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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR258/02

2003.03.19

In the matter between

CRYSTALLITE PLASTICS (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION,

ON 1st Respondent

2nd Respondent

CHEMICAL ENERGY PAPER PRINTING

S UNION 3rd Respondent

4th Respondent

5th Respondent

J U D G M E N T

REVELAS, J:

1. The fourth and fifth respondents, former employees of

the applicant, were dismissed by the applicant following a disciplinary inquiry held on 30 November 2000. That inquiry was chaired by the managing director of the applicant, Mr M E Coetzee, who is also the deponent to the founding affidavit in support of the application in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended ("the Act"), wherein the applicant seeks to set aside the award made by the second respondent, ("the arbitrator"), in favour of the fourth and fifth respondents. The arbitrator found that the dismissals of both the fourth and fifth were both substantively and procedurally unfairly.

2. At the disciplinary inquiry held on 30 November 2000 the fourth and fifth respondents faced charges against them for allegedly having had, on various occasions, – "**unlawfully removed goods belonging to the applicant from its warehouse and offered these goods for sale to various customers with the purpose of enriching themselves.**"

3. The fourth and fifth respondents (to whom I shall refer to as " Nkosi" and "Mazibuko" respectively) were also charged with having failed to deliver goods to – "**designated customers and subsequently offered these goods to potential buyers, also to enrich themselves.**"

4. When Nkosi and Mazibuko were dismissed, they referred

their dispute about the alleged unfair dismissal to the first respondent, where the dispute was eventually arbitrated by the arbitrator. The applicant was ordered to reinstate the fourth and fifth respondents and to pay them compensation equal to 12 months' remuneration each.

1. 5. The disciplinary inquiry, which I referred to and which was held on 30 November 2000, was preceded by another hearing, held on 3 November 2000, where Nkosi and Mazibuko were faced with the same charges. They were also found guilty at that hearing, but that finding was subsequently overturned at an appeal hearing held on 23 November 2000, which was presided over by a Mr Dietrich of the applicant. He found that there was no proper evidence to substantiate a finding of guilty. The next day, 24 November 2000, Nkosi and Mazibuko were notified to attend the hearing referred to, which was held on 30 November 2000, where further evidence was led.

6. At this point it is noteworthy that the only evidence which was before the chairman at the first hearing (Coetzee) was an unsigned statement of one of the customers who allegedly dealt with the fourth and fifth respondents.

7. At the second hearing (30 November 2000), the evidence

presented was four affidavits, *inter alia,* by customers of the applicant, which supported the claims or charges levelled against the respondents. The third and fourth respondents were not afforded the oppurtunity to cross-examine any of these witnesses, and I can at this stage say, much was also conceded by counsel on behalf of the applicant, that these proceedings were procedurally unfair.

8. The question whether or not an employee may be subjected to two hearings was an issue which came before the Labour Appeal Court in *BMW South Africa (Pty) Ltd v van der Walt* 2000 (2) BLLR at 121, where Conradie JA held:

1. **"Whether or not a second disciplinary inquiry may be opened against an employee would, I consider, depend on whether it is in all circumstances be fair to do so. I agree with the *dicta* in *Amalgamated Engineering Union of South Africa and Others v Carlton Paper of SA (Pty) Ltd* 1998 (9) ILJ 588 IC at 596A-D, that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into Labour Law. They are public policy rules. Advantage of finality in criminal and civil proceedings is thought to outweigh the harm which is made in individual cases being caused by the application of the rule. The labour law of fairness, and fairness alone, is the yardstick. (See also**

Botha v Gengold **1996 (4) BLLR 441 IC, and *Maliwa v Free State Consolidated Gold Mines Operations Ltd*, *President Steyn Mine* 1989 (10) ILJ 934 IC). I should make two cautionary remarks: It may be that the second disciplinary inquiry is *ultra vires*, the employer's disciplinary code. (See *Strydom v Busco Ltd* 1997 (3) BLLR 343 CCMA at 350F-G). This might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary inquiry, save in rather exceptional circumstances."**

9. The arbitrator found that there were not any exceptional circumstances in this matter, which necessitated two hearings, I agree with him. The applicants were notified that the purpose of the second inquiry was to hear new evidence, and that the previous findings of. Dietrich was arrived at on the basis that the case would be reheard, should new evidence be found.

1. 10. Of course the fourth and fifth respondents were not notified of anything of the kind at the first hearing. They were not aware of the precondition attached to the appeal findings before the enquiry started.

11. In accordance with the principles set out in the *BMW* case, the dismissal was procedurally unfair.

12. It is trite, and that was supported by the Labour

Appeal Court, that an arbitration hearing is a hearing *de novo*. At the arbitration hearing the evidence presented before the second hearing was put before the arbitrator. A Miss Beatrice Goetze, an employee of the applicant, abc investigated the alleged offences and gave evidence in detail about them; Mr Goetze, also gave evidence about the routes and the duty times of the fourth and fifth respondents, indicating where they were on the days in question. A Mr McKenzie also gave evidence.

1. 13. The arbitrator simply did not deal with this evidence in his award. He decided the whole matter and came to a conclusion based on what transpired at the two disciplinary hearings. These hearings, I have pointed out, were procedurally unfair but the question of substantive fairness was never considered by the arbitrator if one has regard to the conclusions that he came to. It was as if such evidence was never before him. The arbitrator did not apply his mind in this regard. If a disciplinary inquiry was procedurally unfair, because witnesses were not called, that defect should be capable of being cured by an arbitration hearing. The converse would be unfair to an employer who, due to a mere technicality, would be forced to continue a relationship with employees, it believes or

knows, to have committed fraud and theft.

14. In my view, it would be more than fair to set the award aside and refer it back to the CCMA, where the matter should be arbitrated before a different commissioner, and the issue of substantive fairness, to be the only issue to be considered.

15. In the circumstances I make the following order:

1. The dismissal of the fourth and fifth respondents was procedurally unfair.
2. The award is set aside insofar as the question of substantive fairness was not properly considered by the second respondent.
3. The matter is referred back to the Commission for Conciliation, Mediation and Arbitration, for the question of substantive fairness only is to be heard by a different commissioner.
4. Each party is to pay their own costs.

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