IN THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Case No: JR1232/03

In the matter between:

MAKRO PRETORIA WEST	APPLICANT
AND	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER SIPHO RADEBE	2ND RESPONDENT
JOSEPH MAFA	3RD RESPONDENT
ANDRIAN KEKANA	4TH RESPONDENT

JUDGMENT

SANDI AJ

[1] At the arbitration conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration, the second respondent (" the commissioner") issued an award setting aside the dismissal of the third and fourth respondents ("the respondents") and replaced it with an award granting the respondents compensation equivalent to their 12 months' salary and, in addition, ordered the applicant to pay the respondents any annual increases that the

applicant would have qualified for between the date of their dismissal and the date of the hearing.

[2] It is against this award that the review application has been launched.

[3] The third and fourth respondents were employed by the applicant as detailed checker and receiver, respectively. At about 16h00 on 8 September 1998 one of applicant's suppliers delivered to it a consignment of grandpa powder. Procedures laid down by the applicant when receiving orders were followed. After the supplier's driver had parked the delivery vehicle in the parking allocated to it, he produced documents to the booking office, which confirmed that the supplier's order number matched the order made by the applicant. The driver's name and the registration number of the vehicle were recorded. The goods were unpacked and were counted by the fourth respondent, who together with the driver of the delivery vehicle signed the delivery slip certifying that 840 units had been received by the applicant. The next step was that the consignment was subjected to a detailed check by the third respondent who confirmed that 840 units had been received. Both the third and fourth respondents said that the consignment was contained in two pallets. The third and fourth respondents did not play any role in what happened to the consignment thereafter. The goods were placed in a cage which was locked up and sealed by one *Ramutla*, a security guard. On the morning of 9 September 1998 the cage was opened without the seal on the lock having been disturbed. A stock taking revealed that in the whole of the applicant's establishment there were 688 units of grandpa powder

instead of 1111. This does not refer only to the grandpa powder in question.

[4] After the shortage was discovered the third respondent was charged and found guilty of the offence of gross negligence in the performance of his duties as a stock-controller. The fourth respondent, on the other hand, was found guilty of gross misconduct in the performance of his duties as receiver. As a result, the respondents were dismissed from their employment.

[5] At arbitration the respondents were successful.

[6] It is common cause that there is no direct evidence linking the respondents to the misconduct with which they were charged and found guilty and that in support of its case the applicant relied on circumstantial evidence.

[7] Two rules must be followed when dealing with circumstantial evidence. They are stated in *R v Blom* 1939 AD188 at 202-203 as follows:

> (a) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then no inference can be drawn.
>
> (b) The proved facts should be such that they exclude every reasonable inference to be drawn from them save the one that is sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is the correct one.

[8] In civil cases where a lesser onus applies, the second rule is stated as follows: "the proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail. See*: Macleod v Rens* 1997 (3) SA 1039[E], and *Zeffert, the South African Law of Guidance at p105.*

[9] In *AA Onderlinge Assuransie Assossiasie Beperk v De Beer* 1982 (2)SA603 at 614 G-H Viljoen JA said that:

> "It is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the Court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences." (headnote)

[10] Applicant's counsel submitted that the shortage was an indication that the goods were either stolen or never reached the applicant.

[11] As pointed out to counsel during argument I have certain difficulties with his argument. There is nothing to gainsay the respondents evidence. It has to be accepted, as the commissioner did. Moreover, the respondents' version is corroborated materially by the evidence of *Ramutla* who saw at least two pallets of the powder before the cage was locked up and sealed, and no evidence was led to show what quantity of the powder was locked up in the cage and what quantity was removed from it the next morning. Such evidence was vital for an investigation to determine the movement of the grandpa powder after it had been checked by the

respondents.

[12] I disagree with counsel's argument that the only reasonable inference that can be drawn from the facts of the matter is that the third respondent did not receive all the units set out in the delivery document.

[13] In my view, 840 units were delivered to applicant's premises whereafter they were placed in a cage. If any shortage of such goods occurred, it occurred after the respondents had checked them.

[14] The award issued by the commissioner is rational and justifiable on the evidence placed before him and there is no reason to interfere with such finding.

[15] In the circumstances the review application should fail. The parties agreed that if the review application is unsuccessful, the portion thereof that grants applicants compensation in the form of annual increases should be set aside. I propose to do so.

[16] In the result the following order is made:

(i) The commissioner's award is upheld save that the following is deleted from it:

"in addition to 4.4 above the respondent is ordered to pay the applicant's any annual increases that applicants would have qualified for since their dismissal"

(ii) The applicant is to pay the costs of the application.

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B SANDI
Acting Judge of the Labour Court

Date of hearing: 23 June 2006

Date of judgment: 30 June 2006

Applicant's representative: Adv G.A Fourie
(instructed by Perrot Van Niekerk & Woodhouse)

Respondent's representative: Mr Jabulani Motau
(instructed by SACCAWU)