

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 1392/05

In the matter between:

**HOSPITALITY AND GENERAL PROVIDENT
FUND**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

1st Respondent

RODNEY FITZCHARLES N.O.

2nd Respondent

JAMES MOKGOSI

3rd Respondent

JUDGMENT

REVELAS AJ

[1] The applicant seeks to set aside an award made in favour of the third respondent, who had been employed as its Assistant Principal Officer. The applicant, a provident fund, had dismissed the third respondent during November 2004, following charges that he had received certain commission payments made to him, which he did not disclose to the trustees of the applicant.

[2] The third respondent had received payments from SAICOM (“Saicom”) Payphones for the purchase of 130 mobile payphones, on three different occasions, totalling R35 000. 00. He received commission of R300. 00. from Saicom, per mobile pay phone

purchased by the applicant. At the disciplinary hearing held to investigate his misconduct, his defence was that there no rule in place against the non-disclosure of commission earned and that he would have disclosed it at an appropriate time. He described the non-disclosure as the “only skeleton” in his “cupboard”. The chairperson of the disciplinary hearing, who imposed summary dismissal, was motivated by the following considerations:

- (a) On his version, the third respondent was aware that he should have disclosed the payments in question to his employer, irrespective of the existence or not of a rule to that effect.
- (b) The third respondent deposited the monies into his own account. In doing so he could not have been acting in his employer’s best interests. He was either taking a bribe from Saicom for accepting business on behalf of his employer, thereby prejudicing his employer’s reputation or he was accepting a “commission” intended for the applicant and directing it into his own account.

[3] The chairperson held that the third respondent’s conduct constituted gross dishonesty. The dismissal was upheld on appeal on 15 December 2004, whereafter the third respondent referred a dispute about an alleged unfair dismissal to the first respondent, where the matter was eventually arbitrated by the second respondent (“the arbitrator”). In terms of the award, the third respondent had to be reinstated with retrospective effect, the

dismissal having been found to be substantively unfair.

- [4] In the review application argued before me yesterday morning, it was strongly contended that since there was no rule against earning commission as was done in this case, and since the applicant suffered no financial loss, dismissal was inappropriate.
- [5] It was also argued that the applicant had waited for too long to take steps against the third respondent in 2004, when one of the instances of taking commission occurred in 2002. There is no merit in this point because the applicant only became aware of the offences much later.
- [6] The applicant instituted disciplinary action against the third respondent as soon as it became aware, as a result of an audit conducted in November 2004, of the third respondent's misconduct. The arbitrator's finding that the applicant was estopped or deemed to have waived its right to dismiss the third respondent is clearly unjustifiable on the facts.
- [7] The finding that the applicant acted *ultra vires* by dismissing the third respondent without the consent of trustees is also unjustifiable because it is factually incorrect. Mr Horwitz gave evidence that he considered it appropriate to take the matter up with the trustees, and they gave their consent to dismiss the third respondent.
- [8] The arbitrator, the third respondent's legal representative and doubtless many others, hold the view that the third respondent's conduct did not constitute dishonesty. There are those who would argue that as long as the employer suffered no loss, the employee can conduct his or her employer's business in any manner that can

ensure extra income. It is ultimately a question of morality and calls for a value judgment. Any employer should be entitled to set a high standard of ethics in conducting its affairs, particularly where it is the guardian of poor people's money. It is simply not open to commissioners of the first respondent to ridicule that standard and replace it with their own personal standard, without good reason.

- [9] The fact that there was no express rule against making secret commission and profits does not render it permissible or acceptable. That argument is in any event disingenuous because the third respondent admitted at the hearing, that he had read James Dowsey's book, Elements of Retirement Fund Management. The applicant uses it as part of its training for trustees. He agreed that it was a basic manual. This manual makes it plain that trustees (and that would include the third respondent) had a duty to act with care and in good faith and avoid conflicts of interest.
- [10] The third respondent was second in command at the applicant, a position of high authority. Senior employees in particular, owe a fiduciary duty to their employers, which would include a rule against secret profits.
- [11] The actions of the third respondent, at the very least, had the potential of a conflict of interests that could impact on the applicant. The applicant was entitled to set its own standards of ethics and to act against him and dismiss him where he had clearly breached that standard.

[12] The award falls to be set aside and substituted with the following:

“The dismissal of the third respondent was procedurally and substantively fair”.

Elna Revelas
Acting Judge of the Labour Court

Date of hearing: 30 November 2006

Date of judgment: 1 December 2006

On behalf of the Applicant:

Adv. Heidi Barnes, instructed by Cheadle Thompson and Haysom Inc.

On behalf of the Respondent:

Mr Stephen Vivian, of Johan Kotze Attorneys