IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JR1717\06

In the matter between:

WOOLWORTHS (Pty) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER SIBONGISENI HINTSHO	**Second Respondent**
HOLLA KGASAGO	**Third Respondent**
THE SHERIFF FOR THE DISTRICT OF RANDBURG	**Fourth Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] This is an application brought in terms of section 145 of the Labour Relations Act as amended. The applicant seeks to review and set aside an award made by the second respondent to the effect that the dismissal of the third respondent is substantively unfair, with an order that the applicant must pay the third respondent an amount of R36 932.72.

[2] As by the way, this award was issued on or about 18 June

2006. It just struck the court that, the applicant had to incur costs which most certainly exceed the quantum of the award. This was probably not wise in the court's view. Nonetheless, this statement is not intended to prevent employers to challenge awards simply because the amount is negligible. It just seem to me not to make financial sense to incur R100.000.00 in order to save R30 000.00.

[3] Even with the interest earned to date of this judgment, I still believe that the amount is far outweighed by the legal costs. It is apparent from the award, that the finding of substantive unfairness is premised on the fairness of the sanction of dismissal.

Background facts

[4] The third respondent was dismissed for 3 acts of misconduct, namely: that on 31 August 2005, the third respondent took 1hour and 7 minutes for tea, on 01 September 2005, he was away from his post and was captured reading in the stock room for a period of 9 minutes.

[5] Apart from the acts that led to his dismissal, it is apparent that the third respondent was late for his shift on no less than 10 occasions in August 2005. After a disciplinary inquiry, the third respondent was dismissed. Aggrieved by his dismissal, the third respondent sought to challenge the fairness of his dismissal. The second respondent found the dismissal to be unfair. Aggrieved by such a finding, the applicant brought this application.

The attack

[6] In its founding papers, the applicant said the following:

1. It is submitted that the arbitrator, in conflict with the behests of the Act, failed to apply her mind, misconstrued

herself, committed a gross irregularity, exceeded her powers by acting unreasonably or unjustifiably in that:

1.1. Finding that the line manager should have allocated a change of shift in circumstances where:

1.1.1. Kgosago was not complying with his present shift.

1.1.2. the line manager, in an attempt to assist Kgasago proposed changing the shift, however, it was common cause that Kgasago did not revert to the line manager,

1.1.3. in such circumstances, if the line manager had changed the shift without discussing this with Kgasago, not only could such constitute a unilateral change to terms and conditions, but it could have aggravated this scenario as Kgasago was not performing in terms of his present shift and there is no indication that he would have done any better on another shift.

1.2. This finding is clearly unjustifiable.

1.3. In finding that the sanction should have been one of a final warning, ignores that there was progressive discipline, which had already taken place. This finding ignores an employer's discretion where the written warnings were already in place. The situation had then further deteriorated with Kgasago being charged with coming late on some nine different occasions. The arbitrator's finding in this regard cannot be justifiable.

2. The arbitrator has in any event misread schedule 8.

3. Accordingly, the arbitrator has overlooked the notion of a repeated offence therefore the arbitrator's findings in this regard is also unjustifiable and unreasonable.

[7] In its initial heads of argument, filed on 07 December 2007, the applicant somewhat repeated the grounds set out in the

founding papers. In conclusion and having referred to **Sidumo** judgment, it was submitted that the finding was unreasonable and cannot be construed as being the decision of a reasonable decision maker.

[8] On 27 February 2008, the applicant supplemented its heads of argument by referring to the **Fidelity cash management services** judgment. In essence submitting that when finding that the dismissal was a harsh sanction the second respondent failed to take into account the factors enumerated in that judgment, therefore her award is not reasonable.

Argument

[9] In court, it became apparent that Mr. Van As appearing for the applicant, placed much emphasis on the failure to consider the factors listed in the **Fidelity** judgment. The question of course being, does failure to consider those factors render the award reviewable? In court, Mr. Van As firstly submitted that on the face of it, failure to consider those factors does not necessarily render the award reviewable, which submission is unfortunately correct in my view. But he added that if there is misconstruction of evidence then failure to consider renders the award reviewable, which submission is wrong in my view. However, he later argued that since the LAC said must in its judgment, it therefore follows that failure to consider renders the award reviewable.

Analysis

[10] Since the main argument was on the reasonableness of the award and failure to consider factors, I would outright dismiss the unsubstantiated grounds of gross irregularity, misconduct and excess of power.

[11] Starting with the argument that failure to take into account factors renders the award reviewable, I have this to say—In the first instance, the **Sidumo** judgment which contains the selfsame factors to be considered was only delivered on 05 October 2007. To the extent that it can be argued that the Constitutional Court was setting guidelines for commissioners which I doubt, water was under the bridge in respect of the award under attack.

[12] Any argument to the effect that the second respondent was not prophetic enough to anticipate those guidelines is absurd. Therefore the award is not reviewable in that regard.

[13] In my view, the list set out in paragraph 78 of the **Sidumo** judgment is not prescriptive as it were. In other words, a commissioner's award cannot be judged using those factors as a barometer. The Constitutional Court itself accepted that the list is not exhaustive.

[14] Most importantly the award of **Sidumo** was not judged on the basis of those factors, yet the court found that the award ought to be restored. Equally in my view, the LAC did not in **Fidelity cash management** seek to prescribe to commissioners. Instead the LAC added that the Code of Good Practice is a factor to be considered in terms of the Act.

[15] The LAC in fact reaffirmed its view in **Engen Petroleum LTD v CCMA & Others (2007) 28 ILJ 1507 (LAC)** to the effect that the commissioner must decide using his or her own sense of fairness. Incidentally the award in **Fidelity** was found to be reasonable and was not interfered with. That award was issued before **Sidumo** judgment as well.

Order

[17] In the result, I make the following order:

1. The application for review is dismissed with costs.

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Moshoana AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the applicant	: Adv Van As
Instructed by	: Deneys Reitz
For the respondent	: In Person
Date of hearing	: 20 March 2008
Date of Judgment	: 27 March 2008