

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

5 CASE NO : **D872/05**

DATE : 21 FEBRUARY 2008

10 NOT REPORTABLE

In the matter between

15 **K W PLANT HIRE CC** APPLICANT

and

20 **B H LAMBERT** FIRST RESPONDENT

P GOVINDSAMY N.O SECOND RESPONDENT

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION** THIRD RESPONDENT

25

JUDGMENT

PILLAY D, J

30 1. "Is the decision by the commissioner one that a reasonable decision
maker could not reach?" (*Sidumo and Another v Rustenberg
Platinum Mines Ltd and Two Others* (unreported) case number
CCT85/06 paragraph 10). That is the test for reviewing decisions of
arbitrators. This test clarifies the test pronounced in *Carephone (Pty)*
35 *Ltd v Marcus NO and Others* 1998 (19) ILJ 1425 (LAC) and *Shoprite
Checkers (Pty) Ltd v Ramdaw NO and Others* 2001 (22) ILJ 1603
(LAC) which required the decision to be justifiable, based on the

evidence presented at the arbitration.

2. The Sidumo or reasonable test reasserts the difference between reviews and appeals by emphasising that arbitrators' reasons must support their decision. That is, the award must take account of the evidence and law presented at the arbitration. Material presented at the arbitration, the arbitrators' reasons and the decisions make up the continuum that produces a logical, reasonable result. An award that is illogical is unreasonable and therefore unsustainable. An illogical award is one that does not have a thread of reasoning that weaves from the evidence and the law through the reasons to culminate in a decision.
3. In this case, the employer attacks the award firstly because the arbitrator allegedly misconstrued the evidence about whether the third respondent employee's post was redundant. Secondly, the arbitrator dismissed the employer's evidence that the decision to retrench was for economic reasons. Thirdly, the arbitrator's findings that the employer did not properly consider an alternative position for the employee was not justified by the evidence before him. Fourthly, the arbitrator made a surprising finding that the employer had ulterior motives for terminating the employment, there being no evidence to suggest that the employee's poor performance was linked to his retrenchment. Fifthly, the arbitrator relied on evidence that was not

tested in cross-examination of the employer's witnesses. Lastly, the arbitrator's finding of procedural unfairness was unjustified by the evidence presented at the arbitration. Assuming that all of these criticisms are valid, none of them can be elevated to grounds of review. At most, the decisions may be incorrect, but an incorrect decision is not reviewable.

4. The thread of reasonableness that holds together the material before the arbitrator, his reasons and the outcome is the facts that were common cause. The employee was the plant manager of the plant section. He introduced a computerised system in January 2005 which resulted in his duties being redistributed. That left him to refocus on more serious management responsibilities. In the opinion of the employer there were no such responsibilities. The employee disagreed.

5. On 26 January 2005 the employer handed the employee notice of his possible retrenchment. That was hardly a month into the new system introduced by the employee. The employer consulted with the employee on 11 and 18 February on which latter date the employer informed the employee that he was retrenched. He was the only employee to be retrenched.

6. On these facts alone the retrenchment was possibly unfair. The employee would hardly have introduced efficiencies if he knew that

the employer would dismiss him the moment they took effect. To reward the employee for his endeavour with retrenchment is manifestly unfair. Furthermore, the speed at which his dismissal was processed suggests that the decision to dismiss was predetermined and that the consultations were a façade for procedural propriety.

7. The suggestion of unfairness translates to actual unfairness with the evidence of Alan Reddy, the employer's former Human Resource manager. Even if one approaches his evidence with caution because he now works with the employee for another employer, his evidence that the employer could have retained the employee, is probable given the employee's managerial and technical skills as a mechanic. Furthermore, the employer did not explore the option of retaining the employee in parts of its business other than the plant section, a fact which the employer has not disputed.

8. On the merits, therefore, the employer has no prospects of succeeding in its review. It has the further hurdle of overcoming its *onus* in this application for condonation for the late filing of the review. The employer's explanation for the delay is insufficient. Its explanation was that the matter had been handed over to an employer's organisation of which it was a member. However, as there was an administrative error in ensuring that the subscriptions of the employer's organisations were paid timeously, the employer's organisation did not attend to their instructions until their

subscriptions were paid.

5 9. Assuming that to be true, the employer did not explain what steps it took between handing over the instructions and ensuring that an affidavit was prepared timeously for the review. The delay in filing the review is about three weeks. However, there were other delays in the matter for which the employer was responsible which suggest that it was not sufficiently attentive to its responsibilities.

10 10. In all the circumstances the employer has not set out a sufficient basis to obtain the indulgence of this Court for its condonation application. In the circumstances the application for condonation and the review are dismissed with costs.

PILLAY D, J

Date: 14 March 2008

REPRESENTATION:

For the Applicant: J. Forster-Farrel and Associates

For the Respondent: Adv Nicholson instructed by Charmane Pillay & Co

**IN THE LABOUR COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

HELD AT DURBAN

CASE NO : **D872/05**

DATE : 21 FEBRUARY 2008

In the matter between

K W PLANT HIRE CC

APPLICANT

and

B H LAMBERT

RESPONDENT

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

JUDGMENT

JUDGMENT DELIVERED ON 21 FEBRUARY 2008

CONTRACTOR

Sneller Recordings (Pty) Ltd. Durban • 103 Jan Hofmeyr Road • Westville 3630
Tel 031 2665452 • Fax 031 2665459

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

K W PLANT HIRE CC v B H LAMBERT

CASE NO : **D872/05**

COURT OF ORIGIN : **DURBAN**

TRANSCRIBER : **MRS S M BOYCE**

DATE COMPLETED : **6 MARCH 2008**

NO OF TAPES : **CD**

NO OF PAGES : **6**

CONTRACTOR

Sneller Recordings (Pty) Ltd. Durban • 103 Jan Hofmeyr Road • Westville 3630
Tel 031 2665452 • Fax 031 2665459