**REPUBLIC OF SOUTH AFRICA**

Not reportable
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 151 / 2012

In the matter between:

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| **SOLID DOORS (PTY) LTD** | **Applicant** |
| and | |
| **COMMISSIONER JP HANEKOM N.O.** | **First Respondent** |
| **CCMA** | **Second Respondent** |
| **ANDRÉ AFRICA** | **Third Respondent** |

**Heard**: **5 June 2012**

**Delivered**: **25 July 2012**

**Summary:** Review – misconduct – LRA s 145 – reinstatement without backpay – within range of reasonable outcomes.

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**JUDGMENT**

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STEENKAMP J

Introduction

1] The employee, Mr André Africa (the third respondent) was in charge of dispatch at the applicant's Cape Town branch. He was dismissed for gross negligence after goods to the value of R135 000 had allegedly been dispatched to a bonus customer. The arbitrator (the first respondent) found that the employee had committed misconduct but that it amounted to negligence, not gross negligence. He considered dismissal not to be a fair sanction. He ordered the applicant to reinstate the employee with effect from 14 June 2010. The effect of this award was that the employee had been suspended without pay for 6 months. The award was coupled with an order to issue a final written warning for negligence in the performance of duties causing financial loss to the company, effective for 12 months from 14 June 2010.

2] The applicant submits that the award and conclusion is so unreasonable that no other arbitrator could have come to the same conclusion.[1] It seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[2]

Background facts

3] The employee had worked for the applicant, Solid Doors, since October 2002. He was dismissed on 9 December 2009 for misconduct comprising "gross negligence – loss of goods".

4] At the time of his dismissal, the employee was in charge of dispatch at the Cape Town office. He had to ensure that all deliveries for sales orders are dealt with in accordance with the applicant's procedures. The financial manager, situated at the applicant's head office in Johannesburg, had to sign off on credit approvals for sales orders. Once that had been done, the employee would dispatch the goods to the delivery address. He did not deliver it himself – a driver did so.

5] In the case that led to the employee's dismissal, a company called

1 Ie the test set out in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

2 Labour Relations Act 66 of 1995.

Security and Fire Projects (Pty) Ltd (SPF) applied for credit on several occasions. The financial manager granted credit and goods were either delivered to SPF or the customer collected it from the applicant's premises in Cape Town. However, it transpired that, although SPF was an existing customer, a fictitious or bogus customer applied for credit using SPF's credentials. The financial manager granted credit approval for sales orders to the value of R135 000. The bogus customer gave the delivery address as 121 Stock Road, Philippi; it transpired later that this address does not exist.

6] The bogus customer collected goods from the applicant's Cape Town branch on 4 November 2009. On 11 November 2009 the truck driver, S Kume, was dispatched to deliver goods to 121 Stock Road. He could not find the address and telephoned the employee, Africa. The employee phoned the customer, who told him that he would send someone to show the driver where to deliver the goods. The customer did so after telephoning Kume, and told the driver to drop the goods under a clump of trees next to the Philippi train station in Stock Road. Kume did not tell Africa about the unusual place of delivery. Subsequent to this incident, the bogus customer collected goods from the applicant again on five occasions.

7] The applicant's case was that Africa was in charge of dispatch and that he should have made sure that the customer to whom goods were delivered, was a legitimate customer at a legitimate address. His failure to do so amounted to gross negligence and caused a loss of R135 000 to the applicant. The employee argued that another department had granted credit approval; that he dispatched the goods on the strength of this approval; and that he had acted on the information that the customer had given him with regard to the place of delivery.

The award

8] The arbitrator took into account the evidence of Letcher, the applicant's regional manager, about the delivery policy. He testified that customers

should put their stamp on delivery notes to acknowledge receipt; and that, if the delivery address could not be found, the driver should return to the depot.

9] The driver, Kume, however testified that the employee (Africa) could authorise delivery at small companies without calling for a rubber stamp. He also testified that the customer telephoned him (Kume) and sent someone to show him where to drop the goods.

10] The arbitrator came to the conclusion that the applicant had led no evidence to show that the employee had been involved in any fraudulent activity or that he had been part of a conspiracy to steal goods from the applicant. However, he found that the employee had been negligent in the performance of his duties. He should not have left it to the driver and the customer to agree to a delivery address. He "should have done more" to ensure that the goods were delivered to the right customer. Nevertheless, he could not be held solely responsible for the loss of R135 000; the department that granted the credit approval should have ascertained the address of the customer before it granted credit.

11] Having considered the evidence as a whole and the employee's personal circumstances, as well as his clean disciplinary record during seven years' service with the applicant, the arbitrator came to the conclusion that dismissal was not a fair sanction. However, the employee had been negligent and should not get off scot free. The arbitrator therefore ordered the applicant to reinstate the employee with effect from 14 June 2010 only, coupled with a final written warning, effective for 12 months from that date; for negligence in the performance of his duties causing financial loss to the company. The upshot is that the employee was effectively given a sanction of six months without pay, coupled with a final written warning.

Review grounds

12] The applicant raised two grounds of review:

12.1 The arbitrator should have found that the employee should have

instructed the driver to return to the depot, and not that the loss was also attributable to the department that granted credit approval.

12.2 The failure of the department granting credit approval had no bearing on the employee's own responsibility to ascertain he correct delivery address.

Evaluation / Analysis

13] Neither of the two grounds of review raised by the applicant in its pleadings or in its heads of argument constitutes a proper review ground as set out in *Sidumo & Ano V Rustenburg Platinum Mines Ltd & Ors.*[3] I will nevertheless consider the applicant's argument in the light of that test, viz whether the arbitrator's finding was so unreasonable that no other arbitrator could have come to the same conclusion.

14] It is so that Letcher testified that the driver should have returned to the depot rather than making the delivery. But the arbitrator did not exonerate the employee; he found that he was indeed negligent, but that dismissal was not a fair sanction. That finding falls within a range of reasonable outcomes.

15] The commissioner conducts an arbitration *de novo.* In the light of the totality of circumstances, established by the evidence at arbitration, the commissioner must then decide whether the decision to dismiss was fair. In doing so, it is the commissioner's own sense of fairness that must prevail. There can be no deference to the employer. As Davis JA confirmed in the LAC's recent discussion of the *Sidumo* test in *Wasteman Group v SAMWU & Others*[4]:

> "The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner."

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3 (2007) 28 *ILJ* 2405 (CC).

4 Unreported, CA 6/2011 (8 March 2011).

16] That is what the arbitrator did in this case. His conclusion may have been open to appeal, but not to review.

Costs

17] With regard to costs, I take into account that the employee had committed misconduct. He was negligent and was at least partially responsible for a significant loss to the applicant. Even though he has been successful, I do not think it appropriate in law and fairness to make an order as to costs.

Order

18] The application for review is dismissed. There is no order as to costs.

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Steenkamp J

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| APPLICANT: | Attorney Craig Berkowitz, Johannesburg. |
| THIRD RESPONDENT: | Inus Ferreira |
| | Instructed by Africa & associates, Cape Town. |