendu to secure Thabata's confirmation that he actually delivered and received payment for, the 100 crates and empties. The contradictory statements by Mr Mpendu as to whether he knew Thabata, as well as the improbability of the delivery of 100 crates by car (or bakkie), persuade me that Mr Mpendu's testimony has to be rejected as unreliable and a fabrication. His misconduct, considering the position of trust he occupied, was serious and his dismissal cannot be said to have been an inappropriately harsh sanction.

[5] It must be borne in mind that the charge sheet against Mr Mpendu had been whittled down by the time it came to arbitration, so much so that the commissioner outlined the issue to be decided as whether the dismissal of Mr Mpendu for not complying with company rules and regulations when making payment for empties to customers and falsifying such pay outs caused

loss to the company, was fair.

[6] In terms of **Carephone (Pty) Ltd v Marcus NO & Others** [1998] 10 BCLR 1326 (LAC), this Court is not entitled to interfere with an award simply because it feels that that award is not justified. It may only do so when the award is not justifiable and is not rationally connected to the material which served before the commissioner. It seems to me that the commissioner's finding that there had not been compliance with the rules and regulations is one with which I cannot interfere. However, the commissioner goes on to find that Mr Mpendu was guilty of fraud. In my opinion the commissioner has misdirected himself in a grave manner by failing to appreciate that the onus in regard to unfair dismissal rests upon the employer, who must prove the fairness of the dismissal. In this case the dismissal was a fact and the onus therefore rested on the employer to prove the fairness. In proving the fairness, it was incumbent upon the employer to have called Mr Thabata to show that he did not deliver the crates which he was alleged to have done. As I read this award that onus has been thrown upon Mr Mpendu. That, I believe, is a gross irregularity. Although the commissioner correctly states that the hearsay evidence of the cashier should be disregarded, he nevertheless bases his finding on the fact that Thabata informed the company that the empties were not his. This is clearly a hearsay statement and although hearsay is admissible, it must be reliable hearsay. In this particular instance, the failure to call Mr Thabata was thrown at the door of Mr Mpendu and that was not justifiable.

[7] In the circumstances I am satisfied that there has been a defect which entitles me to

interfere with the award. However I have found that Mr Mpendu disobeyed and failed to comply with the rules and regulations regarding empties and I should take that into account. I have also considered whether I should send the matter back to the arbitrator or to a new arbitrator. I feel that that is not warranted in these circumstances. In the premises I make an order reviewing and setting aside the first respondent's arbitration award and ordering the fourth respondent, Picardi Rebel Liquors, to reinstate the second applicant, Mr Mpendu, in their employment on the same terms and conditions which prevailed on the 21st day of November 1997. However, in the light of the fact that there has been a contravention of their rules, I do not make that order retrospective. There will be no order as to costs.

**A A LANDMAN**

Judge of the Labour Court

DATE OF HEARING: 20 November 1998

DATE OF JUDGMENT: 20 November 1998

For the Applicant: Mr Nduzulwana