IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO	:	**D813/06**
DATE	:	31 JANUARY 2008

REPORTABLE

In the matter between

SAPPI FORESTS (PTY) LTD	APPLICANT
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	FIRST RESPONDENT
ANASHRIN PILLAY N.O.	SECOND RESPONDENT
DOUGLAS ALEXANDER BOYD	THIRD RESPONDENT

JUDGMENT 31 JANUARY 2008

PILLAY D, J

1. In this application for review the applicant employer charged the fourth respondent employee with misconduct for allegedly receiving payment from a contractor without the employer's knowledge. The employee was also charged criminally.

2. On 28 October 2005 the employer suspended the employee with full pay pending the disciplinary inquiry. The employer convened a disciplinary inquiry on 2 November 2005. The employee requested a postponement of the inquiry pending the outcome of the prosecution.

The employer acceded to the postponement pending the prosecution, but refused to continue the suspension of the employee on full pay.

3. The issue before the arbitrator was whether the employee's suspension without pay on 2 November 2005 was unfair. The employer challenged the jurisdiction of the arbitrator. Mr *van Niekerk* who appeared for the employer submitted that the Labour Court accepted that there were two types of suspension. Referring to *Koka v Director-General Provincial Administration, North West Government (*1997) 18 ILJ 1018 (LC), he submitted that the first type is a suspension pending an inquiry, otherwise known as a holding suspension. The second type is imposed as a sanction for misconduct following a disciplinary action, in other words, a punitive suspension.

4. Section 186(2)(b) of the Labour Relations Act 66 of 1995 referred to a suspension following a disciplinary action. Alternatively, it applied to holding suspensions only if the circumstances were such that the suspension could be construed as disciplinary action. In this instance it could not be so construed because the employer acceded to the employee's request for a postponement. Consequently, the suspension pending the criminal prosecution did not amount to disciplinary action, so Mr *van Niekerk* submitted for the employer.

5. Mr *van Niekerk's* jurisdictional challenge must be resisted on at least

five grounds. Firstly, the employer had conceded at the arbitration that the arbitrator had jurisdiction. The employer can therefore not allege on review that the arbitrator was unreasonable in accepting jurisdiction.

6. Secondly, as a matter of policy section 186(2)(b) of the LRA should be interpreted generously to include all forms of suspension from employment. A restrictive interpretation will further fragment the resolution of labour disputes between the CCMA and the Labour Courts on the one hand and the High Court on the other hand.

7. Thirdly, upon a proper construction of section 186(2)(b) a suspension pending an inquiry or criminal proceedings is disciplinary action because it is action taken in the course of implementing discipline.

8. Fourthly, the position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend without pay if the employee so agrees or legislation or a collective agreement authorises the suspension. There was no agreement that the employee's suspension would be without pay. In so far as the suspension with pay pending criminal proceedings was an unreasonable hardship upon the employee, it always remained opened to the employer to institute disciplinary proceedings as soon as possible provided its policy allowed it to do so.

9. Fifthly, on the facts a suspension without pay is,

> "penal in effect and involve substantial social and personal implications, to say nothing of severe financial implications."

(Koka at 1028 D – E where LANDMAN J cites HOWIE J in *Muller v Chairman, Ministers' Council, House of Representatives (*1991) 12 ILJ 761 (C) at 775J.)

In the circumstances the Court finds that the arbitrator had jurisdiction.

10. The second challenge to the award was that the arbitrator had failed to decide which of two documents tendered at the arbitration should apply to the employee. As both documents provided for a suspension of the employee with pay pending criminal or disciplinary proceedings, the arbitrator did not have to prefer one document over the other.

11. If the arbitrator did make a choice it should have been to prefer the employee's document firstly because it was the only document available to the parties at the disciplinary inquiry. Secondly, it was the document that guided the parties at the disciplinary enquiry. Thirdly, the document was sourced from the employer's human resources offices in Pietermaritzburg. Fourthly, Mr Jonker, the employer's principal witness and the head of human resources who

had represented the employer at the disciplinary inquiry and the arbitration, was unaware that the document proffered by the employee should not have been relied on. Fifthly, the document relied on by the employee bore a more recent date than that relied on by the employer.

12. Even though the arbitrator did not express his election, it is manifest from his reasoning that he preferred the employee's evidence over that of the employer's witnesses. Even though the document relied on by the employee was more favourable to the employee because it barred the employer from holding a disciplinary inquiry until the criminal case was finalised, the arbitrator nevertheless assessed the employer's conduct against the document it relied on. He found that the employer had failed to apply the procedure prescribed in its document.

In all the circumstances the award is reasonable. The review is dismissed with costs.

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Pillay D, J

Date: 14 March 2008

Representation:

For the Applicant: Advocate G O van Niekerk SC instructed by Millar & Reardon

For the Respondent: Advocate C Nel instructed by Austen Smith