

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR2428/06**

In the matter between:

**MNGUNI VICTORIA**

**APPLICANT**

AND

**MALAPO TSATSIMPE N.O.**

**1<sup>ST</sup> RESPONDENT**

**NATIONAL BARGAINING COUNCIL**

**FOR ROAD FREIGHT INDUSTRY (NBCRFI)**

**2<sup>ND</sup> RESPONDENT**

**UTI t/a MOUNTIES DIVISION**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**Molahlehi J**

**Introduction**

[1] This is an application to review and set aside the arbitration award issued by the first respondent (the commissioner) dated 30<sup>th</sup> August 2006, under the case number D1218/JHB/9259/2005A. In terms of that award the commissioner found the dismissal of the applicant to be fair and accordingly confirmed the dismissal.

**Background facts**

[2] The applicant who was before her dismissal employed by the third respondent as a mail sorter for a period of about 11 (eleven) years was dismissed for an

offence related to misconduct concerning failure to follow the policy requirements in that she failed to report to management a strange parcel which she discovered during the process of sorting out the mail. According to the applicant every mail sorter is allocated a mail cage where he or she would perform his or her duty of sorting the mail. The applicant was responsible for sorting the FNB mail.

- [3] The procedure followed when mail is received by the third respondent from its clients until handed to mail-sorter is summarized by the applicant in her founding affidavit as follows:

*“7.4.1 Client's mail is uplifted by couriers in sealed plastic pacs and delivered to the Third Respondent's Hub department.*

*7.4.2 The Hub admin would consolidate individual mail from similar and/or specific client received from its different branches. (FNB grouped together, Nedbank grouped together etc.) The said consolidated mail would be placed into the consolidated bag and further deposited in the relevant bin (FNB consolidated mails into FNB bin, Nedbank consolidated mail into Nedbank bin etc.).*

*7.4.3 Upon reporting for duty, a mail sorter would report to the Hub admin/superior to uplift his/her mail for sorting.*

*7.4.4 In the presence of the mail sorter, the Hub admin/superior would take out the consolidated mail from the relevant bin, proceed to scanning terminal, scan all mail from consolidated identify from the consolidated bag to identify and/or reflect a specific mail sorter*

*who handled the said mail. Thereafter, the mail sorter would acknowledge receipt thereof by signing on the relevant sheet.*

*7.4.5 The mail sorter would take the consolidated mail bag and proceed to his/her mail sorting cage, unlock and enter the cage, drop the contents thereof and/or emptying the said bag on the table. Thereafter, the mail sorter would tear/open the sealed plastic cover pacs of all mail received, further drop the contents thereof on the sorting table and threw the tear plastic cover pacs in the refuse/rubbish bin.*

*7.4.6 The mail sorter would at the start of sorting different mail by placing different mails into relevant client's branches pigeon holes to where it's destined. (FNB Centurion into Centurion pigeon hole etc.).*

*7.4.7 It should be noted that once mails have been emptied/removed from consolidated bag, and its sealed plastic cover pacs torn/opened on the sorting table, the mail sorter is not permitted to leave the said mail unattended.*

*7.4.8 It should further be noted that if a strange mail is found within the consolidate mail 'I during sorting, the mail sorter should report the said strange mail to the Hub admin/superior as soon as possible."*

[4] Except for paragraphs 7.4.7 and 7.4.8, the third respondent did not dispute the above summary of the process of sorting the mail as set out by the applicant.

- [5] The incident that led to the charges and the dismissal of the applicant occurred on the 1<sup>st</sup> July 2005. On that day whilst busy sorting the mail, the applicant came across a strange mail which he put aside on the table and continued with her work. According to her she had intended to report the strange parcel later and to also take it to the hub. However, whilst busy sorting she saw Mr Paice, one of the managers of the third respondent coming into the cage and without saying anything proceeded straight to the rubbish bin. Although she was surprised by the arrival of Mr Paice in the cage she continued with her work.
- [6] Thereafter, Mr Paice confronted her, holding an empty opened plastic cover and asked her whether she saw a strange mail. She answered in the positive and immediately took the parcel from the sorting table and handed it to him. Mr Paice then left without saying a word.
- [7] On the 22<sup>nd</sup> July 2005, the applicant was summoned to report to the board-room where on arrival she was required to take a polygraph test which she refused undergo.
- [8] On the 29<sup>th</sup> July 2005, the applicant was served with a notice of suspension and notice to attend a disciplinary hearing scheduled for 9<sup>th</sup> August 2005. The applicant was charged with the following offences:

*“1. GROUP 1.5*

*Not applying due diligence to your work/job, in that: on the 1<sup>st</sup> of July 2005 you failed to report a parcel with tracking no MDL 7T001 10824 scanned out to the mailsort, but not intended for mailsorting. You;*

*VICTORIA MNGUNI (ID NO: 640612 1041 084), continued in opening this parcel, for “re-sorting” as a normal mail parcel.*

## *2. GROUND 1.8*

*Failure to comply with the procedures and practices of the company. This refers to both, formal written procedures as well as practices that are not formally set down, but accepted generally in the organization, in that; on the P of July 2005 you failed to report freight that you received and was not sure what do with, to a DEPOT MANAGER. (TAKE FROM S. O. P – 14.4 Job description for mail Sorter)*

## *3. GROUP 2.12*

*Failure or refusal to carry out the lawful and reasonable instructions of a supervisor or a superior, in that; on the 22nd of July 2005, you refused to be polygraphed, to assist the company in the investigation of the said parcel.”*

- [9] At the disciplinary hearing after indicating the reason why she refused to undergo the polygraph test and after the reason for the test was explained to her, the hearing was postponed enable her to undertake the test.
- [10] The essence of the third respondent’s case during the arbitration hearing was that on 1<sup>st</sup> July 2005, the applicant failed to report a strange mail with tracking No. MDL7T00110824 scanned out by her to “*mail sort,*” but not intended for “*mail sorting.*” The cover of the parcel was found in the dustbin by Mr Paice after Mr Simone August, a query clerk of the third respondent received a query from FNB Wesbank looking for shipments that went to the applicant.

- [11] Ms Purity Zondi, a mail sorter, responsible for the ABSA mail testified on behalf of the third respondent about the process that she would normally follow if she found a strange mail amongst the mail that she would be sorting. She testified in this respect that if she found a mistake or queries in the process of sorting the mail she would report such a problem to her supervisor or someone else if the supervisor was not available. She further testified that if she found a strange mail when sorting, such mail must not be opened but handed to the hub.
- [12] Mr Moses Bodibe, a mail sorter responsible for Nedbank mail, testified on behalf of the applicant. He stated that if there was anything wrong with the mail during sorting, such mail is taken back to the hub or they call their supervisor and report to him or her. In the case of discovering a strange mail during the sorting, such mail is put one side until sorting is finished and thereafter, the said mail would be taken to the hub or the supervisor.
- [13] The applicant in testifying on her behalf stated that when they, as mail sorters, receive mail from the hub, they do not know what is inside and do not read the tracking stickers on the mail cover. They simply open all the sealed plastic mail cover for the purpose of sorting. According to her when they find strange mail in the consolidated bag during sorting, they give back such mail to hub clerk, after sorting. She further testified that on the day in question she saw a strange mail and noticed that it was not for FNB and as a result put it aside with the intention of handing it over to the hub clerk. As indicated earlier she was confronted by Mr Paice before she could take the parcel to the hub clerk.

## **The grounds for review and the arbitration award**

[14] The applicant challenged the commissioner's award in terms of section 145 of the Labour Relations Act 66 of 1995, on various grounds of review. She in this respect contended that the commissioner ignored several aspects of her evidence. According to her the commissioner ignored the evidence relating to; (a) the scanning of the mail; (b) the procedure to be followed when mail sorters receive consolidated mail from the hub for sorting; (c) that the mail sorter should report strange mail as soon as possible and not immediately, and (d) the applicant denied knowledge of the existence of the rule regarding the immediate reporting of any strange mail to the hub. The applicant further contended that the commissioner failed to take into consideration whether or not dismissal was an appropriate sanction. She also challenged the award on the basis that it is not rationally justifiable on evidence and facts placed before the commissioner. The applicant further contends that the commissioner committed a gross irregularity in finding that the third respondent handed in a bundle of documents and further that the applicant and her representative were given an opportunity to go through it.

[15] The commissioner in concluding that the dismissal was fair reasoned inter alia that:

*“Based on the evidence led, I am convinced that there were reasonable and lawful procedures and that the Applicant did not follow them. The Council (being the third respondent) cannot interfere with the Respondent's decision unless the decision was irregular and/or unfair.*

*The decision in terms of the Respondent's disciplinary code and procedure and the Council should not interfere."*

### **Evaluation and analysis**

- [16] The test to apply in considering whether or not to interfere with the arbitration award of a commissioner is that of a reasonable decision maker as enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). The test is whether or not the decision which is the subject of the review application is one which a reasonable decision maker could not have reached.
- [17] The review in the present matter is based on the limited record of the arbitration proceedings consisting of the minutes of the transcribed hand written notes of the commissioner, the arbitration award and the bundle of documents used during the hearing. Attempts at finding the tape recordings and reconstructing the record have been unsuccessful.
- [18] The rule with which the applicant was charged with is contained in the Standard Operating Procedure which states under the heading "*Receiving freight*," in the last bullet point that: "*Should you receive freight that you are not sure what to do with it, contact the Depot Manager immediately.*" The applicant does not dispute the rule that the mail sorters need to report strange mail whenever such mail is found during the sorting process but denies knowledge that it has to done immediately. It would appear this is the basis for claiming lack of knowledge of the rule. Her version is that if a strange mail is found during the sorting process



such mail would be put aside and be reported on completion of the sorting process.

[19] The commissioner in her analysis of the evidence says that there are clear rules stating that whenever a mail sorter finds a strange parcel during the process of sorting he or she must immediately report such mail to the manager. In this respect the commissioner rejected the version of applicant and accepted that of Ms Zondi who testified on behalf of the third respondent and confirmed that strange mail has to be report immediately it is discovered.

[20] In determining the reasonableness of the conclusion reached by the commissioner, the powers of the court does not extend to assessing the correctness of the conclusion reached but are rather limited to enquiring as to whether or not there is the evidentiary basis for the conclusion reached by the commissioner. In conducting this enquiry the Court evaluates whether the conclusion reached by the commissioner is supported by substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts. There would be no justification to interfere with the award if it is found that the conclusion reached is supported by the facts and reasoning of the commissioner.

[21] In my view in the present instance the conclusion reached by the commissioner that the applicant was guilty of failing to follow the rule requiring her to report strange mail immediately to management cannot on the facts and the circumstances of this case be said to be unreasonable. The commissioner in her reasoning evaluated the evidence of both parties, rejected the version of the

applicant that firstly she did not have knowledge of the rule and secondly that she did not have to report the strange mail in question immediately to management.

[22] The second issue concerning the fairness of the dismissal concerns the appropriateness of the sanction imposed by the third respondent and confirmed by the commissioner.

[23] It is trite that in considering the fairness of the dismissal commissioners are required to take into account the Code of Good Practice issued in terms of section 187 of the Labour Relations Act number 66 of 1995. The Code of Good Practice: Dismissal as contained in item 2(1) of schedule 8 of the Code provides that the question whether or not a dismissal is for a fair reason must be determined by the facts of the case and the appropriateness of dismissal as a penalty. The guidelines in cases of dismissal for misconduct in terms of Item 7 sets out guidelines in cases of dismissal for misconduct and provides as follows:

*“Any person who is determining whether a dismissal for misconduct is unfair should consider—*

*(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and*

*(b) if a rule or standard was contravened, whether or not—*

*(i) the rule was a valid or reasonable rule or standard;*

*(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*

- (iii) *the rule or standard has been consistently applied by the employer; and*
- (iv) *dismissal was an appropriate sanction for the contravention of the rule or standard.”*

[24] In *Sidumo* (at para 78 and 79) in dealing with the issue of the appropriateness of the sanction the Court held that:

*“[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.”*

*[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.”*

[25] In *Fidelity Cash Management Service v CCMA & others*[2008] 3 BLLR 197 (LAC), in confirming what was said in *Sidumo* regarding the approach to be adopted when dealing with the appropriateness of the sanction of dismissal the Labour Appeal Court held that:

*“Indeed, both in Engen and in Sidumo, this Court and the Constitutional Court, respectively, said that the commissioner must decide that issue in accordance with his or her own sense of fairness. (See Engen, paragraph 117 at 1559A–paragraph 119 at 1559H–I; paragraph 126 at 1562C–D and paragraph 147; Sidumo’s case at paragraphs 75 and 76.) At paragraph 75 in the Sidumo case, the Constitutional Court, inter alia, said that “ultimately, the commissioner’s sense of fairness is what must prevail and not the employer’s view”. At paragraph 76, the Constitutional Court quoted a passage from Engen, which, inter alia, contained a statement to the effect that unions “can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, decide whether the dismissal is fair or unfair.”*

[26] The case of the applicant in as far as the appropriateness of the sanction, which is made out in the supplementary affidavit, is that the dismissal was not an appropriate sanction. This contention is unsustainable in that it is apparent from

the reading of the award that the commissioner took into account the importance of the rule governing the reporting of strange mail whenever discovered by the mail sorters. The commissioner also took into account the disciplinary record of the applicant including the 11 (eleven) years of service which she had served with the third respondent.

[27] As concerning the final written warning which had been issued against her, the applicant contends in her replying affidavit that that warning was unrelated the charges which had been proffered against her in that the final written warning had been issued against her for late reporting for work. This contention is not supported by the material which was before the commissioner. In this respect the record which contains the final written warning reveals that the applicant “*has been counseled on numerous occasions; on 16/08/2004 under group 2.11 and 2.12 of the Code of Conduct and counseled on 25/072005 under group 1.8 of The Code of Conduct . . . .*” Clause 1.8 of the Code of Conduct which is referred to as group 1.8 in the applicant’s papers, deals with the procedures and practices of the third respondent.

[28] In my view based on the above analysis, the applicant has failed to make out a case justifying interference with the commissioner’s arbitration award. However, it would not be fair in the circumstances of this case to allow the costs to follow the results.

[29] In the premises the following order is made:

- (i) The applicant's application to review and set aside the arbitration award issued by the first respondent dated 30<sup>th</sup> August 2006, under the case number D1218/JHB/9259/2005A is dismissed.
- (ii) There is no order as to costs.

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**Molahlehi J**

Date of Hearing : 25<sup>th</sup> June 2009

Date of Judgment : 5<sup>th</sup> November 2009

**Appearances**

For the Applicant : Mr Khoza (union official from RAWU)

For the Respondent: Mr Maddern of Wright Right-Innes Inc