IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR927/08

In the matter between:

PRETORIA PORTLAND CEMENT COMPANY LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER TIMOTHY BOYCE N.O. **Second Respondent**

GEORGE MIYAMBO **Third Respondent**

1.1.1.1 JUDGMENT

JAMMY AJ

1. This is an opposed application in which the Applicant seeks an order reviewing and/or setting aside the Arbitration Award handed down by the Second Respondent, the Arbitrator appointed under the auspices of the First Respondent to determine the dispute between the Applicant and the Third Respondent relating to the Third Respondent's alleged unfair dismissal by the Applicant. The Second Respondent's determination in that regard in the Award in question dated 18 March 2008, was that that dismissal was unfair in his perceived absence of a fair reason for that sanction and his consequent order was that the Third Respondent was to be reinstated with retrospective effect to the date of his dismissal, with certain ancillary relief.

2. It is the Applicant's contention that that finding and its consequence constituted an unreasonable conclusion, a gross irregularity in the conduct of the proceedings, the exceeding by the Second Respondent of his powers under the Labour Relations Act and a misapplication of the legal principles applicable to the matter.

THE EVIDENCE

3. On 12 October 2007, the Third Respondent, who had been in the employ of the Applicant since 30 April 1982 as what the Applicant describes as an "Operator Support" but what he himself terms as a "Bulk Loader", was found, when routinely searched by a security guard at the pedestrian gate on the Applicant's premises, to be in possession of "a few pieces of scrap metal" in his bag.

4. It is an established rule in the company that pass-outs are required for the removal of any of the Applicant's property leaving its premises. This is applicable to scrap metal even if it is found, as the Third Respondent testified to have been the case, in what is known as the "waste bin". Evidence for the Applicant in that regard was that all scrap metal is placed in such a waste bin and is then collected by Rand Metals, which pays for it.

5. Testifying in that regard, the Applicant's Safety Officer quoted the relevant work instruction, the wording of which is as follows:

> "No items/objects will be removed from these premises unless accompanied by an approved gate clearance permit. Contravention of the abovementioned standard can lead to disciplinary action".

Employees were routinely issued, she said, with pass-outs to remove certain items such as scrap planks, scrap iron, plastic chairs and so forth. All staff members, she said, know that pass-outs are required if any of the employer's property is to be removed from its premises.

6. The Third Respondent, in his testimony in the Arbitration did not dispute that he had been found in possession of the scrap metal in question, which he had obtained from the waste bin. The Second Respondent pertinently records his explanation for that fact as follows –

> "In the present matter the employee gave 3 contradictory explanations regarding his failure to obtain the pass-out for the scrap metal in question, viz:
>
> 1. on the day of the incident (12 October 2007) he told the security guard (Ngcobo) that he had forgotten to get a pass-out;
>
> 2. his disciplinary hearing, the employee claimed that he did not get a pass-out since his supervisor was not present;
>
> 3. During the Arbitration he argued that he never believed that he even required the pass-out for the scrap metal in question".

7. The Second Respondent then proceeds to make the following factual findings –

> "The employee, in my view, knew that he required a pass-out to remove the scrap metal and that is precisely why he told Ngcobo that he had forgotten to get a pass-out. It stands to reason that the employee would not have claimed that he had forgotten to get a pass-out if he genuinely believed (as he claimed during the arbitration) that he did not need a pass-out.

Having regard to the aforegoing, I am satisfied that the employer discharged the onus on it to prove that the employee was guilty of "theft of scrap iron from the waste bin".

THE LAW

8. The unanimous decision of the Constitutional Court of South Africa in what has become a leading authority on the issue of the review of Arbitration Awards, -

Sidumo v Rustenburg Platinum Mines Ltd and Others (2007) 28ILJ 2405(CC)

was that, in deciding a dismissal dispute, a Commissioner is not required to defer to the decision of the employer. The Commissioner is, however, not given the power to consider afresh what he or she would do but to decide whether what the employer did was fair. The standard to be applied when a decision by a Commissioner on a dismissal dispute is sought to be reviewed is the following: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?

9. The Third Respondent, referring to the Code of Good Practice in Schedule 8 to the Labour Relations Act which provides, *inter alia*, that "generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable", records that the second employee "had a clean disciplinary record and, in more than twenty five years of employment, had not been found guilty of any misconduct whatsoever". This, he says, constitutes him as a first offender. Accepting however "that the misconduct in question was undoubtedly serious", he then enquires "whether the employee's conduct was so grave that it can be said, after properly considering all the relevant circumstances, that the sanction of dismissal was fair.

10. The Labour Appeal Court in –

Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (2008) 29ILJ 2581(LAC)

quoted with approval the earlier dictum of the Labour Court in –

Standard Bank of SA Ltd v CCMA and Others (1998) 19ILJ 903(LC)

to the effect that –

> "It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… a breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it"

A further reference in the judgment, and one frequently quoted in this Court and the Labour Appeal Court is the dictum in –

De Beers Consolidated Mines Ltd v CCMA and Others (2000) 21ILJ 1051(LAC)

namely –

> "A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise".

11. In reaching his finding, the Second Respondent, referring to the Applicant's Disciplinary Code which, with reference to a schedule of offences which includes theft, provides for a range of sanctions from a minimum of a final warning to a maximum of a summary dismissal, and to the further factor of "the employee's length of service (more than twenty five years) and his clean disciplinary record, … cannot see how dismissal could have been a fair sanction and I am impelled to conclude that the employer did not exercise its discretion reasonably when it

decided to dismiss the employee". Those factors have however been critically discounted in a number of decisions of the Labour Courts. In –

> **"Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others (2008) 29ILJ 1180(LC)**

the Court comments that –

> "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".

With regard to one aspect of those comments, it is contended by the Applicant in this matter that in the course of the arbitration, the Third Respondent showed no remorse for his alleged conduct, but that submission, in my view, is one of little probative value in the face of the Third Respondent's ostensible denial of the allegations against him.

12. The respected writer and commentator on Labour Law, Dr John Grogan in the December 2008 issue of his publication **Employment Law**, dealing with "*Sidumo*" and the "Reasonable Commissioner Test", comments, with reference to, *inter alia*, Hulett supra that –

> "… the Labour Court found that the '*Sidumo* test' did not preclude a

> reviewing Court from setting aside awards in which employees dismissed for dishonesty were reinstated. Before setting aside the award in *Hulett Aluminium*, the Court cited a string of pre-*Sidumo* judgments which support the proposition that 'conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship".

13. Following a further review of decided authorities, including *Shoprite Checkers* and *De Beers Consolidated Mines (supra)*, the following further comments are made:

> "The common characteristic of all these judgments was that the Courts set aside Commissioners' decisions to reinstate employees with long service and clean disciplinary records for defrauding their employers out of relatively insignificant amounts of money or stealing property of relatively insignificant value".

14. The Second Respondent, as I have indicated, makes factual findings which, on any rational analysis, are difficult to reconcile with the conclusions and final determination reached by him. He records three "contradictory explanations" offered by the Third Respondent for his unauthorised possession of the scrap metal in question. He records the Third Respondent's knowledge of the rule requiring a pass-out for the removal of the Applicant's property and disbelieves the explanation of his having "forgotten" to obtain that authorisation. In the result he is "satisfied" that the employee "was guilty of theft of scrap iron from the waste bin".

15. This notwithstanding, he finds the sanction of dismissal to have been "excessive and strikingly inappropriate", that it was unfair and unreasonable and that notwithstanding evidence to the contrary, a continued employment relationship would not be intolerable. In the result, he concludes, a fair reason for the third employee's dismissal had not been proved.

16. In the face of the authorities to which I have referred, the evidence adduced in

the arbitration and the Second Respondent's factual conclusions based thereon, I have little hesitation in concluding that his final decision of the dispute was not one that a reasonable decision-maker could have reached and that his reinstatement of the Third Respondent, in all the surrounding circumstances of the matter, cannot be sustained. I accordingly make the following order.

16.1. The Arbitration Award handed down by the Second Respondent on 18 March 2008 under the auspices of the First Respondent in its Case No. GAJB37633/07, is reviewed and set aside and is replaced with the following –

> "The dismissal of the employee by the employer on 24 October 2007 was procedurally and substantively justified and fair".

16.2. The Third Respondent is to pay the Applicant's costs.

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

24 April 2009