

IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT JOHANNESBURG)

**Case No. J20/01**

In the matter between:

**ROTEK ENGINEERING (PTY) LTD**

Applicant

and

**THE COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

First Respondent

**MARCUS M. N. O.**

Second Respondent

**STANTON R.**

Third Respondent

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**JUDGMENT**

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1. This is a review application.
2. The Third Respondent was dismissed by the Applicant after a disciplinary inquiry held in order to investigate charges about falsifying a document with fraudulent intent.

3. The background to the aforesaid complaint is that when the Third Respondent was employed by the Applicant during May 1999, as a sales executive, he requested that the Applicant pay to him a guaranteed upfront commission of R10 000,00, apparently in order to assist him in purchasing a motor vehicle. The Third Respondent discussed that request with Mr Warner, the Applicant's Dealer Principal and General Manager.
4. It is common cause that this payment was never effected by the Applicant, it being Mr Warner's evidence that although he personally may have been sympathetic to the request, Mr Burger, the Managing Director of the Applicant (and Mr Warner's boss) had refused to pay the aforesaid amount. Furthermore, Mr Warner testified that he told the Third Respondent about Mr Burger's attitude to the matter.
5. Notwithstanding this, the Third Respondent persisted in the view that he was entitled to a guaranteed commission upon commencement of employment and in order to procure payment of R10 000,00 in that connection, he inflated an invoice which he had received from a furniture removal company by the sum of R10 000,00. The Applicant had agreed to assist with the Third Respondent's furniture removal costs and by presenting an inflated invoice to

the Applicant in this regard, the Third Respondent hoped to procure payment of the sum of R10 000,00 which he believed he was entitled to. The presentation of the inflated invoice was the reason that the Third Respondent was dismissed by the Applicant.

6. The Third Respondent's defence both during the disciplinary proceedings and in the CCMA was that the entire scheme of presenting an inflated invoice was the idea of Mr Warner. The Third Respondent maintained that Mr Warner remained sympathetic to his request for a guaranteed commission and because the Applicant had agreed to help out with the furniture removal costs, Mr Warner suggested inflating the applicable invoice so as to include a fictitious amount of R10 000,00 which would enable the Third Respondent to be paid that amount. The Third Respondent argued that because a senior employee like Mr Warner had suggested altering the invoice that excused the Third Respondent from any misconduct in regard thereto. The Third Respondent's case was that he therefore lacked any intention to commit a fraud because the Dealer Principal and General Manager had agreed to pay the aforesaid amount to him and was simply devising a scheme in terms of which payment could legitimately be effected to the Third Respondent, at the same time avoiding the problem of calling it a guaranteed commission.

7. Mr Warner's evidence was that he had never suggested altering any invoices to the Third Respondent. He says that he had made it quite clear to the Third Respondent that his boss, Mr Burger (the Managing Director) had refused to pay to the Third Respondent the sum of R10 000,00 or any other amount as an agreed upfront commission. When the inflated invoice came to his knowledge he requested the Human Resources Department to call for the original in order to verify the invoices because he was suspicious about the copy thereof. He testified that it would have been well within his power and managerial prerogative to have approved payment of the inflated invoice as it was well within his budget. He would have approved payment of the invoice had he been author of the fraudulent scheme.
8. The Second Respondent preferred the version of the Third Respondent to that of Mr Warner and he accordingly found that the dismissal was substantively unfair (as well as procedurally unfair for other reasons). This finding is strenuously attacked on review.
9. Whilst I may not agree with the Second Respondent's findings in this matter, I am not at large to substitute my own decision for his. This is a review application and the parameters for me to upset the award are clearly narrower than those applicable to an appeal. Having regard to those parameters,

which have been clearly defined in the most recent Labour Appeal Court decisions, it seems to me that there are a number of reasons which make the Second Respondent's award justifiable on the material that was available to him. They are set out below.

10. The Second Respondent played an active part in the arbitration proceedings.

It is apparent from the record of the proceedings, the questions that he posed to the parties and his arbitration award that he considered all of the material that was before him in coming to a decision. The Second Respondent says that his rejection of the evidence of Mr Warner is not founded on any unfavourable assessment of Warner's credibility as a witness but stresses that not too much can be made of Warner's *prima facie* credibility because of the Third Respondent's inability to successfully discredit Warner in cross-examination having regard to the limited extent of his efforts and the :

*"obvious limitations of capacity in that direction".*

11. The Second Respondent therefore based his award on the probabilities of the matter and, based on the probabilities, found that Warner was involved in the alteration of the invoice in question. The Second Respondent found that there were four probabilities in favour of the version advanced by the Third

Respondent in the arbitration. He made this finding based on the factual evidence presented before him and, whilst I may not agree with the findings, that does not mean the award is unjustified.

12. In this regard it is, for example, justifiable for the Second Respondent to have concluded, as he did, that :

*"had Applicant acted on his own in contriving the scheme of submitting a fictitious invoice for transport costs to secure payment for his claim, I find it inconceivable that he would have stated openly at the earlier hearing of 16 September 1999 to address complaints about his performance that Warner had asked him to create a fictitious invoice to claim the guaranteed commission ..."*

13. At the time the Third Respondent volunteered his involvement in the scheme in question, during a hearing about his performance (in other words unconnected with the invoice in question) there were no charges against him arising out of the altering of the invoice. In fact, there was a considerable delay in bringing charges of dishonesty against the Third Respondent arising out of his involvement in the scheme in question. Some two months elapsed

from the time the Applicant became aware of the allegations to the time that they charged the Third Respondent with fraud. The delay was explained by Mr Warner as follows. He was prevailing upon Mr Burger not to take disciplinary action because no loss had been suffered and he was worried about the "*Brophy*" connection. Although Mr Warner testified that Mr Burger remained steadfast in his view that disciplinary action should be taken, Mr Burger was never called to testify in the arbitration proceedings in order to explain what is a rather extra-ordinary delay in taking disciplinary action concerning fraud. In fact, disciplinary action was not initiated by Mr Warner and neither was it initiated by Mr Burger. At a time when the Applicant knew about the Third Respondent's alleged fraud, the Applicant strangely initiated other inquiries against the Third Respondent for poor performance but did not deal with the allegations of fraud. It was only when the Applicant volunteered the facts giving rise to the alleged fraud that a further inquiry was then convened in order to deal with this volunteered information.

It was therefore justifiable, in my opinion, for the Second Respondent to conclude that this demonstrated an innocent intent on the part of the Second Respondent in relation to the so-called fraudulent scheme.

14. The other probabilities which the Second Respondent says were against Mr

Warner's evidence were also justifiable and rationally connected to the evidence before the Second Respondent.

15. Finally, it was contended, on review, that even if Mr Warner was involved in the scheme in question, that results in, at best for the Third Respondent, a situation where he was a party, with Mr Warner, to a serious fraud on his employer. That was never the basis of the Applicant's case in the CCMA. The Third Respondent was never cross-examined on that basis and, in fact, the Applicant's representative in the arbitration proceedings (see page 320 of the record, page 182 of the record of the arbitration proceedings) said, in response to a question from the Second Respondent which was "*if Warner did what he (Mr Stanton) says then the dismissal was not justified*", then "*yes, it was not justified. If Warner had instructed him then Warner should be dismissed himself*". Had the Applicant's case been that the two employees in question had colluded to commit a fraud then, clearly, Mr Warner should have been dismissed as well. He was not because that was never the Applicant's case, it was not the basis upon which the Applicant proceeded in the CCMA and therefore the Applicant may not proceed on that basis now.

16. In view of all of the above the Second Respondent's award in this matter in regard to substantive unfairness is justifiable and in my opinion is not capable



of being upset on review. I do not agree with the Second Respondent's findings in regard to procedural unfairness and, in my opinion, the Second Respondent confused procedural issues with substantive ones. However, in my opinion, that does not alter the award given by the Second Respondent. The Third Respondent was dismissed in October 1999. He gave evidence during the CCMA proceedings that he had only been employed "*within the last two months*". This means that he had a lengthy period of unemployment. In any event, by reason of the substantive unfairness of his dismissal the Third Respondent would have been entitled to a retrospective re-instatement had that been his claim. His claim was compensation and in the circumstances of the matter an award of twelve months compensation for substantive unfairness is justifiable. On this basis, the fact that the Second Respondent's award in regard to procedural unfairness may be reviewable is irrelevant. In the result the review application fails and I make the following order :

16.1. The application for review is dismissed with costs.

DATED at DURBAN this 29<sup>th</sup> day of APRIL 2003.

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**N P WOODROFFE AJ**