

the Applicant [“the employee”] Herles, an amount of R182400, 00 being in respect of the notice period determined in his contract of employment. Payment must be made on or before 30 June 2006.”

Background facts

- 2] The third respondent, Mr Herles, (the employee) was prior to his dismissal by the applicant employed as the director effective from 1st March 2003. He was charged with the following:

“Insubordination- you have failed and/or refused to carry out a lawful and valid instruction to repair the gate, which was damaged on the company premises in Cape Town. You refused and/or failed to carry out this instruction despite having received both verbal and written instruction from your managing director to his effect.

Breach of a material obligation contained within your contract of employment as you failed to pay and observed certain reasonable directions and instructions which have been given to you by your managing director.

Breach of contract in that you have failed to observe a material term of your employment contract which clearly

stipulates that you are no entitled to sign any lease, rental or loan agreement without the written consent of the board or without am appropriate directors resolution you have failed to obey instruction from your managing director. You have engaged in sub-letting the company's premises despite instructions to the contrary. You have failed to obtain the consent of the board and further you did not obtain the appropriate directors' resolution"

- 3] The employee was further charged with misconduct arising from the above in that his conduct was in this regard regarded as detrimental to the interest of the applicant in that it led to potential damages which could have arisen from the lessees claiming compensation for having to evacuating the applicant's premises leased to them by the employee.
- 4] The managing director, Mr Bade (Blade) testified that because of the nature of the business which the applicant ran, security was of utmost importance. The applicant had its state of art warehouse from which it ran its operations from the Airport Industria in Cape Town.
- 5] Whilst, the applicant was responsible for the Cape Town operations of the applicant, the overall responsibility and authority rested with Bade. To this extent the employee was accountable to Bade.

6] Bade testified that during February 2005, visited the Cape Town operations only to find that the heavy electronically controlled gate which was not easy to operate manually, had not been operational for some time. On that particular day when he attended there he had to assist the security guard to open it. After meeting with Mr Osler, the financial director and Mr Mc Namara, the consultant, Blade instructed that the gate should be repaired with immediate effect. This instruction was confirmed in an email by Blade on his return to Johannesburg. Blade testified that the issue that had arisen as a result of the broken gate related to both security and that image of the applicant.

7] The employee indicated during this visit by Blade there was a plan to bring Consignment Processing Services (CPS), textile oriented business onto the applicant's premises. This plan included changes to the premises to accommodate office space for the new business. The comment from Osler regarding this proposal was that it was not in line with the business of the applicant and that the proposal should be considered if there was a clear agreement.

8] Blade testified that when he visited Cape Town again during April 2005, he found that three offices had been built and there were already a

number of CPS employees on the premises. In addition to CPS the other company that had moved in at that stage was Dayton Chemicals.

9] The response he received from the employee when he enquired from the employee as to what was happening was that because there was no response from Osler to the proposed plan he had sent him he decided to proceed and implement the plan.

10]The other thing which Blade found during his visit in April 2005 was that despite his instruction the gate was still not repaired. And pursuant to this Blade wrote to the employee accusing him of ignoring his instruction and proposed termination of the relationship between the employee and the applicant. The employee was then suspended and called to a disciplinary hearing on 19th May 2005 which was chaired by a member of the Johannesburg Bar.

11]Osler remembered the discussion about the CPS issue and suggesting that a contract be drawn which would also need the approval of the board. He further indicated having received the power point presentation from the employee relating to the CPS. This presentation was according to him more of a proposal rather than a business plan.

12]The employee testified in support of his case that at the meeting of February 2005, he explained cause of the damage to the gate and how temporary repairs were done to it to ensure that it could be closed and opened manually. He denied that it was difficult to open the gate such that a forklift was required to pen it. He acknowledged that Blade had indicated to him that the repair of the gate was a major concern and that it needed to be repaired as soon as possible. He suggested the cause of the delay in repairing the gate was because the insurance company wanted to have repaired rather than replace it. He had in this regard engaged the insurance company who had finally agreed to replace the gate but there was a delay in paying the money over because of the change in the banking details.

13]Turning to the issue of CPS, the employee testified that he had discussed the issue with both Bade and Osler at the meeting of February and shown them the drawings of what he had in mind. According to him, he motivated at this meeting that it would be a good thing to enter into the textile processing market. The only comment that came from Bade after sharing with them his plan was that he should make sure that the colour scheme and furnishings are the same as those of the applicant.

14]The employee claimed that it was only in May that he became aware that

Bade's view was that the applicant should only be involved in the high end of the market.

Grounds for review and the award

15]At the time of filing the review the applicable test was that of justifiability and rationality as was set out in the *Carephone (Pty) Ltd v Marcus No (1998) 19 ILJ 1625 (LAC)*. The applicant in this regard contended that the commissioner unjustifiably interfered with and committed a gross irregularity in finding that the sanction imposed by the applicant was inappropriate. The applicant further contended that the commissioner unjustifiably ignored the significance of the fact that the employee had "wilfully, deliberately and persistently" gone against the wishes of the applicant and that he was "guilty not only of being in breach of his contract but also of gross insubordination."

16]In his award the commissioner found that the employee had failed to follow the procedure provided for in his contract of employment and had gone against the wishes of Bade. The commissioner then concluded that:

"On that basis I am of the opinion that the Applicant was guilty not only of being in breach of his contract but also of gross insubordination. I am further of the opinion that considering the above a continuation of the relationship was not feasible for the

Respondent and that dismissal was justified.”

17]However having arrived at the above conclusion the commissioner concluded that the employee at all times acted in the best interest of the applicant and for that he should not have been dismissed summarily but that the applicant should have given him 3 (three) months notice. In as far as the loss that the applicant could suffer as the result of the employee's unauthorised action the commissioner accepted that potential loss could result from such conduct but this did not materialise and that the applicant would be able to resist any claim that might arise from the conduct of the employee.

18]It was for the above reasons that the commissioner ordered the applicant to pay the employee compensation equivalent to 3 (three) month's notice

Evaluation of the award

19]This matter turns around the issue of whether the commissioner, having found that the dismissal was both substantively and procedurally fair, was

entitled to interfere with the sanction of dismissal imposed by the applicant. Thus, in essence the issue which the commissioner was called upon to consider was whether the sanction imposed by the applicant was fair.

20]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.

21]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.

22]In *Engine Petroleum Ltd v CCMA & others* (2007) 28 ILJ 1507 (LAC), the Labour Appeal Court held that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case. The commissioner is required to decide the issue of the appropriateness of the sanction in accordance with his or her own sense of fairness. (See *Engen* at par 117) This is the same

approach which the Court had adopted in *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

23]In *Sidumo & Aoter v Rustenburg Platinum Mines (PTY) Ltd & Others* [2007] 12 BLLR 1097 (CC) (at paras 75 and 76), the Court held that the notion of fairness or appropriateness of a dismissal as a sanction is an issue to be left to the commissioner and not the employer and I may add not to the Court sitting on review. In this regard it was said in *Sidumo* (at par. 75) that:

“Ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view.”

24]The factors which a commissioner must take into account when weighing whether a dismissal is an appropriate sanction or otherwise, are stated in *Sidumo* (at par. 78) as follows:

“In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached.; the basis of the employee's challenge to the dismissal; whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record.

The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record."

25]It has been accepted that the factors listed in *Sidumo* are not exhaustive and therefore there are other factors which the commissioners may take into account, including those mentioned in *Engen's* case. In terms of *Engin's* case in assessing the fairness of the sanction account should be taken of the provisions of section 188(1), and section 192(2) of the Act including Schedule 8 of the Code of Good Practice: Dismissal. The essence of this is that commissioners in considering the appropriateness of the dismissal must take into account the provisions of the Code of Good Practice and more importantly the fact that the burden to prove the fairness of the dismissal rests with the employer.

26]In the present instance the commissioner in interfering with the decision

of the applicant to dismiss the employee took into account the terms of the employment contract and the principle of fairness in a more general application.

27]The commissioner reasoned in relation to the CPS issue that there existed elements of a lease in as far as CPS arrangements were concerned.

However, the commissioner found that in entering into the arrangement with CPS the employee did so in what he believed to be in the interest of the applicant. It should be remembered that clause 15 of the employment contract prohibited the employee from signing any lease agreement without written consent of the board or the directors' resolution.

28]It may well be that subjective belief of the employee did not absolve him from his responsibility in as far as breach of the contract of employment was concerned. However, this would relate to the first part of the investigation into the substantive fairness of the dismissal. In relation to the investigation relating to the appropriateness of the sanction, it is my view that the subjective perception of the employee plays an important and is critical in the determination of the fairness of the sanction.

29]In my view where it is established that an employee in doing whatever may be wrong against the employer did so with the belief that that what

he or she was doing was in the interest of the employer and not his or her own interest, would go long way to tilting the scales in favour of a lesser punishment. The record reveals that the employee did not deny his wrong doing in concluding the arrangement with CPS. Similarly, with the issue of the gate, it cannot be said that there was open defiance of Bade's instruction. The employee explained that the delay in implementing the instruction was caused by the view of the insurance that it should be repaired rather than be replaced.

30]The above authorities indicate very clearly that the court should be very slow in interfering with the determining the fairness of the sanction by the commissioner. It is only in extreme cases where it has been established that the commissioner exercised his or her discretion without having regard to the interests of both the employer and employee. This would be in a situation where the commissioner acted capriciously in the determination of the fairness of the sanction.

31]In the circumstances of this case I have not been able to find a basis for interfering with the decision of the commissioner relating to the fairness of the sanction which he regarded as being unfair. Therefore, the applicant's application to review and set aside the decision of the commissioner stands to be dismissed.

32]I see no reason in both law and fairness why the costs should not follow the results.

33]In the premises the application to have the commissioner's award issued on the 26th May 2006 under case number WE7396-05 reviewed and set aside is dismissed with costs.

Molahlehi J

Date of Hearing :27 March 2008

Date of Judgment : 22 September 2008

Appearances

For the Applicant : Adv. Cook

Instructed by :Howes Inc

For the Respondent: Adv Bremridge

Instructed by : C & N Friedlander