IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D577/2003

In the matter between:

SOUTH AFRICAN FIBRE YARN RUGS LIMITED	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER M M GOVENDER	**Second Respondent**
PHILEMON JABULANI SHEZI	**Third Respondent**

JUDGMENT

MURPHY, AJ

1. The Applicant has made application in terms of section 145 of the Labour Relations Act to review the arbitration award handed down by the second respondent ("the commissioner") acting under the auspices of the first respondent ("the CCMA") in terms of which the commissioner found that the dismissal of the third respondent ("the employee") was substantively unfair. The Commissioner awarded compensation to the employee in the amount of R7000.00 (seven thousand rand) and re-instated him in his employment with the applicant. The relevant factual background is largely common cause, the only issue being the conclusions which follow and the appropriate relief to be granted.

2. The employee was employed by the applicant in the position of a shift manager with responsibility for the supervision of all production at the plant during the course of a shift, including the supervision and maintenance of safety for the entire plant during a shift. Normally, he would be the most senior person on site for the duration of a particular shift.

3. Routinely the shift manager has responsibility for the "hand over process" immediately prior to the termination of a shift. This involved meeting the incoming shift managers to discuss production issues, machinery performance and any general information that the outgoing shift manager found necessary to pass onto the incoming shift manager. Production sheets and other necessary information must be handed over to ensure the efficient continuation of production.

4. At approximately 03H00 on the morning of 30 June 2003 and without obtaining permission or advising any of the applicant's supervisors, the third respondent absented himself from the workplace. On that day his shift cycle terminated at 07H00. However, production had ceased at 00h30 and the machines had been switched off. Although it was possible to contact the manager of his department, Mr. Issoor, to make alternative arrangements for the supervision of staff and the safety of the plant in his absence, and despite senior operators being available, the employee failed to hand over his responsibilities and simply absented himself without advising anyone. Consequently, after he left there was no one at the plant to take over his responsibilities and the employee was aware of this fact.

5. Management became aware of the employee's conduct almost immediately at the commencement of the next shift. It accordingly convened a disciplinary enquiry, which ultimately led to the employee's dismissal. At the disciplinary enquiry, the employee justified his absence on the grounds that he had experienced problems with his motorcar that

was not roadworthy and was afraid to drive it home in daylight in case he was apprehended by the police.

6. The employee referred his dismissal to the CCMA for conciliation and arbitration. During the arbitration proceedings on 12 August 2003, his explanation for his absence changed somewhat. On this occasion he presented the justification that he had received a call from his wife at approximately 03H20 advising him of the fact that his child was sick and needed to dash home to attend to his child.

7. It is of particular importance to note that at both the disciplinary enquiry and the arbitration the employee admitted his guilt to the charge of leaving his workplace before time without permission. Accordingly I agree with Mr. Buthelezi, who appeared on behalf of the employee at the review proceedings, that since the employee had pleaded guilty to the charge in question, albeit with an explanation, the real issue for determination by the commissioner was whether the sanction of dismissal was fair in the circumstances.

8. The commissioner made the following findings in his award. Regarding the employee's explanations for his desertion, he felt these were not convincing, especially in the light of the two different explanations offered at different times. He found reasonably that it was difficult to understand why the employee would not have explained the matter of his child's illness to management in the first instance if that information were true. Hence, he concluded that it was more likely that the employee had manufactured the second reason when he realized that he needed to produce a better reason for leaving than the one he had provided at the disciplinary enquiry. If indeed his child had been unwell, he could simply have contacted Issoor who would then have delegated his responsibilities to another employee.

9. At both the disciplinary hearing and at the arbitration the applicant made much of the fact that the nature of its production processes were such that the potential for fire represents a real threat, by virtue of the fact that certain material used in the manufacturing process is a natural fibre which is flammable and capable of ignition by mere friction or spark. The composition of the natural fibre is such that it is not necessary for the production machinery to be functional in order to create a hazard in that fluff arising from the process is around the machines at all times and an electrical spark generated from the positive power supply could ignite the product. The applicant was particularly concerned about fire by reason of the fact that it had recently suffered an incidence of fire. In the light of this submission by the applicant, the commissioner accepted that the employee's misconduct as a senior employee was serious.

10. The commissioner, however, contradicted himself on the extent of the danger created by the employee's actions. Firstly he found that the employee's suggestion that the risk of danger was mitigated or even eliminated because the machines were off was not very convincing. He accepted the respondent's evidence that the fluff of the jute was capable of igniting even when the machines were off, but more importantly because an unsupervised employee could also have restarted the machines. Later in the award he contradicts this by finding that the danger created by the employer's absence "was minimal at best". During the shift in question there had been only one machine in operation at the commencement of the shift due to the lack of orders. As stated, the machine was switched at about 00H30 and the production area was thereafter cleaned up. In other words there was no production after that time for the remainder of the shift.

11. Despite having received in evidence some indication that the employee

had on two prior occasions absented himself without leave, without a full discussion of the justifiability or otherwise of such absences, the commissioner found that the misconduct of the employee was a first offence and by virtue of that fact concluded that dismissal was not an appropriate sanction. He accordingly re-instated the employee and ordered the payment of back pay in the amount of R7000.

12. As I have already mentioned, since the employee had pleaded guilty to the charge of unjustifiable absence, the real issue that the commissioner was required to decide was whether the sanction of dismissal was fair in the circumstances. In order to decide that issue it was necessary for him to invite and hear evidence on the issues relevant to that determination. In particular he needed to consider: the personal circumstance of the employee; his length of service; the seriousness of the alleged misconduct, in particular the exact nature and extent of the risks to which the applicant was allegedly exposed as a result of the employee's conduct; whether the employee had received any particular instruction, training or guidance regarding the necessity of securing the workplace from specified risks at the workplace; whether the employee had any previous record of misconduct, the exact nature of that misconduct and the disciplinary sanction applied in respect of it; and any other evidence, including the disciplinary code and the sanctions stipulated in it. All these factors were relevant for the determination of the fairness or otherwise of the sanction imposed in the circumstances.

13. It is clear from both the record and the award that the commissioner failed to apply himself to these issues with the requisite degree of professionalism and care.

14. Moreover from the record shows that the commissioner committed an irregularity by depriving the parties an opportunity to submit closing arguments on the question of sanction, despite a request to be allowed to

do so. On this ground alone his award cannot stand.

15. Mr. Erasmus, who appeared on behalf of the applicant, made other valid submissions in support of the applicant's claim that the award is not justifiable. However, seeing that Mr. Buthelezi is also of the view that the award deserves to be set side by virtue of the failure of the commissioner to properly address himself to the question of sanction, it is unnecessary to canvass them. In the result the only issue is whether I should remit the matter back to the CCMA for fresh consideration or substitute my decision for that of the commissioner.

16. There is no evidence at all on record with regard to the personal circumstances of the employee or his length of service. Nor is there any evidence about his level of training or awareness of the safety issues at hand, although in this latter regard one could safely assume a certain degree of knowledge. Conceding this, Mr. Erasmus prevailed upon me to have regard simply to the seriousness of the misconduct and in the light of that to rank it more importantly than the other factors that normally would come into play. Put in another way, he submitted that irrespective of the lack of evidence concerning the employee's length of service and his personal circumstances, the gravity of the offence, in the light of his previous misconduct, outweighs all other considerations, which in any event would have been of little or no relevance or significance had there been evidence regarding them.

17. I am inclined to agree rather with Mr. Buthelezi. He correctly, in my view, submitted that there is also insufficient evidence as to the seriousness of the alleged offence and few details of the previous incidence of fire: whether it was small or big or how frequently fires occur at the applicant's premises. I also do not know whether the fire in question occurred during production.

18. Moreover, the applicant's suggestion that the employee has evinced a tendency towards dishonesty (adding to the seriousness of the alleged misconduct) is also not borne out by the evidence. The two versions advanced in justification of his actions are not mutually destructive versions, of themselves necessarily justifying an inference of dishonesty. Neither explanation is clearly elaborated on the record, both being mentioned almost in passing. Moreover, some significance must be given to the fact that the employee actually signed off before leaving the premises. A dishonest employee would not sign off. Moreover, the employee alleged at the arbitration that he had not been given an adequate chance to tender a full explanation. This was not countered by the applicant at the hearing, nor did the commissioner attach any significance to it.

19. In addition the record shows that the employee tendered certain explanations for his previous absences. It is not clear from the record or the award whether these explanations were taken into account and hence whether the previous discipline was indeed justified or not.

20. Section 145 of the LRA obliges this court to scrutinize the legality and regularity of CCMA arbitration awards on review, and not to substitute a decision by the Labour Court in place of the CCMA commissioner. The section grants a power of review not appeal. As a general principle, therefore, this court should be reluctant to substitute its own decision for that of the CCMA. However, in exceptional circumstances and in the interests of the speedy resolution of disputes, this principle may be departed from. The court has a discretion, to be exercised judicially upon a consideration of the facts of each case. Although a matter will normally be sent back if there is no reason for not doing so, it is in essence a question of fairness to both sides - *Livestock and Meat Industries Control Board v*

Garda 1961 (1) SA 342 (A) @ 349. In this regard the court will have regard to: whether a fresh consideration would lead to a result which is a forgone conclusion; the importance of time considerations; the willingness and likelihood of the body being able to re-apply its mind to the issues at stake; any indications of bias or incompetence that cannot be remedied; and whether the court is in as good a position as the functionary under review to make the decision itself. In the present case it is this latter consideration which to my mind is most important.

21. As I have said, the evidence on record regarding the personal circumstances, length of service, previous misconduct and responsibilities of the employee is simply not sufficient. More importantly, for the reasons advanced by Mr. Buthelezi, I cannot make a clear determination of the seriousness of the alleged misconduct, both because the evidence about the risk of fire at the time when the machines are shut down is incomplete and the evidence regarding prior misconduct is lacking in cogency. Hence, even were I persuaded by Mr. Erasmus that the seriousness of the offence would justify less weight being attached to the employee's length of service and personal circumstances, I would still not be in a position to determine the fairness of sanction. Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. The Code of Good Practice in Schedule 8 to the LRA makes it clear that when deciding whether or not to impose the penalty of dismissal, the employer should *in addition* to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself. To re-cap there is absolutely no evidence at all on the employee's length of service or his personal circumstances. And the evidence on both previous misconduct and the circumstances in which the infringement occurred was less than

satisfactory. I am accordingly unable to substitute my decision for the arbitrator's.

20. In the premises, I make the following orders:

20.1 The award of the second respondent under case KN14551/03 dated 21 August 2003 is hereby reviewed and set aside.

20.2 The matter is remitted back to the first respondent for fresh consideration by a Senior Commissioner other than the second respondent within six (6) weeks of the date of this order.

20.3 There is no order as to costs.

MURPHY, AJ

Date of hearing: 17 March 2005
Date of Judgment: 20 April 2005

For the Applicant: Mr. R.J. Erasmus
Deneys Reitz Attorneys

For the Respondent: Mr. Z.E. Buthelezi
Buthelezi Inc.