

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NUMBERS : J2530/98
J2481/98

In the matter between -

TRUWORTHS LIMITED APPLICANT

and

COMMISSIONER, Mr L L RAMABULANA **N O** 1ST RESPONDENT

S A C C A W U 2ND RESPONDENT

MORIGE, CORRINE 3RD RESPONDENT

JUDGMENT

REVELAS J:

- 1] This is an application for review in terms of s 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant ("TRUWORTHS") seeks an order to setting aside an arbitration award made by Mr LL RAMABULANA ("the second respondent"), a commissioner of the Commission for Conciliation Mediation and Arbitration ("the CCMA") on 13 July

1998 in favour of the third respondent, Ms CORRINE MORIGE. TRUWORTHS dismissed the third respondent on 19 September 1997 following a disciplinary enquiry where she was found guilty of the following charges levelled against her:

" Misconduct: Dishonesty in that on 29 July 1997, you allegedly possessed a bank card note for two rand, when in fact it should have been processed for R56,99, resulting in a personal gain of R50,00 as only R4,99 was overbanked"

- 2] The third respondent challenged the substantive fairness of her dismissal and declared a dispute with TRUWORTHS, which she referred to the CCMA, where conciliation failed. The matter then resulted in the arbitration before the first respondent.
- 3] The case advanced by TRUWORTHS at the arbitration hearing was that the third respondent was dishonest in that she took R50.00 after processing a transaction of a client, one Mr GOVENDER, on 29 July 1997. It was common cause that he returned a garment which he had previously bought for R 56.99. He requested the refund to be credited on his credit card account. Contrary to what was required, the third respondent allegedly failed to transfer the whole credit to

Mr GOVENDER's credit card account. She only transferred R2.00. The daily cash-up of the till reflected that there was an excess in the amount of R4.99 only, whereas there should have been an excess or overpayment of R 54.99 according to the transaction registered. The third respondent was not able to account for the missing R50.00. She did not give the R50.00 to Mr GOVENDER or someone else. The transaction was authorized by a supervisor. The first respondent argued that the supervisor should have been disciplined as well.

- 4] The supervisor was not subjected to any disciplinary process, since TRUWORTHS did not impart any blame relating to the transaction to the supervisor. It was submitted on behalf of TRUWORTHS that the supervisor who authorised the transaction did so, after having satisfied herself that the price attached to the garment and the price reflected on the computer screen were the same.
- 5] The case for the third respondent was that she registered an entry of in, R 2.00 on the cash register instead of R56.99. She testified at the arbitration hearing that she had executed her responsibilities on the day in question to the best of her abilities and in accordance with what was expected of her as

an employee. She denies that there was any misconduct on her part and denied that she stole R50.00. It was common cause before the first respondent that the third respondent was the cashier responsible for the transaction.

- 6] The first respondent made the following observation in his award:

" Having perused all the documents submitted and having listened to both parties' submissions, I have concluded that Corrine [third respondent] should be held responsible for the disappearance of R50.00, and partially [sic] the transaction which she concluded on the day in question as indicated above. (my underlining) However, the very same transaction was authorised by her supervisor [sic] the supervisor is obviously reflecting that she is satisfied with the transaction. However, it was subsequently discovered that the transaction itself has a lot of mistakes, in that, instead of crediting the client's account with an amount of R56,99, only R2.00 was credited"

- 7] The first respondent rejected the explanation of the supervisor, who testified at the arbitration hearing that in the whole of the transaction she only checked a few details and left the other details for the third respondent's attention. The first respondent then concluded that the third respondent's dismissal was unfair on the basis that TRUWORTHS acted

inconsistently, by dismissing the third respondent and not subjecting the supervisor to any form of discipline. The first respondent ordered the reinstatement of the third respondent.

- 8] TRUWORTHS argued that the supervisor's role in checking the credit-card refund was to ensure that the garment was returned and that the ticket price corresponded with the amount which appeared on the till screen. It was argued that the supervisor had fulfilled her duties in that regard, and the amount appearing on the docket was the purchase price. It was further argued by TRUWORTHS that it was not the supervisor's responsibility to "*dissect the minutiae of the docket thereafter*".
- 9] According to TRUWORTHS it was contended that the supervisor's role was limited, because it had a system of in-built checks which would detect any non-reconciliation at the end of the day's trading or thereafter. It was emphasized that the entry of the R2.00 credit refund and the fact that the automatic till generated a R54.99 "cash" refund, could only have been created by a deliberate act on the part of the third respondent.

- 10] TRUWORTHS further contended that even if the supervisor was negligent, that it was grossly irregular of the first respondent to compare her conduct with the conduct of the third respondent, which was dishonest, and which strongly suggested an action perpetrated for personal financial gain. It was also argued that the first respondent failed to take cognizance of the difference in the job functions and responsibilities of the third respondent and her supervisor, and failed further to comprehend the gravity of the third respondent's conduct.
- 11] TRUWORTHS was of the view that any misconduct on the part of the supervisor related to poor work performance, which could be dealt with by counselling as a disciplinary measure. In any event, argued TRUWORTHS, the supervisor's conduct was irrelevant to the issues which the first respondent had to decide upon.
- 12] TRUWORTHS raised several new factual matters in its reply to the third respondent's answering affidavit and the third respondent received permission from Zondo J to answer to the replying affidavit of TRUWORTHS. TRUWORTHS then filed a reply to that document. In addition supplementary heads of

argument were also filed, all of which added to the prolixity which marked the cases presented by both parties.

- 13] The relevant issues in this matter, I believe, can be dealt with in a manner which involves far less prolixity.
- 14] The question that I have to decide, is whether or not to interfere with the award of the first respondent, on the basis that the first respondent came to a conclusion which is not justifiable by the reasons given for that conclusion. In other words, it must be demonstrated that there is no a rational objective basis for justifying the connection between the evidential material which was available to the first respondent and the conclusion which the first respondent eventually arrived at. [see *Carephone (Pty) Ltd v Marcus N.O and others* 1998 (11) *BLLR* 1093 (LAC), and also 1998 (19) *ILJ* 1420 (LAC) and *Shoprite Checkers (Pty) Ltd v CCMA and others* (1998) 19 *ILJ* 892]
- 15] Counsel on behalf of first respondent argued that the first respondent was entitled to judge the behaviour of the first respondent, with reference to the standards set by TRUWORTHS, and to interfere when such standards resulted in

unfairness to the first respondent. It was argued that employer inconsistency would render the dismissal unfair. That is correct. But was there inconsistency?

16] According to the third respondent, her dismissal did not fall within the range of penalties which a fair, unreasonable employer would have imposed in similar circumstances, given the background and history of the case. It was also argued that the first respondent did indeed take into consideration, the material evidence relating to the issues before him and arrived at a fair conclusion.

17] TRUWORTHS is of the view that the first respondent committed a gross irregularity. It contends that the evidence presented at the arbitration and the conclusion which the first respondent were not logically connected to the overall assessment and impact of the oral evidence and the documentation, read together. It was argued that the first respondent reached conclusions which were not capable of reasonable justification if the factual premises on which they are based are considered.

18] The following findings of the first respondent are of material

significance in determining this application for review.

18.1 The first respondent found as a fact that the third respondent was responsible for the "*disappearance*" of the R50.00. The amount of R50.00 was not found in the till, nor was it given to the customer.

18.2 The first respondent found that the supervisor and the third respondent were both "*involved in a misconduct [sic]*" and therefore the supervisor should also have been disciplined.

19] In my view the third respondent's conclusion, that the supervisor should also have been subjected to some form of discipline, is not supported by logic or fact.

20] The R2.00 entry, as well as the R56.99 cash entry, were on the probabilities, entered deliberately, and could hardly be result of a mistake, such as the slip of a finger.

21] The supervisor at best was negligent in not immediately realizing that the wrong amounts were registered into the till. In any event there was evidence that errors made, are invariably detected a day or two later. None of the actions of

the supervisor were indicative of an intention to gain R50.00 for herself whereas such an intention can, on the probabilities, be attributed to the third respondent.

- 22] A perusal of the credit note, a copy of which was attached to the founding papers, reflects a total R56.99. To the left of the total amount, it reflects "*Bank Card R2.00*" and "*Cash R54,99*". On the third respondent's version, the supervisor omitted to notice that the bank card entry was R2.00 instead of R56.99. I agree with the contention that it was not a serious omission and does not amount to "*a serious dereliction of her duties*" as found by the first respondent. The failure by the supervisor, to notice the incorrect bank card entry, did not entitle the third respondent to misappropriate an amount of R50.00, which, on the probabilities, is the only inference that can be drawn.
- 23] TRUWORTHS found the third respondent to be dishonest and dismissed her. The supervisor's actions were not dishonest. Therefore, there was absolutely no basis for the third respondent's finding that the supervisor was "*involved*" in the same incident of misconduct, and that a failure to discipline her indicated inconsistency on the part of TRUWORTHS.

24] The arbitrator himself remarked in his award that:

"I also think that had the supervisor executed her duties properly, the embarrassing incident could have been avoided and possibly the dismissal of Corrine. On the other hand, it is my opinion that, had the employer subjected the supervisor to any form of discipline I would have been convinced otherwise, and possibly upheld the dismissal of Corrine." (My underlining)

25] I am unable to grasp the logic behind this reasoning. On the one hand the first respondent labels the conduct of the third respondent as a mere "*embarrassing incident*", but at the same time he finds that the third respondents conduct was of such a nature that it possibly warranted dismissal, were it not for the omission to discipline the supervisor.

26] The fact that the R50.00 was missing, on the probabilities, indicate that the third respondent was dishonest. Dishonesty goes far beyond mere embarrassment. It is the type of misconduct which would normally warrant dismissal. This view is supported by the first respondent himself, where he suggests that he would possibly have upheld the dismissal if the supervisor was also disciplined.

27] Since there is no factual basis for a finding that there was inconsistency on the part of TRUWORTHS in dismissing the third respondent, there is no basis for a finding that the dismissal was unfair.

In *Standard Bank of South Africa Limited v CCMA and others* (1998) 19 ILJ 903 (LC) Tip AJ observed as follows:

" It is one of the fundamentals of the employment relationship that an employer should be able to place trust in the employee. A breach of trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it.

The existence of the duty of an employee to act with good faith towards his or her employer and to serve honestly and faithfully is one of long-standing in the common law. It is regularly and strongly approved by our courts in relation to the unfair labour practice jurisdiction under the previous Labour Relations Act, 28 of 1956. It has been no less strongly reaffirmed in decisions dealing with the current Act."

There is no purpose in remitting the matter to the CCMA for a hearing afresh, in my view, because I have found on the facts that were mostly common cause, that the dismissal was not

unfair.

28] Consequently I make the following order:

1. The arbitration award issued by the first respondent is set aside.
2. The second and third respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

E REVELAS

On behalf of the Applicant:
Advocate L Halgryn

Instructed by:
Andrew Levy and Associates

On behalf of the 2nd & 3rd Respondents:
Advocate A P J Du Plessis

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