IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NUMBER: D 679/04

In the matter between:

HULLET ALUMINIUM (PTY) LTD **APPLICANT**

AND

BARGAINING COUNCIL FOR

THE METAL INDUSTRY **1ST RESPONDENT**

COMMISSIONER M COWLING N.O **2ND RESPONDENT**

P RAMLAKAN **3RD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant, Hullet Aluminium (Pty) Ltd, seeks an order reviewing and setting aside the undated arbitration award issued by the second respondent (the commissioner) under case number MEKOR 354.

[2] In terms of the arbitration award the commissioner found the dismissal of the first respondent (the employee) to be unfair and ordered her reinstatement.

Background Facts

[3] The third respondent who was an accounts clerk was charged, disciplined and dismissed for dishonesty by the applicant on the 8 October 2003.

[4] It is common cause that the applicant had a policy which granted its employees a privilege of purchasing parcels of scrap products from it. The policy apparently set out the procedure to be followed whenever an employee wished to purchase scrap products.

[5] In terms of this policy an employee was not permitted to purchase products exceeding the monetary value of R20- 00 at a given time.

The policy also set out a specific procedure to be followed when an employee whished to purchase scrap products.

[6] The procedure required that an order for the purchase of scrap to be placed with the dispatch section where the purchase would be packed and an employee's purchase slip would be generated and thereafter an employee from dispatch would collect money from the employee who has placed the order. The purchase was limited to the maximum of 2kg and the standard price was R10-00 per kg.

[7] The payment for the scrap item was taken to the accounts section where a receipt would be generated and issued to the employee. The employee would then hand the receipt to the security before collecting the purchased scrap and leaving the premises.

[8] The charge against the employee concerned the dispatch of a sealed box containing material weighing 3.9 kg and valued at R426- 00 which was dispatched to the employee's daughter who is an employee of Servopack, a customer of the applicant.

[9] The employee testified that on the day in question she approached Mr

Cassim who was busy supervising the loading operations and requested him to pack 2kgs of “employee sales” which she wanted to send to her daughter in Pretoria. Mr Cassim is a relative of the employee.

[10] After the request the employee returned to her office. During the cause of the day she, according to her received a sealed box from Mr Johnson, the packer. She assumed this to be the “employee sales” that she had ordered. She testified that without checking the content of the box she labelled it for *“Attention: Sarika Ramlarkin-Servopack.”*

[11] The box was then handed back to Johnson who she claimed to have assumed would do the necessary paper work including coming back to her to collect payment and consequently the necessary receipt would be generated. Johnson never came back to her and had no further involvement with the box that day. The reason for her not following up with the box was because she was very busy that day.

[12] Since then the employee claim to have forgotten about this purchase and was reminded of it when she overheard some employees discussing the issue of containers. The conversation about the

containers reminded her of the container that she purchased for her daughter. She then went and paid R20-00 for the said containers.

[13] It transpired later after the applicant's investigation that the dispatch of the parcel which was not a standard type scrap for purchase by an employee but a sample was dispatched on the pretext that it was being sent to Servopack, one of the customers of the applicant.

[14] It is apparent that arising from the investigation the employee was charged, disciplined and ultimately dismissed. Subsequent to her dismissal she filed an appeal which was unsuccessful.

[15] In her appeal the employee pleaded inconsistency and submitted that Mr Cassim was intrinsically involved in this matter and that the initial inquiry showed that "*he breached the Company procedures for sales (both sample and employee) on a number of occasions yet he was not dismissed."* This argument was pursued further by the employee's representative during the appeal hearing.

[16] Mr Cassim testified that he was on the day in question approached and given a list of samples that needed to be sent to Servopack. He

testified that he did not scrutinise the list but simply passed it over to Mr Johnson.

[17] The employee's defence was that she was never involved in any misconduct nor was she part of perpetrating any theft of the applicant's product.

The award and grounds for review

[18] The applicant contended that the commissioner committed a gross irregularity in placing undue emphasis on the sanction accorded to Mr Cassim who was charged and found guilty of failing to follow company procedure in dealing with the parcel in question. The case of Mr Cassim was heard by a chairperson different to the one who heard the applicant's case.

[19] The applicant also criticised the commissioner for failing to take into account the fact that the employee was charged with an offence of gross dishonesty and also that the employee persisted with her denials both during the disciplinary and the arbitration hearing.

[20] The applicant further contended that the commissioner misapplied the

principles relating to inconsistency and placed undue emphasis on the years of service of the employee.

[21] The commissioner found that the employee *"initiated the entire unlawful process."* He further found that the employee sought to convey the impression that all she wanted was *"employee sales*" and yet she was unable to explain how she could mistake the product that she received as "employee sales" when it had been brought to her by Mr Johnson in a sealed box.

[22] The commissioner further found that the fact that a list did exist militated against the transaction in question being an "employee sales" because the *"employee sales"* consist of a random sample of containers without lids.

[23] The commissioner found the employee guilty of the offences she was charged with but held the sanction to be inappropriate and for this reason decided to interfere with the award. It is apparent that in interfering with the sanction the commissioner was influenced by the following factors:

- The fact that Mr Cassim had been given a final written warning and received a suspension as opposed to being dismissed.

- The years of service that the employee had served with the applicant.
- The procedures concerning the sales of scrap to employees were not strictly adhered to by the applicant.

[24] At the time the judgement in this matter was reserved the applicable test for reviewing commissioners' arbitration awards was the rationality and justifiability test as was set out in *Rustenburg Platinum Mines LTD (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021(SCA). This test has since been done away with by the Constitutional Court. The applicable test now is that of a *"reasonable decision maker."* In my view the result would have been the same even if that test was used in this review.

[25] In the unreported recent case of *Sidumo v Rustenburg Platinum Mines LTD* (Case N0 85/06), the Constitutional Court, was called upon to

consider two issues. The first issue which is very much similar to the issue in the current case was whether in deciding on the fairness of the sanction 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 LRA).

[26] The Constitutional Court discussed at length the two issues and reasoned that the LRA requires the commissioners to determine whether or not dismissals are fair. In determining the fairness of the dismissals the first inquiry that the commissioners need to conduct is a factual inquiry concerning whether or not the misconduct was committed. In conducting this inquiry the commissioners act in the similar manner like a court.

[27] The second inquiry that the commissioners must conduct is that of determining the fairness of the dismissal. In conducting this inquiry

the commissioners must take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement.

[28] The Court further held that in arriving at a decision whether or not the dismissals are fair, the commissioners exercise a value judgement. In exercising the value judgement the commissioners need to take into account all the circumstances of the case, including the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal. The employee's inputs need also to be taken into account.

[29] The other relevant factors to be taken into account are; (a) the harm caused by the employee's conduct, (b) whether the repetition thereof might be avoided through training or counselling, (c) the length of service of the employee and (d) the impact and the effect of the dismissal on the employee.

[30] The result of *Sidumo's case* is that the test to apply in review cases is no longer whether a reasonable employer would have imposed the sanction of dismissal but whether the decision of the arbitrator is one

which a *"reasonable decision maker"* would have arrived at.

[31] Thus, the issue to consider in the current case is whether a reasonable decision maker, based on the evidence and the material before him or her, would have arrived at a different decision. In other words would a reasonable decision maker in applying the parity principle have come to a different or the same conclusion?

[32] I am of the view, for the reasons set out below, that the decision of the commissioner in the current case is not reasonable. Objectively speaking a reasonable decision maker would have in the first place taken into account the approach that has been followed by both the Courts and other dispute resolution institutions in dealing with the issue of parity. Secondly, he or she would have taken into account the serious nature of the offence and the fact that Mr Cassim was found guilty of an offence of a less serious nature than that of the employee. He or she would have found that the case of the applicant and that of Mr Cassim had different features and therefore fairness would not dictate that they be treated like cases.

[33] In dealing with the issue of consistency, Du Toit Bosch et al *Labour*

Relations Law', A comprehensive Guide , state the following:

> *"Consistency however implies treating like cases alike. An employer may thus be justified in differentiating between employees who have committed similar transgressions on the basis of differences in personal circumstances of the employees (such as length of service and disciplinary record) or the merits (such as the roles played in the commissioning of the misconduct)."*

[34] In dealing with the same issue the Labour Appeal Court in case of *SACCAWU and Others v Irvin & Johnson* (1999) 20 ILJ 2303(LAC) at page 2313 (para 29) held that:

> *"In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see e.g. Grogan Workplace Law (4 ed) at 145 and Le Roux & Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. . . "*

[35] The Court went further to say:

> *"If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or is induced by improper motives or, worse, by a discriminating management policy. (As was the case in Henred Fruehauf Trailers v National Union of Metalworkers of SA & others (1992) 13 ILJ 593 (LAC) at 599H-601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd (1994) H 15 ILJ 1257 (A) at 1264.) Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself."*

[36] It is evidently clear from the ratio of Irvin & Johnson that when deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention.

[37] The Labour Appeal Court, in confirming its decision in *Irvin & Johnson* decision held in *Gcwensha v CCMA & Oth*ers (2006) 3 BLLR 234 (LAC) that:

> *"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards."*

The Court went further so say:

> *"… when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated …*"

[38] Similar to the present case, in *Metcash Trading (PTY) t/a Trador Cash & Carry Wholesalers v Sithole & Others* (1998) JOL 3591 (LC), the Court found that reliance on the parity principle was misplaced in circumstances where different chairpersons of disciplinary hearings arrived at different conclusions. In that case

one of the chairpersons found the employee guilty of the misconduct whereas the charges against the other two were withdrawn. The court further held that the principle of parity is applicable when persons have been convicted of the same offences.

[39] Whilst I agree with the decision of Landman J in the *Sithole matter*, I need to point out that there are circumstances where the parity principle may apply even when there has not been a conviction. However, in the circumstances of this case as was the case in the *Metcash's case* conviction plays a critical role.

[40] In this case as indicated earlier the employee was found guilty of a serious offence of dishonesty and dismissed whereas Mr Cassim was found guilty of a lesser charge of failing to follow company policy. This is consistent with the version of the employee as set out in her grounds of appeal. I have indicated earlier that the basis of the appeal was that Mr. Cassim had breached the company procedures relating to the sales and no action was taken against him.

[41] The same was reaffirmed during the appeal by the employee's representative when he submitted that:

> *"Essa Cassim was intrinsically involved in this matter and the evidence led at the initial enquiry showed that he breached the company procedures for sales (both sample and employee) on a number of occasions yet he was not dismissed."*

Thus, even on the employee's own version the offence committed by the Mr. Cassim was not only different but also of a less serious nature than that committed by her.

[42] Turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship. In this regard the Court in *Sappi Novaboard (PTY) Ltd v Bolliers* (1998 19 ILJ 784 (LAC), held that:

"In employment law premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded."

[43] The same approach was adopted in the case of *Standard Bank of SA v CCMA and Others* (1998) 19 ILJ 903, where the court held that dishonesty in general renders the employment relationship intolerable and incapable of restitution. See also *Central News Agency v CACWUSA & Anothe*r (1991) 12 ILJ 343 (LAC) and *Toyota South Africa Motor (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340(LAC).

[44] Another distinguishing feature between the case of the Mr Cassim and that of the employee is the fact that the employee has failed to show remorse. The persistent denials both during the disciplinary and arbitration hearings exacerbated the case of the employee.

[45] It would in my view be unfair for this Court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgement of wrong doing on the part of the employee would have gone a long way in indicating the potential and possibility of rehabilitation including an assurance that

similar misconduct would not be repeated in the future. See in this regard *De Beers Consolidated Mines Ltd v CCMA & Oth*ers (2000) 21 ILJ 1051 (LAC).

[46] The different roles that each played in concealing the misappropriation is also an important factor that has to be weighed in the application of the parity principle. It is evidently clear in this matter that the applicant played a central role in orchestrating the whole plan to conceal the true nature of the product and having others to assist in having the product sent to her daughter. In this regard the commissioner found that:

> *"She attempted to convey the impression that all she wanted was "employee sales" and yet she was unable to explain how she could mistake the product that she had received as "employee sales" when it had been brought to her by Mr Johnson in a sealed box. This was not the ordinary procedure in regard to the "employee sales." In addition she was unable to offer any explanation whatsoever as to why she labelled the box with her daughter's name as well as the destination Servopak in Pretoria."*

[47] Having regard to the evidence and material which were placed before

the commissioner, I am of the view objectively so, that his conclusion was unreasonable. It is evidently clear from the material before the commissioner that the employee was dishonest in the manner she procured and forwarded the product to her daughter. The finding of the commissioner itself supports this view.

[48] It needs to be reemphasized that the employee did not show remorse as opposed to Mr. Cassim who apologized for his conduct. The employee showed no concern in the damage that had been caused to the trust between her and the applicant by her dishonest conduct and therefore how could the applicant be expected to take her back into its employ.

[49] The material before the commissioner also revealed very distinct features between the case of the employee and that of Mr Cassim and therefore the commissioner misapplied the principles of parity and accordingly committed a gross irregularity which resulted in the applicant being denied a fair hearing.

[50] Accordingly the commissioner's award is not reasonable and grossly irregular because of the misapplication of the application of the

principle of parity. And it is for this reason that the award stand to be reviewed. There is no need to refer the matter back for a rehearing, the material and the evidence on the record being sufficient for this Court to make its own determination.

[51] It was not unreasonable for the employee to defend the review. In the circumstances it would not be fair to award costs.

Order

[52] In the premises the following order is made:

1. The arbitration award is reviewed and set aside.

2. There is no order as to costs.

3. The arbitration award is substituted with the following order:

    a. The dismissal of the third respondent was both procedurally and substantively fair.

    b. The dismissal of the third respondent is confirmed.

MOLAHLEHI J

DATE OF HEARING: 13 AUGUST 2007.

DATE OF JUDGMENT: 06 DECEMBER 2007.

APPEARANCES

Applicant Attorneys: Garlicke & Bousfield.

For the Respondent: Adv D P Crampton.

Instructed by: Tolinson Mnguni James Attorneys.