

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

(NOT REPORTABLE)

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CASE NO: **D344/05**

DATE: 2007/04/20

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In the matter between

SMITHS MANUFACTURING (PTY) LTD

Applicant

and

DISPUTE RESOLUTION CENTRE

1st Respondent

COMMISSIONER PHILANI SHANGASE

2nd Respondent

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NUMSA

3rd Respondent

GORDON MOONSAMY

4th Respondent

JOHANNES DLUNGELE

5th Respondent

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JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 20 APRIL 2007

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PILLAY D, J

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[1] The trustees of the pension fund of which the employees of the applicant employer were members had resolved on 16 September 2003 that home loans should not be used for other purposes. The employees, i.e. the fourth and fifth respondents in this review, obtained loans for improving their homes by using their pension funds as security. However, they used the loans for purposes other than improving their homes. They were dismissed in May 2004.

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[2] The arbitrator found that the employees' misconduct did not amount

to gross dishonesty, firstly because there was no evidence to show that when the employees applied for the loans they intended to use them for personal reasons. Only after the loans were paid to them did they use them for purposes other than home improvement.

5 Secondly, the employer granted a home loan to another employee, namely Sanjay Sewcharan, knowing full well that he was going to use it to pay his debts and not for housing. That demonstrated that the offence is not that serious to warrant dismissal.

10 [3] The first reason is rationally connected to the arbitrator's conclusion that the misconduct did not amount to gross dishonesty. Although he does not say what the misconduct was, it must be inferred that he considered it wrong for the employees to use their housing loans for other purposes contrary to their undertakings.

15 [4] The second reason has nothing to do with the guilt or innocence of the employee but to the seriousness of the offence and accordingly the appropriateness of the sanctions.

[5] The rule was important. Hence the trustees had recently reinforced it by resolution. However they exercised some flexibility in the way they applied the rule.

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[6] The employees had an obligation to inform the fund or the employer once they decided to use the loans for purposes other than those for which they gave undertakings. Their failure to do so does not

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automatically lead to a conclusion that they were dishonest. There is an equally strong possibility that they were negligent.

[7] The arbitrator was in a better position to assess the credibility of the employees to determine whether their conduct was dishonest. A compelling factor in their favour was that they admitted from the outset that they did not use the loans for the purposes for which they were given.

[8] As regards the fairness of the sanction, dismissal was harsh for misconduct that did not amount to gross dishonesty or even gross negligence. The appropriate sanction was one that deterred employees from borrowing against their pensions for purposes other than housing. The penalty imposed by the arbitrator was to deprive the employees of more than a year's pay. That is far more than the loans of R10 000 and R12 000 respectively paid to the employees and is an effective deterrent in the circumstances.

[9] The application for review is dismissed with costs.

PILLAY D, J

DATE OF HEARING: 20/04/07

DATE OF JUDGMENT 20/04/07

FOR THE APPLICANT: MR DUNSTAN FARRELL OF FARRELL &
ASSOCIATES

FOR THE 3RD & 4TH RESPONDENTS: RUTH EDMONDS OF RUTH
EDMONDS ATTORNEYS