IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR1155/2005

In the matter between:

CLARKE, LISA **Applicant**

and

MUDAU, ROBERT N.O **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

EDGARS CONSOLIDATED LTD **Third Respondent**

JUDGEMENT

NGALWANA AJ

[1] This is an application for the review and setting aside of an arbitration award made by the first respondent on 21 April 2005 under case number GA15686/04 and under the auspices of the second respondent.

[2] The first respondent found that the applicant had been "*dismissed*

for a good cause" by the third respondent, by which I understand him to be saying she was dismissed for a fair reason.

[3] The applicant submits that the first respondent's finding is susceptible to review and advances one ground for that proposition and it is this: in concluding that the processing of a false cash transaction by her constituted a dismissible offence, the first respondent committed a gross irregularity. The basis for the submission is two-fold. The first, says the applicant, is that the processing of fictitious cash transactions is a widespread practice in the third respondent's stores countrywide and is intended to motivate staff. Second, in any event no-one has ever been dismissed for doing this and there are numerous store managers countrywide who have done it.

[4] The third respondent denies that this is a widespread practice and submits that had the persons responsible for disciplining errant employees come to know of it, disciplinary steps would have been taken against the persons involved. It says an investigation was conducted into this alleged practice and it was found that there were "sporadic" instances of it. This investigation, in and of itself,

says the third respondent, indicates that this was not a common and accepted practice. The applicant counters that if this was no common practice then there would have been no need to investigate it and put a stop to it. Thus, far from indicating that the practice was not widespread, the investigation and subsequent warning to employees to stop it proves that the practice was indeed widespread.

[5] In any event, says the applicant, the investigation conducted was not targeted at the practice of fictitious cash transactions generally but rather at the specific conduct of the applicant. Many managers were not interviewed about the prevalence of this practice. One of the third respondent's witnesses who did the investigation, Sithole, himself conceded that he did not do an investigation into the practice in general.

[6] It seems to me the question is not so much whether the practice was widespread as whether it was condoned. An unlawful practice can take root in a business without the top brass knowing about it, especially where the business has a national footprint where top management cannot always keep an eye on things at shop floor level but must rely on store managers to do so. When the leadership then comes to know of it, the reasonable thing to do in my view is to do precisely what the third respondent did – that is, issue a communiqué to employees to the effect that such practice is

not allowed (see the evidence of Wassermann and Koekemoer). Counsel for the third respondent correctly submitted that the integrity of the business would be threatened by such practice and so would the integrity of its financial results as a listed company. With that there can be no quibble.

[7] But it is one thing to root out an undesirable – and eminently dishonest – practice that is a danger to the very integrity of a business; it is quite another to do so by dismissing an employee in circumstances where the company's leadership itself was unaware of the practice and issued a warning against it only after the dismissal. One would have thought the reasonable thing to do is to issue a warning first and then dismiss when the warning has not been heeded. In my judgment, the third respondent did things the wrong way around.

[8] During argument, counsel for the third respondent referred me to a document titled "Key Risk Factors for Management" and suggested that the practice of fictitious cash transactions was prohibited under the rubric "Cash Credits". But the practice that is proscribed under that heading is that of giving cash credits where

there is no proof of purchase, subject to management using its discretion to giving gift vouchers in exchange for the value of the item purchased. It does not deal with the practice here in issue.

[9] Koekemoer, the applicant's store manager in Sandton, says the applicant's dismissal came as a "*big shock*". This is unsurprising for a number of reasons that combine to make the third respondent's dismissal intervention unreasonable. There had been no prior warning that this was a serious offence; top management was not even aware the practice existed and so would not have had occasion to rank its seriousness; and a number of other store managers appear to have conducted the practice routinely. Whether this occurred sporadically or not is of little relevance in my view. The point is the practice was known among store managers to occur. It is only upon reflection that the applicant realised it was wrong and apologised.

[10] I am thus in respectful agreement with the applicant that the first respondent committed a reviewable act in finding that the applicant's conduct on the facts of this case constituted a dismissible offence.

[11] Counsel for the applicant pressed me to have regard to a judgment of the Labour Appeal Court in *Cape Town City Council v Masitho and Others* (2000) 21 *ILJ* 1957 (LAC) which he said is on all fours with this case. I did. It is not. In that case two sets of ambulance personnel who had abandoned their shift received different sanctions. The one set received a final warning and the other was dismissed. The Labour Appeal Court found (with respect correctly) that this inconsistency of treatment was unfair to those who were dismissed. In this case, since the top management of the applicant did not know of this practice, none of the employees alleged to have taken part in it were disciplined and given a different sanction from that given to the applicant. The applicant was the first employee to be disciplined and dismissed for the conduct here in issue. *Mashilo*'s case is thus not helpful on the facts of this case. Inconsistency of treatment does not even arise because, on the third respondent's own evidence, top management was not aware of this practice to come up with a consistent sanction against it.

[12] The applicant had also been charged with selling company assets without authorisation. But the first respondent made no finding as

regards whether dismissal on that charge was for a fair reason or not. Consequentially, I am in no position to test whether his finding on it is objectively rational and justifiable in relation to the evidence advanced before him on that charge.

[13] As regards appropriate relief, I am satisfied that I am in as good a position as the second respondent because I have all the evidence and documents I need to determine this matter. In any event, there are no credibility findings of the first respondent on which his award firmly hinges. Counsel for the applicant submitted that I could refer the matter back to the second respondent for a determination of only the appropriate sanction or remedy. That would be unnecessary and prejudicial to both parties since a subsequent remedy made by the second respondent is not likely to please both parties, resulting in the matter returning to this court on review with the second round of legal costs and further delay attendant thereupon.

[14] In the result, I make the following order:

[a] The first respondent's arbitration award dated 21 April 2005

under case number GA15686/2004 is hereby reviewed and set aside;

[b] It is declared that a first and final warning would have been an appropriate sanction on the facts of this case;

[c] The third respondent is ordered to re-instate the applicant with retrospective effect to date of dismissal with all the remuneration to which she would have been entitled had she not been dismissed;

[d] The third respondent is ordered to pay the costs of this application.

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Ngalwana AJ

Appearances

For the applicant:	*Mr MJ Van As*
Instructed by:	*Anthony Hinds Attorneys*
For the 3rd respondent:	*Mr A Snider*
Instructed by:	*Deneys Reitz Attorneys*
Date of hearing:	*27 June 2007*
Date of judgment:	*2 July 2007*