

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 1 September 1998 CASE NO. J1079/97

In the matter between:

METCASH TRADING (PTY) LTD t/a

TRADOR CASH & CARRY WHOLESALERS Applicant

and

MR SITHOLE NO AND OTHERS Respondents

J U D G M E N T

LANDMAN, J:

1. Metcash Trading (Pty) Ltd trading as Cash and Carry Wholesalers installed a hidden camera in its premises in order to monitor the activities of its employees. Six employees of the employer were captured on video while they were taking stock and hiding it on their persons. Their cases were given to six different presiding officers. Three of the six employees were found guilty and were dismissed. These three employees are Mr Petrus Nkoe, Mr Denise Jasson, Mr Vincent Mosasa who are the respondents together with the commissioner and the union in this matter. One of the other employees was acquitted by a disciplinary tribunal and the charges were withdrawn in regard to two others.

2. The three respondent employees referred a dispute to the CCMA. The first respondent, a senior commissioner, was appointed to arbitrate the matter. The matter proceeded to arbitration and on 23 September 1997 the first respondent handed down his award. The following part of his reasons is relevant for present purposes. He says:

"It is a requirement of the code of good practice in Schedule 8 of the Labour Relations Act 1995 (Act 66 of 1995) that the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consider (item 3(6)). This misconduct under consideration in the case is the misconduct of all the employees who were captured by the video camera while taking stock and concealing same on their persons. If this was a serious crime, I think it was, then the employer party should

have ensured that the participants are disciplined consistently. In the case of NUM and Others v Free State Consolidated Gold Mines Operations Ltd/President Steyn [1003] 4 (3)

SALLR 36 (LAC) the nature and rationale of consistency or parity principle was explained by the court as follows:

'An important feature of the corrective approach is that like cases should be treated alike. The parity principle, a basic tenet of fairness, requires that like cases be treated alike. If two employees are caught committing much and the same wrong, one should not be disciplined if the other one goes free nor, if personal circumstances are much the same, should one be more severely punished than the other.'

I think the first mistake of the employer party was to appoint a different presiding official for each suspected employee. The employer party must have realised that the different presiding officials were likely to pass different judgments as it indeed happened. This would therefore have resulted in the employees who have been caught committing the same wrong, being treated differently. An employer has the obligation to see to it that employees are treated alike. Here, it is not a question of the employer believing that it acted fairly but a question of being seen to be acting fairly. Bias is a matter of perception. If suspicion is reasonably apprehended then that is the end of the matter."

3. In consequence the first respondent ordered:

1. The employer party to reinstate the dismissed employees with immediate effect in its employment from the date of dismissal on terms and conditions not less favourable to them than those that existed prior to their dismissal.
2. Each of the employees to be paid an amount equal to the remuneration that they would have received for the period that they had been dismissed.
3. No order was made as to costs.
4. The employer was dissatisfied with the result of the arbitration proceedings and launched an application to review it in this court. In terms of a recent decision, Carephone (Pty) Ltd v Marcus NO and Others, unreported, LAC JA52/98, the Labour Appeal Court has recently held that reviews of arbitration proceedings conducted by the CCMA must be heard in terms in section 145 of the Labour Relations Act 66 of 1995. However, that Act must be read subject to the Constitution and the fundamental rights enshrined in the Constitution. The gist of that decision is the following:

"The effect particularly of the administrative justice section in the bill of rights has broadened the scope of judicial review of administrative action. The peg on which the extended scope of review has been hung is the constitutional provision that

administrative action must be justifiable in relation to the reasons given for it. This provision introduces the requirements of rationality in the merital outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety." See paragraphs 30-31.

5. The court goes on to point out that on the plain meaning of the word "justifiable", the distinction between a review and an appeal is to be maintained. It also said that when the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not, however, give the court the power to perform the administrative functions themselves which would be the effect if justifiability in review process is equated to justness or correctness.

6. The Labour Appeal Court pointed out:

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve considerations of the "merit" of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her opinion of the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order." See paragraph 36.

7. The court goes on to point out that there is no purpose in looking for synonyms for justifiable and says:

"It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material property available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA." See paragraph 37.

8. The Labour Appeal Court went on to apply the law to the facts of that particular case where a commissioner of the CCMA declined an application for postponement. In the course of its judgment the court remarked:

"Accordingly, the only basis for review are (1), that the facts amount to misconduct or gross irregularity or impropriety under section 145(2)(a)(i)-(ii) and section 145(2)(b) of the LRA or (2), that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under section 145(2)(a)(iii) of the Act." See paragraph 53.

9. So much for the law. I now turn to the particular facts at hand. In my opinion the matter may be disposed of on two bases. The first is that there is a defect in the award, more particularly in the reasoning of the arbitrator which amounts to a gross irregularity secondly the award is not justifiable in relation to material which served before the commissioner.

10. In the first instance the commissioner is obliged to ad

minister the law, in this particular case it would be the Labour Relations Act, together with the jurisprudence relating to the law and equity and to take into account, as enjoined by the Act, the code of good practice which is set out in Schedule 8 to the Act. In order for the commissioner to apply the law and to be guided by the code, it is imperative that the commissioner must understand it properly in order to apply it reasonably and to arrive at a justifiable conclusion.

11. The law, in so far as it has been developed, is set out concisely by Myburgh JP in Earlybird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC) at 545G-I. He says:

"Like cases should be treated alike: NUMSA v Henred Freuhof Trailers (Pty) Ltd 1995 (4) SA 456 (A) at 463G-J the respondent and Mayiza were guilty of the same offence, the theft of chicken pieces. Prima facie, they should have received the same penalty. I say prima facie, because an employer may be justified in differentiating between employees, guilty of the same offence, on the basis of differences in personal circumstances of the employees (such as length of service and disciplinary record) or the merits (such as the roles played in the commission of the misconduct): National Union of Mine Workers and Others v AMCOAL Collieries and Industrial Operations Ltd [1992] 13 ILJ 1449 (LAC) at 1452I - 1453B; The South African Law of Unfair Dismissal, P A K Le Roux and Andre van Niekerk, p.111.

12. As far as the code is concerned, the code provides in item 6 as follows:

"The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration."

13. The commissioner was aware of the code, indeed he cites the code in his award. He was aware of the law in this regard. In my opinion, however, he misconceived the nature and import of the code and did not understand the decisions to which he referred. It is clear that the law and the code only apply where there has been a conviction or a verdict that employees have been found guilty of the same or a similar offence. Where employees have been subjected to a disciplinary enquiry and have been found not guilty or where, for various reasons, the charges have been withdrawn, it cannot be said that the employees who were not found guilty of the offence are to be treated in the same way as those who are

found guilty. Those who were found guilty must be treated alike. The facts of this particular case show that they were treated alike for all three of them were dismissed. Those who were found not guilty or whose charges were withdrawn were dealt with in accordance with that result and were not dismissed.

14. In my opinion the commissioner made a material error in assuming that when there is reference to misconduct it is to objective misconduct or to suspicion of misconduct. The law and the code confine it to misconduct which has been proven on a balance of probabilities in disciplinary proceedings before an impartial and unbiased chairperson. It therefore follows, in my opinion, that the commissioner committed a gross irregularity by misunderstanding the law and that gave rise to a reviewable award.

15. In any event, I must point out that if this case is to be decided on the basis that the award must be justifiable in relation to the reasons for the award, then it is clear that the reasoning must take place in accordance with the logic permitted by the law. Put differently, but basically stating the same, the material which the commissioner takes into account must not simply be the factual material but must also include the rule of law which is applicable. This must be applied in order to arrive at a conclusion which is justifiable in the light of that material. Where there is an error of reasoning and a misunderstanding of the law, then it is highly likely, and in this case it has been shown to be the case, that the award will not be a justifiable one.

16. In the premises I am satisfied that the award of the commissioner should be set aside and it is hereby reviewed and set aside and substituted by finding that the dismissal of the third, fourth and fifth respondents is substantively and procedurally fair. The application therefore succeeds and the second, third, fourth and fifth respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

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JUDGE A A LANDMAN

LABOUR COURT OF SOUTH AFRICA

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ON BEHALF OF APPLICANT : ADV A E FRANKLIN

Instructed by : Fluxman Rabinowitz

ON BEHALF OF RESPONDENTS : MR V ZIBI

Instructed by : SACCAWU

DATE OF HEARING : 1 SEPTEMBER 1998

DATE OF JUDGMENT : 1 SEPTEMBER 1998