

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE No: JR

1419/05

IN THE MATTER BETWEEN:

COCA-COLA FORTUNE (PTY) LTD

APPLICANT

AND

THE COMMISSION FOR MEDIATION,

CONCILIATION AND ARBITRATION

1ST

RESPONDENT

R BYRNE NO

2ND

RESPONDENT

FAWU O.B.O LUCKY SIBIYA

3RD

RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant seeks an order to review and set aside the

arbitration award issued under case number MP26-05 dated 29 April 2005. In terms of this award the second respondent (“the commissioner”) ordered the reinstatement and compensation of third respondent (“the employee”).

Background

- [2] The employee, Mr Sibiya was prior to his dismissal employed as a stock controller by the applicant at its Bushbuck Ridge depot and his job entailed controlling the stock in the warehouse.
- [3] During the latter part of 2004, the applicant conducted an internal audit at Bushbuck Ridge and based on the outcome of that audit the employee was charged with poor performance and fraud. The employee was found guilty, issued with the final written warning for the charge of poor performance and dismissed for fraud.

[4] The charge of fraud for which the employee was dismissed for was pursuant to the physical count of the stock in the warehouse which was coordinated by the employee. The employee recorded the count in the stock sheet as per the procedure prescribed to by the applicant.

[5] As stated above, subsequent to the completion of the stock count, the applicant conducted an investigation which revealed that the figures entered in the computer system known as the SAP, were different to those recorded on the stock sheet by the employee.

Grounds for review

[6] The applicant contended that the commissioner committed gross irregularity in that he failed to apply his mind to whether the applicant proved the existence of the elements of fraud. The failure to understand the elements of fraud is attributed to the alleged misunderstanding of the definition of fraud by the

commissioner.

[7] The applicant further argued that because of the failure to apply the proper definition of fraud the reasoning of the commissioner was so flawed that it prevented a fair adjudication of the issues.

[8] The applicant further contended that the commissioner committed an irregularity in finding that the picking slip was not produced by the applicant both at the disciplinary and arbitration hearing. In this regard the applicant argued that the commissioner failed to apply his mind to the common cause fact that the employee conceded that he did not mention the picking slip at the disciplinary hearing. The commissioner should not, have criticized the chairperson of the disciplinary hearing for not adjourning the proceedings to look for the picking slip, according to the applicant, because the employee never mentioned it during those proceedings.

[9] The commissioner in his analysis of the evidence indicated that he was faced with a problem of the

picking slip in that it was not produced by either of the parties. Whilst, it is not clear what the commissioner meant by saying that the employee was “*partly guilty of fraud*” the essence of his reasoning was however, that the applicant had failed to discharge its onus of showing that the employee was guilty of fraud.

[10] Turning to the test for review, the rationality and justifiability test for reviewing the CCMA awards has now been done away with. The Constitutional Court has now introduced the “*reasonable decision maker*” test.

[11] The “*reasonable decision maker*” test was introduced by the Constitutional Court in the unreported recent case of *Sidumo v Rustenburg Platinum Mines Ltd (Case NO 85/06)*, where the Court, was called upon to consider two issues. The first issue was whether in deciding on the fairness of the sanction of dismissal in a case where the employee had been found guilty of misconduct, the commissioners should approach the employer’s decision with a “*measure of difference.*” The

second issue was whether or not in reviewing the CCMA awards the Labour Court should apply the Promotion of Administration Act 3 of 2000 or the grounds as set out in section 145 of the Labour Relations Act 66 of 1995 (“the Act”). On both issues, the Constitutional Court over turned the *decision in the Rustenburg Platinum Mines case*.

[12] Thus in the present case the issue is whether the decision of the commissioner was reasonable having regard to all the evidence and the material placed before him. The starting point in this regard is to consider who bears the onus of proving and whether such onus had been discharged in this case.

[13] In terms of section 192 of the Act, the employee has to establish the existence of the dismissal and once done the burden to prove that the dismissal was both procedurally and substantively fair rests with the employer. The employer has to prove on the balance of probabilities that the dismissal was both substantively

and procedurally fair.

[14] The applicant's Rules and Regulations do not define fraud in any details, save to state under clause 3 that:

"Fraud – any form of fraud, e.g., clocking fellow worker's card, altering documents etc."

[15] In the absence of any specific definition in the applicant's rules and regulations, fraud must be given its ordinary meaning within the general law applicable in the country. In the *South African Criminal Law and Procedure* by Hunt and Milton (1982, Juta & Co Ltd, volume II 2ed) at page 755 fraud is defined as follows:

"Fraud consists in the unlawful marking with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."

[16] Thus, the applicant would have succeeded in discharging its onus, had it adduced evidence that

showed that the employee in making the entry as he did, made it unlawfully and with the intention of misrepresenting the stock count and such misrepresentation caused the applicant prejudice or potential prejudice.

[17] The employee testified that on the day in question he went to the warehouse to do a physical count of stock which he did with a security guard. He then discovered later after entering the figures into the computer system that he was 18 (eighteen) cases short. He went to investigate and discovered that one of the trucks was overloaded.

[18] I do not with due respect agree with the contention of the applicant that the commissioner did not apply his mind to the facts and the material before him. In arriving at the conclusion that there was insufficient evidence to prove that the employee had committed fraud, the commissioner analyzed the

evidence and took into account that once he had discovered that there were discrepancies between the figures captured from the stock and those entered in the computer (SAP), the employee went back to the warehouse to investigate the problem.

[19] The issue of the finding that the chairperson of the disciplinary inquiry should have stopped the proceedings to look for the picking slip, goes to the criticism about the appropriate process that the chairperson could have followed in dealing with the picking slip. This in my view has no material bearing on the decision of the commissioner.

[20] Thus, on the basis of the material and the evidence placed before him the commissioner concluded, reasonably so, that there was insufficient evidence upon which he could find the employee guilty of fraud. In the premises, having found that the employee was not guilty of the offence, the issue of the breakdown in the

trust which is central to the relationship between the parties could not have arisen. It was also in this context that the commissioner ordered the reinstatement of the applicant.

[21] In my view the decision of the commissioner is reasonable and is one which a reasonable decision maker would have arrived at. I see no reason why costs should not follow the result.

[22] In the premises the review application is dismissed with costs.

MOLAHLEHI J

DATE OF HEARING : 20 JUNE 2007.

DATE OF JUDGMENT : 29 NOVEMBER 2007.

Appearances

For the Applicant : Adv Gouws instructed by J W Wessels &

partners

For the Third Respondent: Mr B A Ndou of Ndou Attorneys.