IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR2041/07

In the matter between:

ROYAL CANIN SOUTH AFRICA (PTY) LTD	**APPLICANT**
and	
N. MBILENI N.O.	**FIRST RESPONDENT**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**SECOND RESPONDENT**
ENOCH PULANE NDHLOVU & 2 OTHERS	**THIRD RESPONDENT**

JUDGEMENT

TSHABALALA AJ

[1] **INTRODUCTION**

1.1 This is an application in terms of Section 145 of the Labour Relations Act 66 of 1995 as amended ["The Act"] for the review and the setting aside of the First Respondent's arbitration under case number GAJB 18490 – 07 dated 23 July 2007.

1.2 The review application is only opposed by the Third Respondent.

[2] The Applicant seeks the following relief:-

2.1 that the arbitration award made by the First Respondent, dated the 23 July 2007, be reviewed and set aside in terms of Section 145, alternatively in terms of Section 158 (1) (g) of the Labour Relations Act No. 66 of 1995 (as amended) "The LRA";

2.2 an order this Court may deem appropriate under the circumstances;

2.3 cost of suit;

2.4 a stay of the said arbitration award being made an order of this Court or any certification thereof.

THE PARTIES

[3] The **APPLICANT, ROYAL CANIN SOUTH AFRICA (PTY) LTD** ('**Company**") is a limited liability company duly incorporated in terms of the company laws of the Republic of South Africa. The Applicant manufactures and distributes animal pet food.

[4] The First Respondent is **N. MBILENI N.O.** ("**Commissioner**") the Commissioner who arbitrated the dispute between the Applicant and the Third Respondent.

[5] The Second Respondent is the **COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION ("CCMA"), GAUTENG**.

[6] The Third Respondents are **ENOCH NDHLOVU, NORMAN SUTHANE AND EPHRAIM TAU** the ex – employees of the Applicant.

BACKGROUND

[7] The Applicant is a prominent pet food manufacturer. In the period April 2007 to May 2007, a national pet food contamination caused by the Applicant's product took place in the market.

[8] Veterinary practices predominantly in Gauteng were visited by pet owners in that many animals had taken ill with a poisonous substance found in the Applicant's product. Veterinary practices noticed that pet food manufactured by the Applicant showed traces of ethelene glycol substance [antifreeze] which if ingested by animals is fatal in that it causes renal failure and ultimately death of the animals.

[9] The source of the toxic contamination was determined; and; nationally all products of the Applicant were recalled and destined for storage. Over a period of weeks the Applicant accumulated losses in excess of R 90 000 000 – 00.

[10] According to the Applicant, Third Respondents were sensitized on a particular rule to apply during this crisis period and on the result of the breach of the rule. The rule was that all recalled stock had to be removed from an area known as the PAA Warehouse; and; that failure to comply with this instruction would have further adverse commercial results and could probably lead to the termination of the contracts of employment of the Third Respondents.

[11] The Third Respondents denied that they were informed that they might be dismissed if they did not take the precautions to ensure that no contaminated stock left the warehouse.

[12] The Third Respondents alleged that the person who was responsible for removing and placing the contaminated stock in the warehouses was Daniel Ditlhape ["**Ditlhape**"], the employee whom the Applicant had initially dismissed but later reinstated.

[13] The Applicant alleged that on or about 09 May 2007, it was advised by an entity known as "**VETSERVE**" that it had received

contaminated stock. Pursuant to a detailed investigation, it was discovered that the Third Respondents were directly involved in not ensuring that the contaminated stock did not leave the PAA Warehouse and eventually the Kya – Sands premises where it was stored.

[14] This discovery resulted in the Applicant having to institute disciplinary proceedings against four of its employees namely the Third Respondents and Ditlhape. On or about 18 May 2007, the Third Respondents received notices to attend disciplinary hearings.

[15] The disciplinary hearings were presided over by one Ester de Beer, an official from the employer's organization to which the Applicant was affiliated and who later represented the Applicant in the arbitration proceedings under review.

[16] The Third Respondents were dismissed for:-

16.1 "*gross negligence in that they failed to ensure that all recalled stock was removed from PAA Warehouse, as well as the fact that they were the responsible checkers of orders picked; and; recalled stock that was sent to customers*;

16.2 failure to ensure that short dated stock was isolated as per their manager's instructions".

[17] The outcome and penalty of disciplinary hearings held was that they were found guilty of the misconduct and were dismissed effective 29 May 2007. The dismissal notice advised all the dismissed employees that they could also either appeal or refer their dispute to the CCMA. The relevant clause reads as follows:-

"*6 Ad recourse: I have been informed that an appeal procedure exists, but I confirm the same. The matter may be referred to the appropriate Dispute Resolution Forum in terms of the Labour Relations Act – Act 66 of 1995 [as amended] or to appeal. Appeal to be done in writing within 5 working days.*"

[18] Ditlhape, who was also dismissed by the Applicant, did not refer his dismissal dispute to the First Respondent but appealed to the Applicant against his dismissal. The outcome of Ditlhape's appeal was that he was reinstated.

[19] The Third Respondents on the other hand, approached the Second Respondent and alleged that they were unfairly dismissed by the Applicant. First Respondent was appointed to arbitrate over the dispute between the Applicant and the Third Respondents.

[20] The First Respondent's arbitration award, which is the subject matter of this review application, ordered the Applicant to reinstate the Third Respondents by no later than 01 August 2007. No provision for backpay or compensation was awarded by the First Respondent.

[21] In analyzing the evidence and the argument, the First Respondent stated that:-

21.1 "*the gist of this case is whether the dismissal of the Applicants was too harsh given the circumstances in particular that of re – instatement of a fellow employee;*

21.2 the evidence of the misconduct is common cause, it is further common cause that the Applicants were aware of the standard of conduct which was set;

21.3 *the issue is therefore whether the Respondent acted unfairly by reinstating Mr. Ditlhape and refused to reinstate the Applicants*;

21.4 the Respondent's response regarding the case of Mr Ditlhape was that he had addressed an internal appeal whereas the Applicants had chosen to approach the CCMA for relief;

21.5 it is evident from the bundle of documents submitted that the Applicants were given an election by the chairperson of the disciplinary hearing. They could either appeal in terms of the Respondent's internal

processes and procedure, or approach the relevant dispute resolution forum in terms of the Labour Relations Act. In the case of the Applicants they chose the CCMA;

21.6 the Respondent's representative argued that the relationship between the Respondent and the Applicants was broken down as a result of the incident that led to their dismissal. It was further argued that Mr Ditlhape was remorseful during appeal;

21.7 I am of the view that the Applicants have shown remorse during the internal hearing and even during the CCMA arbitration. They have not denied the allegations, and have said they regretted what had occurred;

21.8 I further find that it is unfair for the Respondent to allege a break down of the relationship only with regard to the Applicants and not the other employee;

21.9 I recognize that the Applicants were not blameless in the situation and it would therefore be unfair to expect the Respondent to compensate them.

AWARD

21.10 I therefore order the Respondent to re – instate the Applicants with effect from the date of this award with no provision for backpay or compensation.

21.11 The effective date of reinstatement should be not later than the 1st August 2007."

THE GROUNDS FOR REVIEW OF THE ARBITRATION AWARD

[22] The Applicant's grounds of review as set out in its founding affidavit are that:

22.1 the Commissioner committed gross misconduct in relation to her duties as a Commissioner, she committed a gross irregularity in the conduct of the arbitration proceedings by exceeding her powers as a Commissioner, or;

22.2 on the basis of rationality and or justifiability in relation to the Commissioner applying her mind to the facts;

22.3 that the Commissioner acted in accordance with the review grounds stated above in that:

22.3.1 she committed a gross irregularity and she cannot rationally justify her decision to interfere with the Applicant's disciplinary sanction for such a serious offence;

22.3.2 she committed a gross irregularity and the she cannot rationally justify her decision to compare an arbitration process to that of an internal appeal, without the facts of

the internal appeal before her, or the record or witnesses thereof, and find that the Applicant herein had acted inconsistently;

22.3.3 *she committed a gross irregularity and cannot rationally justify her decision to find that the Applicant had incorrectly averred a breach of the employment relationship in relation to the Third Respondents, as opposed to the reinstatement of the other employee, and that a reinstatement order would be appropriate*."

[23] In its supplementary affidavit the Applicant amplified its grounds of review as follows:

23.1 "*that a reasonable Commissioner would not have come to the conclusion, based on the testimony presented, that dismissal was too harsh or that there was an inconsistent application of dismissal therein*;

23.2 *that the First Respondent cannot reasonably reach a conclusion that the dismissal was too harsh, considering that many employees were dismissed, yet only one employee appealed, and following an appeal hearing, such employee was reinstated. Those facts were not presented to the First Respondent, and even less the appeal record, hence the*

unreasonableness in the award therein. A reasonable Commissioner would have found that despite an election, there remains a discrepancy, and the facts at arbitration reasonably may not include an inference of an appeal that was not before the Commissioner."

[24] When the matter was argued before me, the Applicant attacked the award of the First Respondent her in finding that the Applicant acted unfairly in reinstating Ditlhape, following an appeal, but refused to reinstate the Third Respondents.

[25] The Applicant argued that the case in the main involved the application of the parity principle. The Applicant submitted that at no stage following their dismissal did the Third Respondents make any demand to be reinstated, and no evidence was presented that the Applicant refused such a demand. The Applicant submitted that its conduct in the circumstances was reasonable and that the reasoning of the First Respondent cannot pass muster and stands to be reviewed in that:-

25.1 all affected employees were made subject to disciplinary hearings;

25.2 all affected employees were dismissed in line with the internal code and severity of the case in point;

25.3 only one employee lodged an appeal, which was chaired by an independent chairperson;

25.4 the other employees elected to have the matter determined at the Second Respondent.

[26] The Applicant submitted that the court must be mindful that the two processes are entirely different; the manner of the presentation of evidence is entirely different; the appeal record was not before the First Respondent; the chairman of the appeal was not summoned to testify at the arbitration proceedings; the First Respondent simply assumed her finding in the absence of any supporting evidence on that fact; the First Respondent thus failed to draw a distinction, reasonably, that there cannot be any comparison of an appeal lodged, which was heard internally to a statutory arbitration;

[27] The Applicant relied on Cape Town City Council v Masitho & Others 2000 21 ILJ at 1957 LAC particularly at p 1961 Nugent JA A,

SACCAWU & OTHERS V IRVIN & JOHNSON LTD 1999 20 ILJ AT 2302 LAC, where Conradie J states that plurality of dismissals is a

wrong decision can only be unfair if it is, capricious or if induced by improper motives or worse by a discriminatory management policy.

[28] The Applicant argued that Ditlhape's reinstatement was different to that of the Third Respondents in that Ditlhape was reinstated on four conditions, namely that he was prepared to accept a suspension without pay; he was prepared to work without pay; he was willing to payback a proportion of the amount lost as a result of his conduct and he was willing to accept a written final warning.

[29] Applicant argued that, the reinstatement order of the Third Respondents by the First Respondent resulted in the Third Respondents getting what Ditlhape got without them being also bound by the four conditions which applied to Ditlhape. Applicant's Counsel argued further that the Third Respondents received greater benefits than Ditlhape who is, as a result worse off; and; parity is consequently not achieved.

[30] Applicant's Counsel argued that the facts of the case and the award do not set out the principle of parity. According to the Applicant the facts of the case and the award ignore the material distinguishing features of the two instances. Consequently the parity principle is not applicable.

[31] In conclusion, the Applicant submitted that based on the evidence before the First Respondent the above Honourable Court should find that the dismissal of the Third Respondents herein was justifiable and fair, the parity principle is, in *casu* not applicable, and should consequently grant the review and/or replace the award with a finding that the dismissal was fair and order the Third Respondents to pay the costs jointly and severally, the one paying the others to be absolved.

[32] The Third Respondents on the other hand argued that the review application be dismissed with costs. The Third Respondents submitted that the First Respondent did not commit any gross irregularity in her outcome and that the Applicant had not set out the basis and/or reasons for its allegations.

[33] The Third Respondents submitted that the meaning of gross irregularity as a ground for review was dealt with in **Sidumo and another v Rustenburg Platinum Mines Ltd and Others** where it was held by Ngcobo J in paragraph 265 that:

33.1 regarding the ground of rational justifiability, the Labour Appeal Court, in the matter of **Fidelity Cash Management Service v CCMA & Others** held that:

"...justifiability of administrative action in relation to the reasons given for it, as propounded in Carephone (Pty) Ltd v Marcus NO & Others 1999 (3) SA304 (LAC), as a ground of review of CCMA arbitration awards under Section 145 of the Act does not apply any more....."

[34] Therefore, the Third Respondents submitted that this ground of review is no longer applicable and the Court should not consider this test as raised by the Applicant.

[35] The Third Respondents' legal representative submitted that the First Respondent did look at all the circumstances of this matter. Before taking a decision of whether the dismissal of the Third Respondents, as required, was fair or not, consideration should be given to the principles espoused in the matter of **Sidumo mentioned above by Navsa AJ, in 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"

[36] According to the Third Respondents this paragraph shows that the Commissioner is required to observe all circumstances of the case and she is not limited to the circumstances mentioned in the above paragraph. The First Respondent's decision was also motivated by the fact that all the Third Respondents during the disciplinary hearing and at the arbitration proceedings had "…. ***Shown remorse…….They (sic) have not denied the allegations, and have said they regretted what had occurred***". She also considered that the Applicant's representative argued that a relationship between the Applicant and Third Respondents had broken down, but Mr Ditlhape was reinstated and the issue of relationship is not an issue. (**p28, para 5.7**)

[37] It was a duty of the First Respondent to determine whether the punishment imposed by the Applicant is harsh or not. In paragraph 75 of **Sidumo** the Court held that:

" ***It is practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct arbitration in***

terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing "discretion". Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace. "

[38] Thus, the First Respondent analysis that "**the gist of this case is whether the dismissal of the Applicants was too harsh given the circumstances in particular that of the re – instatement of a fellow employees**", is correct because it was within her mandate to decide this aspect.

CONCLUSION

[39] I am of the view that the award of the First Respondent is not reviewable. A closer look at the award reveals that the First Respondent applied her mind to the issues presented to her. The Applicant's Counsel main attack of the award is that the parity principle is not applicable. I disagree with this submission, firstly, the Third Respondents were given the choice of forum by the Applicant itself. The Third Respondents either had to refer their

dispute to the appropriate dispute resolution forum in terms of the Act or to appeal to the Applicant.

[40] The Third Respondents elected to refer the dispute to the CCMA. The Applicant is not arguing that the Third Respondents prematurely referred their dispute to the CCMA prior to them exhausting all their internal dispute resolution procedures.

[41] The Applicant is not and cannot argue that the choice of forum of the Third Respondents to refer the dispute to the CCMA is incorrect in that it is the Applicant which gave the Third Respondents the choice. Once made Applicant must abide by it. The Applicant is now seeking to draw a difference between the arbitration proceedings and the internal appeal.

[42] This distinction in this instance does not assist the Applicant. That the Third Respondents elected to refer their dispute to the CCMA is the choice which the Applicant gave to the Third Respondents and it is bound by it.

[43] The Applicant has argued that the First Respondent decided the matter without the benefit of the appeal record of Ditlhape and that there was no evidence before her to decide the issue. The Third Respondents' case at all material times hereto was their inconsistent treatment by the Applicant. The Applicant chose not to call the chairperson of Ditlhape's appeal hearing to arbitration. The Applicant failed to produce the appeal record of Ditlhape. It must therefore live with such consequences.

[44] It is incorrect to argue that the Third Respondents benefited from Ditlhape's reinstatement on appeal without the four conditions attached to Ditlhape's reinstatement applying to the Third

Respondents. The First Respondent was aware of the Applicant's case and the alleged four conditions which were testified to by the Applicant. But even in the face of this, the First Respondent found in favour of the Third Respondents. She applied her mind to the matter. A reading of her award shows in my view that the First Respondent applied her mind to the issues before her. When she reinstated the Third Respondents, she clearly stated that the employment relationship between the parties had not irretrievably broken down which is demonstrative of her having applied her mind to the issues before her.

[45] The uncontested evidence of the Third Respondents is that Ditlhape was responsible for ensuring that the contaminated stock does not leave the PAA warehouse and Kya Sands premises. I disagree with the argument of Applicant's Council on the parity principle that the facts of the case and the award do not set out the principle of parity. If there were any material distinguishing features in casu the Applicant failed to adduce them at arbitration. In the face of the alleged four conditions under which Ditlhape was reinstated by the Applicant, the First Respondent found in favour of the Third Respondents.

[46] Ditlhape received a similar letter to the one received by the Third Respondents, he chose to appeal and was reinstated. Ditlhape like the Third Respondents is bound by the election which was made available to them by the Applicant. In turn the Applicant is bound by the results of the choice it made available to its employees. That Applicant has set conditions for Ditlhape's reinstatement, that is the choice which it and Ditlhape chose to be bound by. That the dispute resolution forum which the Third Respondents chose to invoke did not set the four conditions the Applicant imposed on Ditlhape is the choice the Applicant made when it granted its employees the choice

of forum after it had dismissed all four of them for the same misconduct. Had the First Respondent imposed those four conditions on the Third Respondents, she would have committed a reviewable misconduct in that she would have exceeded the powers conferred on her by the Act.

[47] Consequently, the First Respondent did not in my view commit any reviewable act for the Applicant's decision and method of how it chose to run its case at arbitration hearing bearing in mind that the chairperson of the disciplinary hearing of the Third Respondent is the same person who represented the Applicant at arbitration.

[48] The argument of the Applicant that at no stage following their dismissal did the Third Respondents make any demand for reinstated, and that there was no evidence presented that the Applicant refused such a demand is absurd.

[49] The finding of the First Respondent that dismissal was in the circumstances of the case too harsh is in my view well reasoned and substantiated by the facts. The decision of the First Respondent was not, as argued by the Applicant, a decision to compare an arbitration process with an internal appeal. The choice of forum is the choice which the Applicant gave to its employees upon dismissal, and in my view the outcome of such processes binds the Applicant.

[50] I find that the award of the First Respondent is well reasoned. I am not persuaded that I should interfere with it. Consequently, I dismiss the review application with costs.

ORDER

[51] The review application is dismissed with costs.

TSHABALALA AJ

FOR APPLICANT: G.F. HEWEY
[duly INSTRUCTED BY VAN GRAAN ATTORNEYS

FOR RESPONDENTS: MR S. MABASO
JOHANNESBURG JUSTICE CENTRE

Date of Judgment: 26 March 2010