OF INTEREST TO OTHER JUDGES

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 733 / 2008

In the matter between:

IDWALA LIME,

A DIVISION OF IDWALA

INDUSTRIAL HOLDINGS (PTY) LTD	**Applicant**
and	
CCMA	**First respondent**
COMMISSIONER HENDRIK OLIPHANT	**Second respondent**
BAMCWU	**Third respondent**
GOTLIEB SWARTS	**Fourth respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1] The fourth respondent, Gotlieb Swarts, was dismissed for gross negligence. Swarts was a stores assistant / receiver. The reason for the dismissal was that he recorded on a "Goods Received Voucher" (GRV) that a certain type of conveyor belt had been received when in fact this had not been the case.

2] Mr Swarts, assisted by his trade union, the Building, Allied, Mining and Construction Workers Union (BAMCWU, the third respondent) challenged the dismissal in an arbitration before the CCMA (the first respondent) in Kimberley. The commissioner, Mr Hendrik Oliphant (the second respondent) declared the dismissal substantively unfair. He ordered the applicant, Idwala Lime, to reinstate Swarts, but without arrear salary, as Swarts "was not completely innocent".

3] The applicant seeks to review and set aside that award.

CONDONATION

4] Both parties applied for condonation. The application was brought timeously. The supplementary affidavit in terms of rule 7A(8), though, was about two weeks late. The fourth respondent's answering affidavit was about a year late. At the outset of the hearing, though, both parties agreed that the matter should be fully argued on the merits.

5] The delay in filing the answering affidavit was occasioned mainly by the tardiness of BCAMWU. Swarts was let down by his trade union, eventually terminated its mandate, and instructed attorneys. The attorneys were diligent in pursuing his opposition to the review application. Regardless of my eventual finding on the merits in this matter, I must take into account that Swarts must have been persuaded that his prospects of success were good, given that he was armed with an arbitration award in his favour and that the hurdle for the applicant to be successful on review is a high one, given the test in *Sidumo v Rustenburg Platinum Mines Ltd.*[1] This may seem anomalous, given my eventual finding on the merits, but in the context of an application for condonation, I am satisfied that Swarts should not be barred from defending the application, despite the length of

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1 (2007) 28 *ILJ* 2405 (CC)

the delay. His explanation was persuasive and I do not think it is in the interests of justice to penalise him for the tardiness of his trade union. Both parties are granted condonation.

BACKGROUND FACTS

6] On 25 February 2008, Swarts acknowledged receipt of conveyor belts to the value of R591 471, 00. The belts had ostensibly been supplied to Idwala by Multi Supplies. Swarts signed a GRV to acknowledge receipt.

7] It was established subsequently, and it is common cause, that one of the four conveyor belts was never supplied. Yet applicant had paid for it.

8] The applicant's foreman, one Viljoen, also acknowledged receipt of the belts. He was also dismissed. I was informed from the bar – and it appears from the affidavits filed in the review application - that his dismissal stands.

9] The charge against Swarts in the internal disciplinary hearing was one of gross negligence in the performance of his duties by making a representation that the goods had been "taken into receipt" when in fact they had not been received.

10] The invoice for the goods was signed by Viljoen, the foreman. It is unclear whether he signed the invoice before or after Swarts signed the GRV on 24 February 2008. What is common cause, is that payment was approved on 3 March 2008 on the signature of Piet Venter, the applicant's quarry manager, with a stamp noting "goedkeuring vir betaling". It is also common cause that the applicant paid for the belt as per that invoice.

11] It appears that Viljoen signed the GRV on 26 February 2008, ie after Swarts had done so on 25 February.

12] The applicant's witnesses testified at the arbitration that it was vital for the ongoing and uninterrupted efficient operation of its business that back-up conveyor belts be readily available in the event of breakages or breakdown. This was not contested.

13] The non-delivery was only discovered when the applicant's quarry superintendent

asked Roux, the administration manager, about it. The belt was needed to repair a section of the main conveyor belt that conveyed ore from the quarry to the crushing section. On 3 March 2008 the stores controller, Ms Lesch, asked Swarts if the conveyor belt had been received, He confirmed that it had. This was patently false.

14] Multi Supplies subsequently issued the applicant with a credit note. This was on 6 June 2008, after Swarts had been dismissed.

15] At the arbitration, Roux testified that Swarts had been involved in a similar incident previously. In December 2006 he had signed for goods without checking that it had been received. Roux had an informal discussion with Swarts and informed him that a repeat offence could lead to his dismissal.

16] At the arbitration Swarts testified that it had been the practice that he would sign off the GRV based on the foreman (Viljoen)'s signature. This had been the practice for 13 years.

THE AWARD

17] The commissioner accepted that Lesch had told Swarts that he could sign for and endorse deliveries on the signature of the foreman, Viljoen. He also accepted that, in this instance, Swarts had signed the GRV before Viljoen had done so. In his view, however, this "…does not take the matter further as it was not disputed that the foreman had received the items, which were delivered inside the plant".

18] The commissioner accepted that Swarts had been instructed by Lesch to re-check the delivery and that he had informed her that the delivery had been received correctly. The commissioner then stated: "Based on the above evidence I had properly before me I find on a balance of probabilities that Swarts was only guilty of failing to carry out an instruction."

19] Turning to sanction, the commissioner considered the applicant's argument that dismissal was appropriate as, *inter alia*, the company had suffered a loss. The commissioner came to the conclusion that this was incorrect as Multi Supplies had issued the applicant with a credit note.

20] Considering the previous similar incident, the commissioner stated that Swarts was not guilty of “signing for goods he had not seen”, but that he was “only guilty of not re-checking the delivery as instructed by Lesch”. He also took into account that there was no documentary evidence of a verbal warning. The commissioner therefore viewed Swarts as having had a clean record.

21] Based on the above, the commissioner concluded that the evidence “only showed Swarts had failed to carry out an instruction”. He concluded that the trust relationship had not been breached and that Swarts was “not guilty of negligence.” He found that the dismissal was substantively unfair. He ordered reinstatement, but ordered it to be without backpay as Swarts was “not completely innocent”.

WAS THE FINDING REASONABLE?

22] The applicant argues that the award was so unreasonable that no reasonable commissioner could have come to that finding had he properly applied his mind to the facts of the matter.

23] The applicant submits that the commissioner failed to:

23.1 apply the law of evidence in assessing Swarts’s credibility;

23.2 find on this basis that Swarts was dishonest, both in his conduct and in his evidence before the CCMA;

23.3 consider the probabilities;

23.4 consider the effect of a finding of dishonesty on the continued employment of an employee who had been employed in a position of trust;

23.5 apply the substantive law of dismissal in cases of dishonesty;

23.6 apply his mind to all materially relevant factors.

24] Mr *Benade,* who appeared for the fourth respondent, argued that dishonesty was

not an element of the misconduct that led to Swarts's dismissal. Swarts was, indeed, dismissed for gross negligence. But the argument of Mr *Stelzner*, who appeared for the applicant, was a different one. He pointed out that, subsequent to signing the GRV on 25 February, Swarts was pertinently asked if the belts had been received. He said that they had. This was not negligent conduct, as in the case of the 25 February signing off. This was dishonest. And dishonesty is a relevant factor in deciding whether the employee can be trusted, and thus whether the employment relationship can continue. Swarts deliberately misled the applicant, yet the commissioner attached no significance to this factor. Instead, he found that Swarts "only failed to carry out an instruction".

25] The commissioner also made contradictory findings in parapgraphs 13 and 14 of his award. In paragraph 13, he noted that Swarts "stood firm" in his evidence that the practice was that he would sign off GRVs on the foreman's signature – on that basis he found that Swarts had not been negligent. Yet, in the next paragraph, he says that Roux and Lesch "stood firm" in their evidence. He makes no attempt to decide which of the witnesses is the more credible. Instead, he dealt with each incident in a piecemeal fashion.

26] In *Freshmark (Pty) Ltd v SACCAWU*[2] the court set aside the decision of a commissioner reinstating an employee who had been dismissed for misappropriation of produce and deviation from a prescribed route. The award was set aside on the grounds that the commissioner had approached the evidence in a piecemeal way and he had not applied his mind to all relevant factors, including the events that gave rise to the suspicion that the employee had misappropriated produce and the impact this had on the trust relationship. The deviation from the route occurred on a day when the truck contained extra unauthorized goods, and it was on a day when the truck stopped near a produce stall where the persons at the stall behaved suspiciously. The court held that the only answer to the question, "Was it fair to dismiss the employee for deviating from his route in circumstances in which the deviation occurred on the day in question?" was "yes".

27] In the current case, it is clear that Swarts deliberately misled the applicant even after the non-delivery of the conveyor belts came to light. It was unreasonable for the commissioner not to have taken this factor into account when deciding on the

2 (2009) 30 *ILJ* 341 (LC)

fairness of the sanction. Instead, the commissioner only found that Swarts had failed to carry out an instruction. It went much further than that. Swarts deliberately misled his employer. Even though he was dismissed for gross negligence, the commissioner's failure to take this misrepresentation into account when deciding on the appropriate sanction, was so unreasonable that no reasonable commissioner could have reached the same conclusion.

28] Turning to the question whether the company had suffered a loss, it is so that the supplier issued a credit note subsequent to payment for the belts and subsequent to the dismissal of Viljoen and Swarts. But is it clear, as the commissioner finds, that "the employer had up to now not suffer *[sic]* an actual loss"? I think not. The evidence showed that the missing belt was never delivered. The applicant ceased to do business with the supplier. It had, in fact, suffered a loss.

29] Mr *Benade,* for the fourth respondent, made much of Swarts's defence that it was only required of him to endorse the foreman's signature acknowledging receipt of the goods. But even if this practice had been established, in the present case it is not what happened. Viljoen signed the GRV only the day after Swarts had done so. For the commissioner to find that this fact "does not take the matter further", cannot be a reasonable conclusion. It undermines Swarts's very defence.

30] On the evidence before the commissioner, Swarts's acrions clearly amounted to gross negligence. His subsequent conduct was dishonest. A finding that this was not sufficient to justify his dismissal, is in my view, so unreasonable that no reasonable commissioner could have come to the same conclusion. This is all the more so when Swarts had previously been reprimanded for a similar offence. It seems to me to be a contradiction in terms for the commissioner to have required "documentary proof" of the verbal reprimand occasioned by that incident.

31] I have come to the conclusion that the arbitration award should be reviewed and set aside. All the evidence has been traversed in the disciplinary hearing, the subsequent arbitration and this application. It would serve no purpose to remit it to another commissioner.

32] With regard to costs, I take into account that Swarts was armed with an arbitration award in his favour. His trade union did not give him the required

assistance. He was compelled to incur the costs of legal representation. I do not consider it appropriate, in law or fairness, to hold him responsible for the applicant's costs. Nor did the applicant persist with its prayer for costs.

CONCLUSION

33] The award of the second respondent is reviewed and set aside. It is substituted with an order to read: "The dismissal of the fourth respondent (Swarts) by the applicant (Idwala Lime) was fair."

34] There is no order as to costs.

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A.J. STEENKAMP

Judge of the Labour Court

Cape Town

Date of hearing: 12 August 2010

Date of judgment: 23 August 2010

For the applicants: RGL Stelzner SC

Instructed by Joubert Galpin Searle, Port Elizabeth

For the respondent: E Benade

(heads of argument having been drafted by G Leslie)

Instructed by Madisha Legodi, Kimberley