IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR2841/06

In the matter between:

RELYANT RETAIL LIMITED

t/a **BEARS FURNISHERS** APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION 1ST RESPONDENT

COMMISSIONER M RAMOTSHELA 2ND RESPONDENT

NOLENE ANN RADEMAN 3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The applicant, Relyant Retail Limited t/a Beares Furnishers, a company duly registered in accordance with the laws of the Republic of South Africa seeks an order reviewing and setting aside the arbitration award issued by the second respondent (the commissioner) under case number LP 5854-04 dated 22nd December 2005. In terms of that arbitration award the commissioner found the dismissal of the third respondent, a former employee and credit manager of the applicant, to have been substantively unfair and ordered the applicant to

compensate her in the amount of R43 576.00. For ease of reference the third respondent is referred to as the "the employee" hereinafter.

Background facts

[2] The employee who was prior to her dismissal employed as credit manager was dismissed for misconduct related to gross negligence and poor customer service. The applicant contended that the employee had at the time of the disciplinary hearing a previous record of misconduct related to poor customer service.

[3] The disciplinary action against the employee arose from two transactions which the employee performed with a customer, Mr Smith. Before dealing with facts related to the two transactions I need to deal first with the operating system of the applicant which was central in the formulation of the charges proffered against the employee.

[4] The procedure to follow in concluding a credit agreement at the applicant's stores is as follows:

- capture the necessary factual information of the customer.
- capture all the transaction information.
- then establish the credit worthiness of the customer.

[5] Once the above information is recorded the system allocates a score in respect of the purchase deal and thereafter either indicates whether the deal can be authorized or not. The system will indicate if the deal based on the information fed to it is a credit risk or not. The credit controller has two options if the system indicates that the deal bears some risk. The options are:

a. refer the application to Durban for office for approval; or

b. convert the high purchase transaction into a loan account.

[6] Turning to the incident that led to the termination of the employment relationship, it is common cause that the employee concluded two transactions (at separate times) with Mr Smith, a customer who purchased furniture on credit from the applicant. The transactions were concluded on 25th and 30th September 2004 respectively.

[7] On 25th September 2004, Mr Smith sought to purchase from the applicant on higher purchase (HP) a wall unit from the applicant. Before finalizing the agreement the employee had to capture the details and all transaction information of Mr Smith. The purpose of doing that was to establish the credit worthiness of Mr Smith being a new customer. Because of what appeared to be a default in payment at Morkels Furniture Store the system identified Mr Smith as a potential risk creditor.

[8] The case of the applicant during the arbitration proceedings was that once the system had shown that Mr Smith's was a risk, the employee had two options, in terms of the procedure stated earlier. The one option was that he should have referred the matter to the Durban office and the second was converting the HP deal into a loan account. It was also the duty of the employee according to the applicant to have assessed the credit reference of Mr Smith before exercising any one of the two options available to her in terms of the policy.

[9] The case of the applicant was also that the employee failed to conduct a proper check on Mr Smith and had he done so she would have discovered that the

Morkels account had been paid off and that the credit reference was out dated. Had she done the proper credit check there would have not been any need for her to exercise her discretion in as far as having to refer the matter to the Durban office or converting the deal into a loan agreement. A proper credit check would have indicated to the employee that Mr Smith qualified for a straight HP agreement which caries a much lower interest rate. The loan account on the other hand carries a much higher interest rate.

[10] A week after the conclusion of the agreement, Mr Smith was unhappy with the wall unit he purchased from the applicant. Mr Smith approached the store manager, Mr Kruger about his dissatisfaction with the wall unit. Unaware of what had transpired Mr Kruger agreed as per the request of Mr Smith to swap the wall unit with another one. The employee was instructed to capture the swapping transaction in terms of the applicant's policy.

[11] The employee entered the transaction again as an HP agreement and then converted it into a loan agreement without notifying Mr Smith of the conversion.

[12] The case of the employee is that at the time of concluding the transaction Mr Smith had an old pay slip with him. Apparently an arrangement was made between the two of them that Mr Smith would later bring his recent pay slip. The employee contends that she informed Mr Smith that the transaction could change once he submits his recent pay slip. As per this arrangement the wife of Mr Smith subsequently brought the recent pay slip which contained different information to the one which was submitted earlier. According to the employee

the HP agreement was changed to a loan agreement when the information of the new pay slip was entered into the system.

The grounds for review and the award

[13] The applicant contends that the arbitration award contained certain reviewable irregularities in that the commissioner failed to:

- apply his mind to the evidence before him in particular in relation to the issue of gross negligence. The applicant contended in this regard that the conduct constituted a serious misconduct taking into account the fact that the employee was an experienced credit manager who had an intimate knowledge of what was required of her.
- take into account the two previous warnings which had been issued against the employee relating to poor customer service.

[14] The applicant further contended that the commissioner committed a misconduct as envisaged in section 145 of the Labour Relations Act 66 of 1995. The commissioner's arbitration award was criticized for being unjustifiable having regard to the evidence presented during the arbitration proceedings.

[15] As indicated earlier the commissioner found the dismissal of employee to have been unfair and ordered both reinstatement and compensation for the unfairness.

The legal principles and evaluation

[16] The function of the Court in considering whether or not to interfere with the arbitration award on review is limited to those grounds provided for in terms of section 145 of the Labour relations Act 66 of 1995, as suffused by the constitutional standard of reasonableness. The reasonable standard entails the

applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision maker could not reach. See *Bato Spar Fishing (PTY) v Minister of Environmental Affairs and Tourism 2004 (7) BCLR 687(CC), Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC).* In order to succeed in relying on the grounds set out in section 145 the applicant must show that the commissioner:

> *"(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;*
>
> *(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or*
>
> *(iii) exceeded the commissioner's powers."*

[17] The issue of whether or not the commissioner committed a gross irregularity or failed to apply his or her mind entails a determination as to whether or not the complaining party was accorded a full and fair hearing by the commissioner. A fair and full hearing entails a determination of all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the arbitrator. See *Sidumo at 1179 A-C and 1180 A-C.* There is however authority that it is not every irregularity that would constitute gross-irregularity.

[18] In the present matter the commissioner in her evaluation of the facts and evidence accepted that the employee did not follow the procedure as a set out in

the applicant's policy. Having arrived at this conclusion and having further evaluated the facts in relation to the first charge of gross negligence found that the applicant has failed to show the misconduct of gross negligence.

[19] The complaint of the applicant in this regard is premised on the proposition that the commissioner failed to properly evaluate the evidence and the facts which was presented during the arbitration hearing.

[20] In addition to what I have already stated above the general rule as I understand it is that the function of a reviewing Court in dealing with the complaint of gross irregularity is limited to determining whether or not a commissioner in exercising the powers given to him or her by the Labour Relations Act did so within the appropriate sphere of those powers and whether the conclusions reached in the exercise of those powers are grounded on the relevant principle of law and supported by all the evidence and the material facts which were presented during the arbitration proceedings. I may hasten to also say if there is deviation from the facts or the law it must be of such a material nature, that it would amount to a denial of a fair hearing to the affected party, for that to warrant interference with the award by the Court.

[21] It needs to be emphasized that the judicial review power given to the Labour Court is not for the purpose of necessarily weighing evidence which was presented during the arbitration hearing, upon which the commissioner acted upon in arriving at his or her conclusion. The enquiry which the Court needs to conduct is whether or not there is the evidentiary basis for the conclusion reached by the commissioners. In other words the duty of the court in review is

to determine whether the conclusion reached by the commissioner has its support in substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts. In my view, of course this inquiry may answer both the question of whether the commissioner committed gross irregularity or the reasonableness or otherwise of the award.

[22] The only witness of the applicant testified that she phoned Morkels on 19th November 2004 and established that Mr Smith had paid that account within 6 months. Had the employee done the same she would according to him have established that fact and would have entered the correct information in the system. He further testified that Mr Smith ended up paying R32,00 more on his instalment because of the incorrect conversion of the deal from HP to a loan agreement.

[23] In her defence the employee testified that when she converted the contract to a loan agreement she gave a copy thereof to Mrs Smith. She acknowledged that this was against policy but indicated that it was common practice which was adopted in seeking to ensure that one does not lose a customer.

[24] The employee testified that whilst waiting for the Mr Smith to bring the signed contract back she received a call from the customer care unit. As concerning the reasons why the transaction was changed from HP to a loan agreement, the employee testified that there were various reasons for that. She indicated that one of the reasons was because of failure to submit the payslip by Mr Smith. She disputed that the system blocked the HP transaction because of the incorrect information about Morkels' account. She however under cross-

examination conceded that that was the reason she gave when the issue was raised the first time.

The charge of gross negligence

[25] In arriving at the conclusion that the dismissal was unfair the commissioner reasoned that he found it difficult to accept that the conduct of the employee amounts to any negligence at all. He accepted that the conduct of the employee may well be prohibited by the applicant's policy but did not justify dismissal. In analyzing the evidence further the commissioner found that the sanction of dismissal was inappropriate. It is clear that the commissioner in arriving at this conclusion took into account the circumstances surrounding the conduct complained off by the applicant.

[26] It is common cause that Mrs Smith lodged a formal complaint with the applicant when he came to know about the changing of the transaction from HP to a loan agreement. The relevant parts of that email which was submitted by the father-in-law of Mr Smith read as follows:

> *"On the next Saturday we went in to try and sought out the misunderstanding and when we told Mrs Rademan that we did not phone customer care to report her but just to make enquiries she became very personal and said that she did not expect this from us because we are "Christians." This kind of comment is unacceptable.*
>
> *Mrs Rademan explained the reason for the two contracts. She said that it was because on the first contract she had not filled in all the information on the computer and therefore when she did at a later stage, the*

computer gave a new contract – on which we were deemed to be a high risk customer requiring a higher instalment. Had the higher contract amount been on first contract we signed we would not have had a problem but due to the fact that the work was not done correct in the first place it is unreasonable to just expect the customer to sign a new contract and pay up.

We therefore decided that as Beares was not prepared to stand by their first commitment we would take out business somewhere else and so cancelled the deal.

I come back to the unacceptable reference to the fact that as "Christians" it was OK to expect us to carry the cost of incompetence. As the pastor of a local church in Tzaneen I will not be giving your store my support and nor will my congregation after this kind of comment.

Yours,

Rev. Peter Booysen."

[27] In my view the conclusion reached by the commissioner is very strange in that he says that there was no negligence on the part of the employee after finding that the employee did not follow the procedure as set out in the applicant's policy. It seems clear that the commissioner did not apply his mind to the issue of whether there was any causal connection between failure by the respondent to follow the procedure set out in the policy of the applicant and the loss suffered by the applicant as a result of the conduct of the employee in this regard.

[28] In the circumstances of this case negligence entailed an investigation into whether or not by failing to comply with the policy and procedure for concluding a credit transaction with Mr Smith the employee failed to exercise reasonable care. If the commissioner had conducted this enquiry and assuming that he had come to the conclusion that the employee did not exercise reasonable care in the manner in which he handled the transaction then the conclusion would have been that the employee was negligent in the manner in which he handled the transaction. Of course this enquiry would have entailed an investigation into whether or not the employee could have reasonably foreseen the consequent result of his failure to follow procedure. Having come to the conclusion that the employee was negligent the next inquiry would have entailed enquiring into whether or not the negligent conduct was aggravated and if so then the conduct would have amounted to gross negligence.

[29] The above is a task which the commissioner seems to have ignored or failed to appreciate. Had he applied his mind to the totality or substantial evidence before him he ought to have found that not only did the employee fail to comply with the applicant's procedure in concluding the agreement and converting it into a loan agreement but that it was also because of that conduct that the applicant incurred an unnecessary loss. The other inquiry which the commissioner ought to have conducted which he failed to do concerns the issue of whether or not the employee did foresee the loss the applicant suffered as a result of his failure to follow procedure.

The charge of poor customer service

[30] As concerning the charge of poor customer service the commissioner found that the applicant had failed to show the existence of a rule regarding poor customer service. The commissioner questioned the validity and the reasonableness of such a rule if it existed at all.

[31] In its founding affidavit the applicant does not challenge the finding of the commissioner that there is no evidence of the formal rule governing customer service. The applicant however contends that there was no need for a specific rule to deal with that issue because the rule is self evident. This contention seems to be based on the assumption that the employee ought to have known about the standard governing the way credit managers were to handle customers and the consequences of failure to meet that standard.

[32] Item 7 of the Code of Good Practice, provides that any person who considers whether the dismissal for misconduct is unfair should consider:

> *"(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the work place; and*
>
> *(b) if the rule or standard was contravened, whether or not*
>
> *(i) if the rule was a valid or reasonable rule or standard*
>
> *(ii) the employee was aware, or could reasonably have been expected to be aware, of the rule or standard*
>
> *(iii) the rule or standard has been consistently applied by the employer*
>
> *(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."*

[33] It is generally accepted that an employer need not specifically spell out each and every rule of the workplace. In this respect the employer need not for example specifically spell out a rule regarding theft at the workplace. This is a rule that every employee is reasonably expected to be aware of including its consequences.

[34] In the present instance the duty to show that the employee was aware of the rule or should reasonably have been aware of its existence rested with the applicant.

[35] It seems to me that the commissioner failed to appreciate the substantive evidence which had been placed before him. As a result he committed a fundamental mistake of fact when he said that the applicant had no rule or standards regulating poor customer service. The mistake arises from the fact that even on the version of the employee she knew about the standard regarding customer service. According to her she was on 10th November 2004, summoned to a performance counselling concerning the issue of customer service. She was at that hearing cautioned by Mrs Kruger who initiated the counselling that she could face dismissal at the end of the counselling.

[36] The employee was also on 15th May 2003, charged with:

> *"Poor performance in that your customer service is extremely poor & your sense of urgency is Zero."*

[37] In answering the question under section *"D"* of the counselling form which required her to make "*input or suggestions that he/she can make to solve the problem",* the employee states the following:

"I will be more careful & make sure all information is 100% capturing (sic) to be done correctly & quickly. Access (clients) quickly. Report back to BM immediately."

[38] It is therefore clear from the above that the commissioner failed to apply her mind to the evidence which was before her when he concluded that the there was no standard regulating customer service. The employee was aware of the rule and was in fact previously charge in terms of that rule. Thus the conclusion of the commissioner is not supported by the evidence which was properly placed before him during the arbitration hearing and this, in my view is an unreasonable conclusion.

[39] It is accordingly my view that the arbitration award of the commissioner stands to be reviewed. The circumstances of this case requires in my view that the matter should be remitted back to the first respondent for a determination afresh by a commissioner other than the second respondent. It is a well established principle of our law that the determination of the fairness of a sanction is the responsibility to be left to the commissioners. The Greek Philosopher, Aristotle who is said to have been a fan of arbitration observed and affirmed this principle when he said: *"for arbitrators keep equity in view, whereas the judge looks to the law."* See *Journal of Dispute Resolution: Exemplary Awards in Securities Arbitration: Short-Circuit Rights to Punitive Damages (vol 1995, number 1) at page 129*. Another commissioner may find that although the employee was grossly negligent in the manner in which he handled the transaction of Mr Smith, he or she may in investigating the appropriateness of the sanction find

that the dismissal of the employee by the respondent to have been harsh and therefore unfair.

[40] In the premises the following order is made:

1. The arbitration award issue case LP5854-04 dated 22 December 2005, is reviewed and set aside.
2. The matter is remitted back to the first respondent for a consideration afresh by a commissioner other than the second respondent.
3. There is no order as to costs.

Molahlehi J

Date of Hearing : 24th April 2009

Date of Judgment : 15th September 2009

Appearances

For the Applicant: Ms H Schensema of Nkaiseng Chenia Baba Pienaar & Swart Inc

For the Respondent: Mr C Geldenhuys of Geldenhuys CJ @ Law Inc