

**IN THE LABOUR COURT OF SOUTH AFRICA HELD IN
JOHANNESBURG**

Case no: JR1845\04

In the matter between:

CASHBUILD SOUTH AFRICA (Pty) LTD **Applicant**

and

MYHILL E.L.E. N.O.	First Respondent
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**THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

**Second
Respondent**

ADRIAN VAN DER BURGT **Third Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

- [1] This is a review application brought in terms of section 145 of the Labour Relations Act as amended.
- [2] The applicant (Cashbuild (Pty) Ltd) brought a review application and premised it on the fact that the first respondent has misconstrued the nature of his inquiry, which was to determine whether the third respondent's dismissal on the ground that he committed misconduct is fair or not. In short, the first respondent found that the dismissal is substantively unfair on the basis of inconsistent application of discipline when such was not the basis of the challenge of the alleged unfair dismissal. Therefore, the applicant was not afforded a fair hearing. Accordingly, the first respondent

committed misconduct which renders his award reviewable.

- [3] The third respondent (Adrian Van der Burgt) also lodged a separate review of the same award. His grounds were that no misconduct was proven on his part and accordingly the award is reviewable.
- [4] It does appear that both parties were contend that the award is reviewable either way. The only difference is that the applicant contends that the award should be substituted with an order that the dismissal is not substantively unfair. Whereas the third respondent contend that the award should be replaced with an order that the dismissal is substantively unfair and awarding maximum compensation.

Background facts

- [5] The third respondent was employed by the applicant as procurement manager. On or about June 2002, the applicant received information through the third respondent that one of its suppliers, Medal Paint would increase prices with effect from 19 August 2002. In terms of the applicant's policy the applicant had to increase its prices for Medal Paints products by 19 July 2002. The third respondent was then instructed by one Steve Botha to increase the selling price as per the policy in place.
- [6] The third respondent failed to do so. As a result of his failure, the applicant suffered a loss in the amount of R600 000.00. Consequently, the third respondent was charged with the following charge:

Failure to comply with company procedure regarding pricing

in that you failed to lift the selling price by the same value as the cost, with effect from September 2002 with regard to Medal Paints”.

[7] Pursuant to a disciplinary hearing, the third respondent was found guilty as charged and dismissed for such a misconduct. Aggrieved by his dismissal, the third respondent referred a dispute about the fairness of his dismissal to the second respondent.

[8] After hearing all the evidence, the first respondent issued an award to the effect that the dismissal was substantively unfair and awarded the third respondent three months compensation.

[9] The applicant lodged its review application on 16 August 2006, when the third respondent lodged its review on 30 August 2006. For the purpose of this judgment, the third respondent's review shall be referred to as the counter review.

The review

[10] The applicant sought to attack the award on the basis that the first respondent misconstrued the nature of the charge thereby committing a gross irregularity.

The counter review

[11] In his counter review, the third respondent conceded that he was not charged with failure to maintain rand margin, but was charged with the charge referral to earlier. In his submission, the first respondent committed an irregularity to the extent

that he found him guilty of what he termed “failure to maintain rand margin”.

[12] Further he contended that he is not guilty of non-compliance with the company policy. Also, he accused the first respondent of not considering evidence and thereby committing an irregularity. In addition, he contended that the relief afforded to him was inappropriate. He in turn raised the justifiability and rationality ground.

[13] Given the approach, I take, it will not be necessary to deal in details with the grounds set out in the counter review. Even if I were to dismiss the counter review, I will still review the award on the grounds contended by the applicant.

The award

[14] In the award, the first respondent records that the following was common cause:

1. The applicant was dismissed on 08 May 2003 on the following charge:

“Failure to comply with company policies and procedures regarding pricing in that you failed to lift selling prices by the same value as costs with effect from September 2003 (*error the correct year is 2002*) with regards to Medal Paints”

2. An appeal hearing was held on 02 June 2003 where the sanction was upheld.

3. During August 2002, the applicant (third respondent) was informed of a 14% price increase in the entire range of Medal Paints (categories 4303 and 4304) and that this increase would become effective in September 2002.

[15] The first respondent, rightly so, stated that he had to first

decide whether or not the applicant (third respondent) was guilty as charged. He then found that the third respondent is indeed guilty of the charge as set out earlier.

- [16] He then stated that he ought to decide, correctly so, that dismissal as a sanction was appropriate. He was the satisfied that dismissal was an appropriate sanction. He then considered without it being raised by the third respondent as the basis for the challenge, the issue of consistency. He then concluded that there was inconsistent application of discipline.

Analysis

- [1] The record of arbitration does not reveal that any inconsistent application of discipline was raised by the third respondent. That being so, it was expected of the applicant at the arbitration hearing to devote its attention in proving that the third respondent is guilty of the charge and that dismissal as a sanction was appropriate. No warning was sounded by the first respondent that he will decided the matter on an issue not raised by any of the parties, in particular the dismissed employee. This conduct deprived the applicant of a fair hearing and accordingly amount to gross irregularity.

See: Ellis v Morgan 1909 TS 576, accepted and followed in **Sidumo v Rustenburg Platinum Mines 2008 (2) BCLR 158 (CC)**.

- [18] In any event, the first respondent seems to have misconstrued his powers and misunderstood the evidence before him. He found that because at one stage Botha had incurred a loss, therefore there was inconsistent application of discipline.
- [19] Item 7 of schedule 8 refers to whether that rule or standard has been consistently applied by the employer. It is common

cause that Botha or at least there was no evidence before the first respondent that Botha was guilty of non-compliance with procedure or policies. It was further common cause that the third respondent was not charged with incurring a loss. This point was conceded by Advocate Van der Walt appearing for the third respondent. It therefore follows that the award is not reasonable at all over and above the fact that the first respondent committed gross misconduct in relation to his duties as a commissioner.

[20] On the counter review, all I consider is whether the dismissal is nonetheless substantively unfair. The first respondent has already found that the applicant is guilty of misconduct. Although I intend to upset his award, I find no reason to upset that finding. Having looked at the record, I find that the third respondent is indeed guilty as charged.

[21] Not much was submitted in the counter review on the appropriateness of the sanction of dismissal. I find that the finding that dismissal as a sanction is appropriate should not be disturbed.

Order

[22] In the result, I make the following order:

1. The award is reviewed and set aside.
2. The dismissal of the third respondent is fair.
3. No order as to costs.

Moshoana AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the applicant	: Snyman
For the respondent	: Adv Van der Walt
Instructed by	: Greyvenstein & Grundlingh Inc
Date of hearing	: 18 March 2008
Date of Judgment	: 27 March 2008