IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 462/07

In the matter between:

PARMALAT SOUTH AFRICA (PTY) LTD	APPLICANT
AND	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER H MATSEPE N.O.	2ND RESPONDENT
MARILYN PRETORIUS	3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award of the Second Respondent (the Commissioner) made under case number LP1720/06 and dated 28th February 2007, in terms of which the dismissal of the Third Respondent was found to be both substantively and procedurally unfair. The relief granted in terms of that award was that the Applicant should pay the Third Respondent compensation in an amount of R107 400.

[2] The Third Respondent opposed this application.

Background

[3] The Third Respondent, Ms Pretorius who was at the time of her dismissal employed as the area distribution manager, was charged with misconduct or poor management:

> *"In that you failed to report on time the Simmondsburg expired stock at the value of plus/minus R200 000 and gross misconduct (dishonesty), in that you intentionally instructed employees to change the actual stock count in order not to reflect the true variance in the variance report."*

[4] At the arbitration hearing Mr Bruwer, the financial accountant based at the Applicant's head office in Stellenbosch testified on behalf of the Applicant that the variances report which were receive daily were used to reconcile the physical and theoretical stock. This is according to him a standard procedure used to determine the Applicant's business focus.

[5] Bruwer further testified that in January 2006 he received a tip-off that the stock in the Polokwane distribution centre was being manipulated. There was an exchange of correspondence between Polokwane and head office about this matter. The bulk of the variances were on the cheese lines. When 10 (ten) lines were tracked, it was discovered that about 1 (one) tone of variances to the value of about R30 000 per line and the total value of about R222 000, were not reported.

[6] The concern from Bruwer arose when he discovered that some of the variances were not disclosed. This was confirmed by the investigation which was conducted by the Applicant.

[7] According to Bruwer the applicant used the services of temporary employees across the country and that for 8 (eight) months Polokwane did not have a distribution manager. In relation to charges which were proferred against the employee he testified that even if she did not report any theft in Polokwane the stock loss would be discovered because distribution centres are audited once a year.

[8] The second witness of the applicant Mr Rossouw, the distribution manager at Gauteng testified that he visited the Polokwane branch after being requested to do so by the regional distribution centre manager.

[9] Rossouw was placed in charge of the Polokwane branch after the suspension of the employee. The suspension according to him was because there was information that indicated that there was something wrong with the stock taking in Polokwane distribution centre.

[10] While the variance report, according to Rossouw, indicated a variance there was no loss reflected at the end of the month. The stock account that he conducted revealed that there was about R200 000 worth of expired stock in the freezer and that this stock was contrary to the Applicant's policy.

[11] Rossouw further testified during cross-examination that the staff compliment during his period was better at Polokwane compared to the period of the employee was there.

[12] The employee testified on her own behalf that the absence of the warehouse controller impacted negatively on the ability to run the depot. The stock controller is responsible for the stock control report and in this regard provides support to the manager.

[13] The employee further testified that at the time it was unknown what amount of stock was sold to customers and what orders the stores were taking. She further in this regard indicated that she did not receive any support from head office.

[14] The head office according to the employee supplied stock that was over ordered and their own factories had to ask her how to get rid of the stock.

[15] The employee denied having instructed other employees to change the actual stock count and that she had opened a theft case due to the stock variance and that the police were at that time busy investigating this. She also testified that she had informed her superior, Mr Schoeman after she had looked at the report and saw huge discrepancies between the stock that was counted and that which was on the floor.

The grounds of review

[16] The Applicant has in its founding affidavit raised a number of grounds of review, the essence of which is that the Commissioner committed a gross

irregularity, failed to apply his mind, contradicted his earlier findings in the award, change his findings midway through his award having found the Third Respondent to have committed an offence.

[17] The Third Respondent argued that the Commissioner never contradicted himself and that when he referred to the elements (a)-(d) of substantive fairness he was referring to the first charge which related to failure to report the expired stock to the value of R200 000.

[18] The Third Respondent further argued that she was not afforded the opportunity to cross-examine the witnesses and was also denied access to the contents of the computer.

[19] In essence the issue for determination in the present instance is whether the Commissioner committed gross irregularity in relation to:

- His duties as a commissioner;
- In the conduct of the arbitration hearing; and
- Whether the Commissioner did exceed his powers.

Evaluation of the award

[20] In the analysis of the evidence presented before him the Commissioner deals firstly with what the employer is required to prove in order to show that the dismissal was both substantively and procedurally fair. In this regard the Commissioner correctly points to the factors to consider in determining the substantive fairness of the dismissal as follows:

"In dealing with the substantive fairness the respondent has to prove inter alia the following: (a) that there is a rule in the respondent's company prohibiting the particular behaviour or offence, (b) that the applicants knew about the said rule or could reasonable be expected to have known about the said rule when the offence was committed, (c) that the said rule is legitimate and reasonable, (d) that the said rule has been consistently applied, (e) that the applicant in deed breached the said rule, and (f) that the sanction imposed by the employer to the applicant was appropriate under the circumstances."

[21] After setting out the above requirements to show substantive fairness by the employer, the Commissioner proceeded to indicate in relation to charge 1 (one) that the employee would not have been entitled to refer the dispute to the CCMA as she was not dismissed for it as she was issued with a written warning. It was for this reason that the Commissioner concluded that "*dealing with the merits of charge 1 would be academic."*

[22] After indicating the approach he adopted in relation to charge 1 (one) the Commissioner then proceeded to deal with charge 2 (two). In dealing with charge 2 (two) the Commissioner started off by saying:

"The respondent in effect called therefore only one witness in as far as count 2 is concerned.

From the evidence of this witness, from, perusal of respondent's bundle of documents as amplified by applicant concession during cross-

examination it is clear that elements (a)-(d) of substantive fairness can be accepted as proven. (My underlining)

Applicant herself agreed that she gave a plea of guilty on count number 2 for which she was subsequently found guilty."

[23] The Commissioner then rejected the version of the third respondent that she was influenced to plead guilty to charge 2 (two) by the Applicant. In rejecting the allegation of undue influence the Commissioner reasoned that:

- The allegation of undue influence was never put to the Applicant's witnesses during cross-examination.
- The Third Respondent being at the position she was could not be influence in the manner she alleged.
- The Third Respondent did not during the cross-examination indicate that its version when she presented her case would be that the plea of guilty by the Third Respondent was due to undue influence.
- The Third Respondent had enough time to between the time of the alleged undue influence to have consulted her attorney regarding her rights in this regard.

[24] In addition the Commissioner found that the Third Respondent had conceded during her testimony to the allegations concerning charge 2 (two) being that she had ordered staff to alter the variances report in order to give them (the employee) an opportunity to correct their mistakes. The Commissioner found in

this respect that even if the Third Respondent had good intentions in ordering the employees to change the variances that would not have absolved her from an act of dishonesty.

[25] The Commissioner proceeded in her analyses of the conduct of the third respondent and stated that:

> *"She further stated that the mistake could have been over the past six months yet she allowed it to continue by ordering the altering of the original stock counts. This constitutes nothing but dishonesty on the part of the applicant whatever the reason may be.*
>
> *I therefore reject the excuse of applicant and find that she indeed committed count 2 for which she gave a plea of guilty."*

[26] Having concluded the above analysis which firmly establish that not only did the Commissioner reject the defence of the Third Respondent but also that the Applicant had satisfied the requirements of proving its case, the Commissioner asked himself the following question:

> *"...the question is whether the respondent succeeded to prove other elements of substantive fairness."*

[27] In answering this question the Commissioner finds that the Applicant did not prove all the elements of substantive fairness in that it did not apply the rule consistently. The Applicant failed to prove that the rule was consistently applied according to the Commissioner because:

"It is clear from the evidence led that the respondent did not prove at all that the rule of the company was consistently applied. No evidence was introduced that certain senior or ordinary employees were dismissed for acts of dishonesty and if so what their names are, clock numbers, types of dishonesty committed, dates thereof and the sanction accordingly."

[28] The Commissioner based his conclusion on the reasoning that:

"Since the respondent did not succeed to prove that the rule was consistently applied it cannot be said that the sanction of dismissal is appropriate under the circumstances."

[29] It is clear, the Commissioner committed a gross irregularity by issuing an award that was contradictory and confusing. On the one hand the Commissioner found that the Applicant had successfully proven all the elements of substantive fairness. And on the other hand, found that the Applicant has failed to show that it had complied with the requirement relating to inconsistency. In *Abdull & Another v Cloete NO & Others [1998] 3 BLLR 264 (LC),* the Court held that:

"[12] As far as misconduct is concerned, it is at least arguable that an arbitrator will make himself guilty of misconduct in relation to his duties as an arbitrator if he fails to apply his mind responsibly and fairly to the issues before him. An arbitrator that acts in this fashion is not conducting himself in accordance with the requirements of the LRA which enjoins the arbitrator to give due consideration to the issues before him, to apply his mind thereto

and to come to a reasoned conclusion. For example, section 138 of the LRA directs a commissioner to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute albeit with the minimum legal formalities. The section also requires the commissioner to issue an arbitration award with brief reasons for his award. Solomon JA in Dickenson and Brown v Fisher's Executors 1915 AD 166 stated (at 176):

> *"It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a court might not properly find that there had been misconduct on his part.""*

[30] The Commissioner's decision is further reviewable on the ground of unreasonableness. It is well established that a decision is unreasonable if it is one which a reasonable decision-maker could not reach. See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC).* The decision in the present instance is unreasonable in that the Commissioner misunderstood the application of the concept of inconsistency. In essence the finding of the Commissioner is that in every case of misconduct the employer must adduce evidence indicating that the rule has been consistently applied. In other words the Commissioner required the Applicant to prove the negative. The conclusion of the Commissioner is also unreasonable because it is not supported by evidence. The issue of inconsistency never arose during the arbitration

proceedings. There is no evidence of any other employee having committed the same offence, and not being charged or being charged and a lesser or no punishment being imposed on such an employee.

[31] In the premises I issue the following order:

(i) The arbitration award issued by the Second Respondent under case number LP1720/06 and dated 28th February 2007, is reviewed and set aside.

(ii) The Second Respondent's award is substituted with the following award:

"The dismissal of the applicant, Ms Marilyn Pretorius, was both procedurally and substantively fair.

The unfair dismissal claim of the Applicant is dismissed."

Molahlehi J

Date of Hearing : 8th August 2008

Date of Judgment : 3rd February 2009

Appearances

For the Applicant : Mr Matyolo of Perrott, Van Niekerk & Woodhouse Inc

For the Respondent: Mr Jan Stemmett of Stemmett & Coetzee Attorneys