IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR925/02

In the matter between

JDG TRADING **Applicant**

and

G SADIKI **1ST**

Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **2ND**

Respondent

BLIGNAUT, FRANSA **3RD**

Respondent

J U D G M E N T

REVELAS J:

[1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act"). The applicant, the former employer of the third respondent, seeks to review an arbitration award made by the first respondent ("The Arbitrator"), in favour of the third respondent.

[2] The third respondent was dismissed by the applicant for breach of certain procedures and what it argues was dishonesty. It is common cause in this matter that the applicant exchanged a postdated cheque, signed by her husband, for R2 000,00 cash, from the applicant and instructed her colleagues not to do the banking on the Monday as the cheque was postdated for the coming Tuesday.

[3] Since she had acted in this manner in front of her co-employees *inter alia*, a certain Ms Lufono, she was reported, charged and dismissed at a disciplinary hearing.

[4] It is also confirmed that in terms of the applicant's banking procedures, banking of all cash received, be effected daily in terms of a written process. In addition there was also a strict policy with regards to which cheques may be accepted and how all cheque transactions should be treated. The third respondent was fully trained in, and fully aware of the provisions of such policies and procedures. This was one of the main reasons why the applicant felt, the third respondent should be dismissed.

[5] The third respondent required some funds for personal purposes, being to purchase cattle, and the sum involved was R2 000, 00. The third respondent removed this sum in cash from the company funds on Saturday 12 May. I have already stated that the sum was replaced by a postdated cheque, signed by the third respondent's husband for the same amount dated for the Tuesday which was 15 May 2001.

[6] The arbitrator held that although aggravating circumstances were not presented in evidence, and at the disciplinary hearing,

that could not be held as fatal against the employer's case in as far as procedural fairness is concerned, as long as guidelines by Schedule 8 (Code of Good Practice were followed, and they were.

[7] With regard to substantive fairness, it had been conceded from the beginning that the employee exchanged the postdated cheque for cash. In respect to substantive fairness, the Arbitrator found as follows:

> **"Having considered the facts globally, I determine the following:**
>
> **1. That the consistency plea could not stand against the employer as same is based on hearsay and no proof that the employee took an active initiative to have somebody discipline.**
>
> **2. That I determined under the circumstances that the sanction of dismissal is harsh, taking the following into consideration.**
>
> **2.1 The transaction was not done secretly and the employee was always open about it. (No act of dishonesty took place).**
>
> **2.2 The personal circumstances, for example, service with a clean record proves that the employee could improve to avoid transgressions if given a second chance."**

[8] In essence, the applicant's case was that employers, rather than arbitrators, should give employees a second chance when they misconduct themselves. That may be so, but in this particular

matter, there are other factors which I have to (and which the arbitrator did) take into account.

[9] In this application for review, I had to consider whether the arbitrator's ultimate conclusion was connected to the facts before him or her. In this case, the applicant committed a serious breach of the applicant's banking procedures. It is so, that in most such cases, employers would be quite entitled to, and would indeed decide to dismiss such an employee. Other employers might take into account, as the arbitrator had done in this matter, that the employee had a long, clean service record and that she had not acted deceitfully. The arbitrator also considered the suggestion that there was bad blood between Ms Lufono and the third respondent, before this incident.

[10] Argument was also presented on behalf of the applicant, that the third respondent had acted dishonestly, asking that the banking be held over until the Tuesday. That may be an aggravating factor to some extent, but it is clearly not indicative of patent dishonesty as one would find in fraud or theft, as she did so openly. In these circumstances, the arbitrator's finding was one of a reasonable range of outcomes and is not irrationally disconnected to the facts.

[11] Even if I am wrong in finding that the Arbitrator did not act irrationally, there is a further factor which persuades me that this application for review should be dismissed, and that is that the applicant filed and served its review application in June 2002. The arbitration award is dated 14 May 2002. The applicant therefore brought its application for review well in time. However, thereafter the applicant and his attorney rested on

their laurels and this review came before the court for hearing for the first time on 12 December 2005. The previous time the matter was set down for hearing, was on 8 December 2005, but this time it was set down by the third respondent who wished the application for review to be dismissed due to the applicant's failure to expeditiously prosecute its review.

[12] I am not convinced by any of the reasons presented by the applicant's attorney that there is an excuse for a delay of more than three years to persue a review application. It has led to undue prejudice. The Labour Court also has to take a stand against the employers who bring review applications and then embark on delaying tactics. There is no time limit specified, during which a litigant should produce the record of arbitration proceedings in a review application, and that is where, in the court's experience, most delays occur. These type of abuses are used by several employers to avoid liabilities in terms of the awards that are made against them. It is with growing concern that I have noticed how long a review application can be dragged out by simply doing nothing about serving a record. Strong reliance is usually placed on alleged defects of the CCMA's administration and case management. Without going into the appropriateness or otherwise, of such an assertion, it would appear that any form of mismanagement at the CCMA is manipulated to the advantage of those who wish to delay review proceedings.

[13] The application is therefore dismissed with costs.

_____

Judge Elna Revelas

Judge of the Labour Court

Date of Hearing: 08 December 2005
Date of Judgment: 12 December 2005

On behalf of the applicant:
Adv. W Hutchinson instructed by Snyman Attorneys

On behalf of the respondent:
Mr A Naude of Coxwell Steyn Vise and Naude Attorneys