NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No: JR 491/03

In the matter between

RALLIT TOTAL TRANSPORTATION (PTY) LTD Applicant

and

SAZISO HLONGWANE NO 1st Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION 2nd Respondent

RIAAN LINGENFELDER 3rd Respondent

JUDGMENT

TOKOTA AJ:

[1] In this matter the third respondent was employed by the applicant as a security investigator. On 29 June 2002 after work and at the premises of the applicant, the third respondent, one Boshoff, Steven Nkabinde, De Beer, and Jordaan, all being employees of the applicant, were drinking beer.

[2] The third respondent together with other employees tied Nkabinde to a chair by means of what was referred to as "cable ties"and pushed him to a corridor. It was alleged by Nkabinde that there were racial remarks that were passed on to him although he could not understand Afrikaans properly. The third respondent and the other two employees who tied Nkabinde were white employees. Nkabinde was very upset about the incident and pleaded that

they should untie him. He was untied after about five minutes.

[3 On Monday the incident was reported to management and one Erasmus, Operational Director of the company, called the third respondent and confronted him about the incident. He wrote a letter to the third respondent in which he expressed the unacceptability of his, the third respondent's conduct.

[4] Although the incident initially did not appear to be too serious after investigation it turned out to be. Nkabinde was tied with cables and apparently sustained some marks. The company viewed this conduct in a serious light and considered it to have some racial undertones.

[5] A disciplinary inquiry was subsequently instituted and the employees that were involved were found guilty as charged and two of them were dismissed and one was given written warning. The one who was given a written warning did not participate in tying up Nkabinde. It was third respondent and one Bishoff that were dismissed.

[6] It is not in dispute that this was a dismissable offence. It is also not in dispute that the company viewed the transgression in a serious light.

[7] The third respondent appealed against the sanction but his appeal was dismissed and the sanction confirmed. He then declared a labour dispute, which culminated in the CCMA arbitration. The commissioner set aside the sanction and substituted the same with his own. He ordered that the applicant should pay third respondent seven months salary compensation.
He made that order on the basis that the dismissal was procedurally fair and that reinstatement was not warranted.

[8] It is needless to say that the discipline of employees lies exclusively within the prerogative of management. It is the management that must set standard for its employees and decide what should be appropriate sanction for each infraction of any of its rules. This prerogative ought to be respected. The arbitration is not an appeal court, which, because in its wisdom, the sanction appears to be harsh, must lightly interfere therewith.

It is not the function of the commissioner to impose sanction on behalf of the employer even though it may not agree with it as such.

The arbitration did not find the sanction to be unreasonable and instead agreed that this was a dismissable offence. In his award the commissioner found that it" was common cause that the company has a rule relating to unacceptable behaviour being one of serious offence that could lead to summary dismissal. It was common cause that the applicant (third respondent) broke the rule, and the rule was reasonable and lawful. The applicant was aware of the rule"

[9] In my view the commissioner, even after having made the above finding was not entitled to simply substitute his own sanction as he saw fit. He can only do so if he finds the dismissal to be unfair. Consequently the commissioner exceeded his powers and the award cannot stand.

In the result I make the following order.

The review succeeds and order of the commissioner is set aside and substituted with the following;

" The application is dismissed"

2. No order as to costs.

B R TOKOTA

ACTING JUDGE OF THE LABOPUR COURT

DATE OF HEARING : 25 March 2004

DATE OF JUDGMENT: 18 May 2004

APPEARANCES: For the Applicant: MS M.M. De Jongh of De Jongh Attorneys.

For The Third respondent: Adv.Erasmus instructed Van Zyl Incorporated.