Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR63/01

2002-02-.11

In the matter between

RUSTENBURG PLATINUM MINES LIMITED

(RUSTENBURG SECTION) Applicant

and

COMMISSION FOR CONCILIATION

N 1ST Respondent

2ND Respondent

3RD Respondent

---

**J U D G M E N T**

Delivered on 11 February 2002

---

REVELAS, J:

1. The third respondent was employed by the applicant as a Grade II patrolman, based at the applicant's protection services department until his dismissal for misconduct

relating to his failure to follow the applicant's precribed procedures for security searches. He had been employed for 15 years. His misconduct, which is not in dispute, was discovered in the course of an investigation conducted by the applicant with a view to establish the cause of an alarming drop in production.

2. The applicant decided to monitor its security staff, particularly with the purpose to evaluate how searches were conducted at the only access point in its redressing section, where the third respondent was employed.

3. To this end surveillance equipment was installed unbeknown to employees, and amongst those monitored was the third respondent. The period over which this surveillance was conducted was 27 February 2002 to 27 May 2002. The surveillance equipment, including video footage captured by camera, demonstrated that the redressing section was not performing properly, it was not properly managed, employees were not efficiently carrying out their duties, and some were even found sleeping on duty. A pitiful work performance picture of employees was observed.

1. 4. At the end of May 2002 the surveillance was completed, and the applicant started to take disciplinary action against those employees who were

not performing their duties properly. Criminal charges were laid against some employees, but not against the third respondent. The third respondent, as stated before, worked in the redressing section in question, and during the period 12 April to 17 April he was on duty that only access point to the area in question. In terms of his duties he was required to search all employees leaving the redressing section, and he had to follow a particular procedure. It is important to make reference to those procedures.

5. The applicant's search procedure requires all security staff of the redressing section to adopt a stringent search procedure, which involves *inter alia* searching all persons leaving the redressing section, one at a time; an inspection or search of all hand luggage on the premises; an inspection or examination of the watches, jewellery, private property and hard-hats of the persons being searched; a frontal body frisk from hands to feet; a rear body frisk from hands to feet; a metal detector scan, (both of the rear and front of body, from head to feet); the scanning of a person's shoes, as well as underneath both feet, with a metal detector. This is a rather elaborate procedure, but there is good reason therefor, and that is because of theft. A very small quantity of platinum or gold is

worth thousands of rands.

6. The applicant's search procedures were distributed in writing to all security employees, including the third respondent, under cover of a Works Instruction document dated 16 August 1999. The third respondent acknowledged that the search procedures had been read and explained to him in detail, and he fully understood all the different tasks and responsibilities required of him. All employees were invited to hand in queries or questions.

1. 7. The third respondent admits that search procedures were distributed to all security employees, but denied that the procedures were read and explained to him in detail. What is clear is that the third respondent knew what was required of him at a particular search, but he raised the question that he was not required to search each and every employee, but that he was permitted to perform random searches.

8. Since the applicant carries on the business of platinum mining and the mining of precious metals, security is of particular importance, and particularly in its redressing section, where the third respondent was on duty at the particular time in question. This was not disputed. The high grade precious metals, which are extracted from the concentrate, are extremely valuable,

and contains metals such as platinum and gold. These metals are the livelihood of the business of the applicant.

9. It is common cause that the specific point controlled by the third respondent would normal circumstances or in the ordinary course be controlled by a senior patrolman, who was more senior to the third respondent. In my view this fact did not entitle him to be negligent in his searching as he clearly was. It was ascertained from the video surveillance that the third respondent had failed to conduct any search at all in certain cases, and in other cases did not search in compliance with the procedures I referred to herein. In those cases he did not use the metal detector and in some cases he failed to conduct the required bodily search. In 24 searches, watched over a period of three days, he only conducted one search in accordance with the procedures laid down.

1. 10. The third respondent, as I have said before, stated that he was only required to do random searches. Here it is important to note that there was no evidence that any theft occurred during any of the third respondent's shifts.

11. The second respondent, the arbitrator who conducted the arbitration under the auspices of the CCMA following

the referral by the third respondent of his alleged unfair dismissal dispute, found that his dismissal was too harsh, and determined that the third respondent be reinstated with effect from 1 January 2001 (– the date of the arbitration hearing was 14 November 2000 –) and the reinstatement was subject to a written warning, and the third respondent was awarded compensation equal to three months' salary.

12. The applicant now seeks to review this award in terms of the provisions of section 145(2)(a) of the Labour Relations Act, 66 of 1995 ("the Act"). Strong reliance was placed during the argument advanced on behalf of the applicant on the dictum of the Labour Appeal Court in *County Fair Foods (Pty) Ltd v CCMA and Others* 1999 (20) ILJ at 1707. In this judgment it was indicated to commissioners that the determination of an appropriate sanction is largely in the discretion of the employer, not to be interfered with lightly, and that commissioners should *"show deference to disciplinary sanctions imposed by employers"* (p.1717G).

1. 13. It is of note in this regard, and with reference to the *County Fair* case, that in that matter the commissioner had found that the dismissal of a male employee who had violently assaulted a female employee at the workplace, with whom he had a previous

relationship, was unfair. The Labour Appeal Court disagreed, and were of the view that it was a very serious matter which, on the facts, deserved dismissal, and the commissioner held otherwise. The Labour Appeal Court was of the view that the court *a quo* should have interfered with the award of the commissioner on review.

14. In the matter of *Pretoria Heart Hospital v CCMA and Others* 2000 (21) ILJ 624 (LC) a commissioner reinstated an employee who was dismissed for theft. Dismissal is the general sanction imposed for instances of theft, unless the sentence or sanction induces some form of shock. That was the view of Landman J in that matter, where he interfered with the award of the commissioner who reinstated an employee who was found guilty of theft.

15. In the present case the third respondent, an employee, had a clean service record of almost 15 years, did not commit a violent crime, nor did he assault anyone, nor did he steal from anyone, nor did he commit an offence which unequivocally demanded dismissal as opposed to any other sanction.

16. The third respondent did not do his work properly, but neither did several other employees. Corrective or progressive discipline in his case does not induce a

sense of shock.

1. 17. On the applicant's case, serious overhauling of the work performance in certain sections of its operations was seriously required and directly linked to the production.The applicant had good reason to take drastic measures. In essence the applicant was faced, in several cases, with poor performance or laziness, at best, which is not the type of misconduct which justifies dismissal without prior warning for a first offence after 15 years of service.

18. Finally, the test for review is contained in *Shoprite Checkers (Pty) Ltd v Ramdaw N.O and Others* 2001 (22) ILJ 1603, which did not depart from the leading case on the test for review, namely *Carephone (Pty) Ltd v Marcus N.O. and Another* 1998 (11) BLR 1093 (LAC). To successfully review a statutory arbitrator it must be demonstrated that the conclusion arrived at by the arbitrator must be rationally or reasonably connected to the facts before the arbitrator.

1. 19. In *Metro Cash & Carry Ltd v Tjela* 1996 (17) ILJ 1126 (LAC), the LAC was faced with a matter where a cashier was not present, as he was required to be, when cash was "dropped", or handed in for depositing. The court held that the employer in question was entitled to act severely against those who breached the strict

rule introduced because an employer is entitled to introduce rules to protect its commercial integrity. This is so, and I am in respectful agreement thereof, but the strict rule was introduced in the case of the *Metro Cash* matter to combat theft of cash where employees in a position of trust were required to deal with large amounts of cash. It is then understandable that a form of strict liability is coupled to the rule introduced.

20. In the present case the third respondent did not deal with money. It was argued that he could have caused, or did cause, potential loss. If there was an iota of evidence that theft was committed during the times that he was on shift, and not performing his duties properly, that might have a bearing on the matter. There is no such evidence. It is also very significant that when he was surveilled, he was performing the work which a more senior employee usually performed. In other instances where employees, unbeknown to them, were watched on a video camera, their surveillance resulted in their arrest where they had stolen gold or other precious metals from the applicant. Such considerations did not apply to the third respondent. The third respondent was also watched over a long period. Strict liability is not applicable to this

matter as this is a matter rather relates, as I have pointed out, to poor performance than misconduct. Employees who do not perform their duties properly, where dishonesty was absent, should not, automatically incur the harsh sanction of dismissal on the basis of strict liability, even if they work in a gold mine.

21. In this matter the arbitrator held that:

1. **"Article 7(b)(iv) asks whether the dismissal was an appropriate sanction for the contravention of the rule or standard. While I agree that this conduct was misconduct, I am not convinced that the dismissal was an appropriate sanction. In my view dismissal under these circumstances would be too harsh when taking into account the following: There were no losses suffered by the employer; the violation of the rule was done unintentional or 'a mistake', as argued by the employee. Lastly, the level of the honesty of the employee is something to consider**."

And;

"**Schedule 8 article 4 of the Act provides that it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Based on the evidence before me the employee had had a clean record of service with the employer for the past 14 years. This, in terms of the code of good practice cannot be ignored. The Labour**

**Court has endorsed the concept of collective or progressive discipline. An employee's behaviour is to be corrected through a system of evaluated disciplinary measures, such as counselling and warning. It is therefore my view that the type of offence committed by the employee does not go to the heart of the relationship, which is trust. I therefore believe that the continued employment relationship is still intact. To deprive an employee of his employment in this circumstance would be wholly unfair**."

22. The aforesaid reasoning does not fall foul of the *Carephone* or the *Shoprite Checkers* test, neither does it fall foul of the provisions of section 145 of the Act. More closely looked at, the application for review it is an appeal rather than a review. There is no basis upon which I can interfere in the award of the arbitrator in this matter. Parties are often unhappy with the awards of commissioners because employers often feel that their own sanctions should not be ignored. The arbitrator in this matter followed common sense, followed the code of good practice, followed the Act, and the reasoning process which he was duty bound to perform. He also regarded the offence as serious because he imposed a warning. He did not ignore accepted labour law principles in doing so. He followed them.

23. In the circumstances the application for review is dismissed with costs.

_____

E. Revelas