

IN THE LABOUR COURT OF SOUTH AFRICAHELD AT DURBANCASE NO : D254/05DATE: 30 APRIL 2007

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Not Reportable

In the matter between:

REONALD HILLS

Applicant

and

COMMISSION FOR CONCILIATION,

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MEDIATION AND ARBITRATION

First Respondent

L.M. EPSTEIN N.O.

Second Respondent

SHOPRITE CHECKERS (PTY) LTDt/a OK FURNITURE

Third Respondent

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JUDGMENT

Pillay D, J:

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This is an application to review and set aside the award of the second respondent Commissioner.

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The applicant employee was responsible for the third respondent's store. As such he held a senior position and was in a position of trust. He pleaded guilty to breach of a rule at the disciplinary inquiry and at the arbitration. The misconduct for which he was charged is described as follows:

“Gross misconduct in that you pre-POD's in the FF6

instances: Tax Inv. No 21256, 21266, 21140; which is
totally against company policy and procedures.”

“POD” means proof of delivery. The rule required the POD to be entered
onto the computer system after the goods purchased had been delivered to
5 the customer and the delivery note is returned to the store manager. If a
POD entry was made into the system before the delivery note was returned
the possibility existed that the goods might not eventually have been
delivered and the calculation of commission on sales could be inflated.

The applicant was aware of the rule and admitted that he breached it
10 at the arbitration. In this review, however, he challenges the decision of the
arbitrator on several fronts including the finding by the Commissioner that he
knew the rule, that it was reasonable, and that it was “irrationally
unjustifiable.” He contends that the Commissioner allegedly did not state the
basis for coming to that conclusion; that the Commissioner failed to apply his
15 mind to the evidence before him and concluded that the “applicant failed to
show that the respondent acted inconsistently in dismissing him”; that the
Commissioner “blatantly disregarded the applicant’s version that he was
never informed by the third respondent (the employer) that pre PODing was
a dismissible offence”.

20 In his address to the Court Mr *Ncongo*, who appeared for the
applicant, submitted that the only basis on which the review proceeded was
that the applicant had expressed his remorse at the arbitration and that the
penalty was too harsh. That is not the case made out in the Heads of
Argument. The Heads of Argument, as the Court has pointed out above,
25 attacks almost every aspect of the arbitrator’s award. The attack is wholly

unfounded. A further criticism of the arbitrator's award, which Mr *Ncongo* raised in his address and in his Heads of Argument, was that the Commissioner misconstrued his jurisdiction with regard to the applicant's bonus. The issue of the bonus was not a matter that had been placed before
5 the Commissioner through the pre-trial minute. The applicant conceded this much at the arbitration and the arbitrator was not invited to deal with the issue of bonus specifically. In any event, even if he had been invited and came to a conclusion which was wrong that did not render his decision reviewable. There was no evidence before him as to whether a bonus
10 accrued to the applicant and whether the bonus was obligatory or discretionary. In the circumstances the arbitrator could not make any award, even if he had jurisdiction, in the absence of evidence in that regard; neither can the Court.

The jurisprudence in the Labour Court and in the Labour Appeal
15 Court has consistently been to uphold the sanction of dismissal in cases of dishonesty. The applicant was invited to produce to the Court any authority that suggested otherwise and was not able to do that. The arbitrator, in dismissing the applicant's claim, was sympathetic to him in relieving him of the costs of the arbitration because he was ill-advised to pursue his claim.
20 He did not take that advice, neither did his representatives apply their minds to it. The Court has once again questioned the judgment of Mr *Ncongo* and anyone else from the Legal Aid Board who applied their mind to funding this matter. Funding this matter must have been at the expense of a more deserving case. Dishonesty should not be rewarded in any way, not even by
25 legal assistance from public funds.

In the circumstances the application for review is dismissed with costs.

Pillay J

Date of Judgment: 30 April 2007

Date of Editing: 10 February 2009

Appearances:

For the Applicant: Mr A Ncogo – Durban Justice Centre

For the Respondent: Mr B M Denny – Deneys Reitz

