IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

LAC CASE NO. JA 37/06

In the matter between:

MUTUAL CONSTRUCTION COMPANY TVL (PTY) LTD	**APPELLANT**
and	
NTOMBELA N.O.	**FIRST RESPONDENT**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**SECOND RESPONDENT**
THOKOANE, JOSEPH	**THIRD RESPONDENT**

J U D G M E N T

NDLOVU AJA

Introduction

[1] In this matter the Court *a quo* granted leave to appeal only against its order for compensation and refused leave to appeal against its order on the merits of the review application under case number JR797/01. However this Court, on petition, granted the appellant leave to appeal against the entire judgment of the Labour Court handed down on 25 April 2006. In terms of that judgment the Labour Court dismissed with costs the review application launched by the appellant against the arbitration award issued by the first respondent ("the Commissioner") dated 14 May 2001 under case number GA70877 in favour of the third respondent as against the appellant.

[2] The only respondent opposing the appeal (and previously the review application) was the third respondent, Mr Joseph Thokoane, who was formerly employed by the appellant and whose dismissal by the appellant gave rise to the litigation which culminated in this appeal.

[3] In his arbitration award which the Court *a quo* upheld, the Commissioner found that the third respondent's dismissal was both procedurally and substantively unfair. The appellant was, as a result, ordered to reinstate the third respondent in the appellant's employ with retrospective effect and that the third respondent had to present himself for resumption of duty on 4 June 2001.

Application for consolidation of two appeals

[4] First for us to consider was the preliminary issue involving the application (brought by the appellant) for consolidation of two appeals under case numbers JA37/06 and JA48/06 for the purpose of dealing with them as one appeal. Further, that the consolidated appeal be heard on a date set down for hearing of the appeal under case number JA37/06. There was no opposition to the application. I propose to deal with this application presently.

[5] Indeed, the facts pertinent in the application are simple and straightforward. Upon the review application being dismissed with costs (on 25 April 2006) the appellant lodged an application for leave to appeal against the entire judgment of the Court *a quo*. The application was partially granted and partially refused. The order read thus:

> "1. The appeal for leave to appeal succeeds only on the ground pertaining to the relief granted to the Third Respondent by the First Respondent, in the review application.
> 2. Costs of the application for leave to appeal will be costs in the appeal."

[6] In perspective, it was clear that by the words “the relief granted to the third respondent by the first respondent” in the order was actually meant the quantum of the compensation granted and computable on the basis of retrospective reinstatement, which turned out to be an amount equivalent to approximately 23 months’ salary of the third respondent. This relief awarded to the third respondent was challenged by the appellant on the basis of the decision of this Court in *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Lt*d (2007) 27 ILJ 292 (LAC). It was then only to this extent that the Court *a quo* granted leave to appeal.

[7] In the meantime the appellant proceeded and prosecuted the appeal on the issue in respect of which leave was granted by the Court *a quo*. Such appeal was registered under Case No. JA37/06. As for the merits of the review itself, in respect of which leave to appeal was declined by the Court *a quo*, the appellant petitioned the Judge President of this Court in terms of section 166(2) of the Labour Relations Act 66 of 1995, as amended (“the LRA”). The petition was successful and therefore leave was granted to the appellant to appeal against the entire judgment of the Court *a quo*. The appellant prosecuted the latter appeal under Case No. JA48/06.

[8] It was common cause that in respect of both appeals the records of proceedings filed were identical save for the notices of appeal. Indeed, there could be no dispute that this is essentially one and the same matter and that it would only be proper and appropriate to deal with the matter as one appeal. The application, in my view, should therefore succeed.

The Parties’ Submissions

The appellant’s case

[9] The third respondent was formerly employed by the appellant since on or about 16 January 1997. As at the time of his dismissal he was designated as an administrative clerk. His duties included the recording of hours worked by all employees (including himself) for the purpose of calculating payment

due to employees. The said hours were recorded by the respondent in a timesheet and he then presented the document to the appellant's site manager, Mr Binks ("Binks"), for signature and approval. Payment of staff salaries and wages was then determined on the basis of the hours so approved.

[10] During June 1999 the third respondent was charged with misconduct and summoned before an internal disciplinary enquiry facing three misconduct charges, namely: "Dishonesty", "Breach of trust" and "Action taken in bad faith". The charges related to allegations that the third respondent recorded for himself in the time sheets to have worked a certain number of hours on certain days, thus claiming remuneration therefor, whereas in fact and in truth he had not worked those hours and that he committed this dishonest act to the financial prejudice of the appellant since the appellant paid, or was induced to pay, the third respondent for the hours so recorded and claimed.

[11] Specifically, the appellant alleged that the third respondent was not on duty on the following days but booked himself as on duty for the number of hours indicated:

Date not on duty	Number of hours booked as on duty
29 May 1999	9 hours
30 May 1999	8 hours
31 May 1999	11½ hours
1 June 1999	11½ hours
3 June 1999	11½ hours
5 June 1999	9½ hours
6 June 1999	10 hours
13 June 1999 (Sunday)	10 hours

[12] The appellant further alleged that, in addition, the third respondent had tampered with the time sheet and varied certain figures contained therein. In particular, the appellant alleged that on 18 June 1999 the period worked by

the third respondent was altered from 11½ hours to 14 hours and on 14 June 1999 it was changed from 9 ½ hours to 11½ hours. It was further alleged by the appellant that on 24 June 1999 the third respondent was absent from work without permission.

[13] Copies of the relevant time sheets as well as the appellant's disciplinary code were included in the appellant's founding papers in the review application.

[14] The disciplinary hearing against the third respondent was held on 29 June 1999. According to the appellant, the third respondent did not dispute the allegations against him, save to address the instances when he was off on sick leave, that is, during the period 3, 4 and 5 June 1999 and in respect of which period the third respondent submitted a medical certificate to cover for the days of absence.

[15] The appellant also averred that the disciplinary hearing was held in terms of the appellant's disciplinary code and that the third respondent was accorded a fair hearing. It was the appellant's strenuous argument that, as a result of his dishonest conduct aforesaid, the trust and working relationship between the appellant and the third respondent had broken down irretrievably. Hence, the only appropriate sanction was the dismissal.

The third respondent's case

[16] On the other hand, the third respondent claimed, in the first place, that he did not receive a procedurally fair hearing. He alleged that the notice served on him to attend the disciplinary hearing did not indicate any detail of the allegations against him and that when Binks served him with the notice he (Binks) did not explain the charges to him. When he attended the hearing he was told that he had falsified the time sheets for the 3rd, 4th and 5th June but he was never shown the time sheets concerned.

[17] He said he was then asked whether he pleaded guilty, to which he responded in the negative. In explanation of his not guilty plea he had told the

tribunal that when he recorded himself as present on duty in the time sheet it was because he was claiming for sick leave. In support thereof he had attached to the time sheet the doctor's sick note. However, although he was sick for three days (being 3, 4 and 5 June 1999) he had only claimed sick leave for only two days, namely the 3rd and 5th and not for the 4th June.

[18] The third respondent sought to assert that it was the appellant's procedure to claim for sick leave in the manner that he had done. In this regard, he put his case at the arbitration hearing thus:

> "According to the procedure that I know, I have to book the hours normal hours, nine and a half hours, then attach a sick note as proof that the person was sick on those days." *(Page 183 lines 17-19 Volume 2 of the Record.)*

[19] The third respondent further stated that after he recorded the hours as shown in the time sheets, he had given the same to Binks who then signed and approved the time sheets for payment. In other words, it was submitted by the appellant that when he signed the time sheets Binks was approving that everything was done correctly.

[20] At the conclusion of the disciplinary hearing the verdict was recorded as follows: *"Found guilty of the charge laid against him"*. The notice of dismissal served on the third respondent appeared to show that he was convicted of all three counts as charged. The sanction was one of a summary dismissal with effect from 30 June 1999. It was the appellant's contention that its working relationship with and trust of the third respondent had irretrievably broken down.

The Arbitration Award

[21] In his award the Commissioner made the following observations and findings:

> "The applicant (now the third respondent) … alleged that during the hearing he was never shown the timesheet that the respondent (now the appellant) claimed he changed, the respondent did not dispute this. The Respondent

> failed to explain why the original document was not given to the applicant during the hearing and also failed to bring the same during these proceedings. The applicant emphatically denied the allegation of changing certain hours on the timesheet. It is difficult to see how these hours were changed because the respondent failed to bring along the original copy to these proceedings. It must also be noted that Binks actually signed this document basically, in my view, confirming that the information on the timesheet is correct and the employees to be paid. My logic tells me that as a manager before signing any claim, you need to satisfy yourself that the information is correct. … On balance of probabilities, I find the respondent's evidence not convincing. It is therefore my view that the applicant was dismissal (*sic*) not for the fair reason.
>
> In terms of procedure, I concur with the union that the respondent did not properly explain the charges that were put against the applicant. The applicant was charged for being dishonest but the charge sheet doesn't explain why. It is not the applicant's duty to seek clarity on the charge. The responsibility lies with the respondent to ensure that the charge is not ambiguous. … The respondent in this matter never bothered to explain the charges on the charge sheet. This in my view had negative impact in applicant's preparation of his case. …" *(Page 26 Volume1 of the Record)*

[22] The Commissioner proceeded and criticised the appellant for the fact that at the arbitration hearing the appellant claimed that a certain Mr Mashego (the third respondent's co-employee) was the complainant at the disciplinary enquiry whereas the notice to attend the enquiry reflected that Binks was the complainant. Binks' explanation was that he had made a mistake by reflecting himself as complainant in the notice of enquiry. The Commissioner further found it procedurally wrong of the appellant not to have first called evidence in support of its case against the third respondent (before allowing the third respondent to testify) given the fact that the third respondent had pleaded not guilty. Consequently, the Commissioner found, in addition, that the third respondent's dismissal was also procedurally unfair.

The Labour Court's Judgment

[23] As stated, the award issued by the Commissioner was challenged by the appellant by way of review to the Labour Court. In its judgment the Court *a quo* made findings and reached a conclusion, all of which can be summarised as follows:

23.1 The third respondent was indeed never shown the original time sheet which was allegedly altered and this was a deficiency in the misconduct enquiry procedure since that time sheet was the very document on which the acts of misconduct were premised. The appellant had failed to take any remedial step to cure this deficiency. In this regard, the Court *a quo* held that no "gross irregularity" was committed by the Commissioner when the Commissioner found that absent the production of the original time sheet "it was difficult to see how the hours were changed".

23.2 Indeed, when Binks signed the time sheets it meant that he had satisfied himself that the contents of the document were correct. In this regard the Court *a quo* stated:

> "The signing of time sheets by a mine manager was a very critical step in the business of the (appellant). It directed the salaries department to pay an employee on the basis of the hours as were reflected on the time sheet. In the absence of that signature, the salaries department would be acting contrary to the procedure of the (appellant) if it continues to generate payment for employees. The Mine Manager had then to satisfy himself that the time sheet was correct. He would be entitled to query any alterations or any entries in the time sheet which, from his perspective, were a cause for concern. In my view, it was reckless as much as it was irresponsible of the (appellant) to belittle the role played by Mr Bings (*sic*) in signing the time sheet. The decision of the (commissioner) was, accordingly, justifiable."
> *(Page 254-5 Volume 3 of the record.)*

23.3 The attachment by the third respondent of the medical certificate to the time sheet was proof that the third respondent lacked any intention to misrepresent facts to the appellant.

The Law

[24] The appellant had the onus to demonstrate that reinstatement was not appropriate. In this instance, in particular, the appellant had to show that the circumstances as contemplated by section 193(2)(b) and/or (c) existed, being that "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable" and/or that "it is not reasonably practicable for the employer to reinstate or re-employ the employee." (see

also: *Chemical Workers Industrial Union & Others v Latex Surgical Products, supra; Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC)).

[25] This Court in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2000) ILJ 1051 (LAC) stated the following:

> "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."

(at 1058E-G)

[26] In *Branford v Metrorail Services (Durban) & Others* (2003) 24 ILJ 2269 (LAC) this Court stated:

> "The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case. In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A), Smalberger JA made the following remarks on fairness at 589C-D:
>
> > 'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 4461). And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down, any universally applicable test for deciding what is fair.'" (at 2278H-2279A)

[27] As to the test and approach on review against an arbitration award issued by a CCMA commissioner the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA (CC); (2007) 28 ILJ 2405 (LAC) stated the following:

> "The question on review was not whether the record revealed relevant considerations that were capable of justifying the outcome, but rather whether the decision-maker properly exercised the powers entrusted to him." (at para 45)

At paragraph 78:

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

At paragraph 79:

> "To sum up. In terms of the LRA a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

At paragraph 110:

> "To summarise, *Carephone ((Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425; [1998] 11 BLLR 1093) held that sect 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that sect 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star (Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687)). Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

At paragraph 116:

> " … In my view, the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine's valuable property, which he did not do. However, this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach."

At paragraph 117:

> "The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. … That Mr Sidumo did not own up to his misconduct and his denial that he received training are factors that count against him."

Analysis and Evaluation

Substantive Fairness Aspect

[28] It is common cause that the decision reached by the Commissioner in this case was (1) that the dismissal of the third respondent was procedurally and substantively unfair, and (2) that the appellant must reinstate the third respondent with retrospective effect in the appellant's employ. Then the primary question to be asked: Was this decision reached by the Commissioner one which a reasonable decision-maker could not reach?

[29] Counsel for the appellant conceded that the original time sheet reflecting the alleged alterations was not produced at the arbitration hearing but he submitted that the issue of the authenticity of the time sheets was never placed in dispute by the third respondent. Subsequently, however, counsel no longer pursued this point but argued that the third respondent was, in any event, still guilty of the other transgressions that he booked himself on duty when he was in fact absent from work. Therefore it seems not necessary to deal with this aspect of the case.

[30] It was noted that in his evidence during the arbitration hearing the third respondent admitted being absent from work for six days, namely: 30 May 1999 (Sunday); 2, 3, 4, 5 and 6 June 1999.

[31] Of course, the third respondent was not charged for being absent on 2 and 4 June 1999. In other words, as far as the charge was concerned, the third respondent admitted having been absent from work on 30 May, 3 June, 5 June and 6 June 1999. According to him the 3rd and 5th were covered by the sick note which he attached to the time sheet. I will return to this aspect shortly.

[32] Based at least on what he admitted (as indicated above), the third respondent could not proffer an explanation as to why he booked himself as present on duty on 30 May and 6 June (as reflected by him in the time sheet) when in actual fact he was not present. It can hardly be doubted that this

conduct alone amounted to dishonesty and constituted a gross misconduct by the third respondent.

[33] It did appear that the procedure which the third respondent subsequently chose to follow in terms of claiming for sick leave in the manner that he did was obviously unknown in the appellant's operational system. At some point the third respondent claimed that he was taught the procedure by a certain Mr Moses Jacobs *(see page 183 line 22 of the record)* whom, unfortunately, the third respondent did not bother to call as his witness in that regard. The appellant denied that there was such a procedure at the appellant. Indeed, it would appear that it was not for the first time that the third respondent was on sick leave, yet it was his first time to make use of that procedure.

[34] In any event, supposing the procedure did exist as indicated by the third respondent, it was his evidence that a claim for a day's sick leave (under this procedure) would consist of only hours for a normal working day, namely 9½ hours. Strangely, therefore, he could not explain why then (if he was claiming for sick leave in respect of the 3rd and 5th June) he recorded 11½ hours for the 3rd June, in particular.

[35] Therefore, it seems clear to me that, on his own evidence and admissions, the third respondent was indeed guilty of serious misconduct involving gross dishonesty. On that basis, his conviction for misconduct was, in my view, a fair reason to justify his dismissal.

[36] It was important that the Commissioner took the totality of the circumstances into account in making his decision. In the present instance the third respondent was placed in the position of trust and responsibility. He was basically the source from which all the information was obtained by the appellant as to how the staff was to be remunerated in terms of the number of hours of work actually performed by each employee. This role played by the third respondent constituted a crucial and fundamental operational requirement in the appellant's business. Indeed, it was correctly submitted on

behalf of the appellant that the third respondent, given the post that he held and duties that he performed, was in a good position to able to have made false entries in the time sheet not only for himself (as was the case here) but also for other employees. This was not a mere speculation but, in my view, a potential reality.

[37] The misconduct which the third respondent committed involved gross dishonesty and fraud which was bound to cause harm and prejudice to the appellant's business operation. It was also significant that the third respondent elected not to own up to his misdemeanour. In other words, he showed a complete lack of remorse or contrition for what he did. Instead, he attempted to shift the blame to the site manager whom the third respondent apparently induced to signing the falsified time sheet. He had only 2½ years of service with the appellant. Even if he had a much longer service that would not (and should not) have spared him in the circumstances of this case. In *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC) the Court stated:

> "Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.
> I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction."

(at 344C-F)

[38] I have found that, especially given the position of trust and responsibility that he held at the appellant, the third respondent, on his own admission, committed misconduct which involved gross dishonesty, which essentially amounted to fraud. Hence, in my view, retaining the third respondent in the appellant's employ, in these circumstances, would have been severely detrimental to the appellant's operational requirements and

therefore inappropriate. Any continued working relationship between the appellant and the third respondent was, as a result of the third respondent's conduct, rendered intolerable. In a *dictum* (*per* Conradie JA) in *De Beers Consolidated Mines Ltd, supra,* this Court stated:

> "Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him or her and the employer has been destroyed." (at 1057C-D)

[39] Accordingly, I am satisfied that the decision reached by the Commissioner was indeed one which a reasonable decision-maker could not make. Besides the fact that the judgment of the Labour Court was handed down prior to the advent of the *Sidumo* decision, it does nevertheless seem to me that the Court *a quo* dealt with the matter, on review, somewhat narrowly by tending to focus strictly on the reasons given by the Commissioner for his decision, instead of considering the matter more broadly in the light of the entire evidence adduced at the arbitration hearing, which included the third respondent's own admissions of serious and dishonest wrongdoing.

Procedural Fairness Aspect

[40] The Court *a quo* had only the following to say on the aspect of procedural fairness:

> "While some of (the Commissioner's) findings on procedural fairness were more formalistic, than substantial as I would hold, I would have arrived at the same conclusion as he reached on procedural fairness. It is my view that, I need not take this aspect any further."

(Page 257 Volume 3 of the Record)

[41] I do not think that, viewing the issue holistically, the third respondent did not receive a fair hearing. Of course, the procedure was not without some flaws but these to me were not so gross and of the nature as to justify the vitiation of the process. Granted, the charges as reflected in the notice of enquiry did not specify with any degree of certainty what it was that the third respondent was alleged to have done which supported the charges preferred against him. According to Binks the charges were explained to the third respondent at the disciplinary hearing. In any event, it did appear from the nature of his defence and evidence which he adduced that the third

respondent fully understood the import of the charges against him and conducted his defence thereto reasonably well. This position was further better demonstrated during the arbitration proceedings, which was a hearing *de novo* of the dispute. Indeed, it could not be expected of a company official who was not legally trained to have drafted and formulated a charge sheet as, for example, was seen to be done in a court of law.

Order

[42] For these reasons, the judgment of the Court *a quo* cannot stand. However, the third respondent, being the losing employee party already out of employment, will have received sufficient punishment by the outcome of this appeal. In any event, it was not unreasonable for him to have opposed the appeal. I would consider, therefore, that no order be granted as to costs. Accordingly, the following order is made:

(1) The application for consolidation of two appeals under Case Nos. JA37/06 and JA48/06 to be dealt with as one appeal under Case No. JA37/06 is granted.

(2) The appeal is upheld and the order of the Court *a quo* is set aside and substituted with the following order :

(a) The review application is granted.

(b) The arbitration award dated 14 May 2001 under Case No. GA70877 issued by the first respondent (the Commissioner) is reviewed and set aside and substituted with the following order:

(aa) The application is dismissed.

(bb) The dismissal of the employee was both procedurally and substantively fair.

(c) There is no order as to costs.

(3) There is no order as to costs on appeal.

_____
NDLOVU, AJA

_____ I agree
KHAMPEPE, ADJP

_____ I agree
TLALETSI, AJA

Appearances

For the appellant	:	Mr S. Snyman c/o Snyman Attorneys
For the third respondent	:	Mr C Orr
Instructed by	:	Cheadle Thomson & Haysom
Date Judgment	:	8 May 2009