



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 69/2022

In the matter between:

**SAMANCOR CHROME LTD t/a SAMANCOR
EASTERN CROME MINES**

Appellant

and

NUM OBO N.E. MATSHEBELE

First Respondent

HAROLD NTALE MATSEPE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 3 September 2024

Delivered: 06 September 2024

Coram: Sutherland AJA, Van Niekerk JA, Nkutha-Nkontwana JA

This judgment has been delivered by uploading it to the court online digital database of the Labour courts of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10h00 on 06 September 2024.

THE ORDER

1. The appeal is dismissed.
 2. The appellant shall bear the respondent's costs of appeal.
-

JUDGMENT

SUTHERLAND, AJA

Introduction

[1] It has been said of some cases that the effort to prosecute them is akin to flogging a dead horse. This case is not of that kind; rather, this horse was stillborn.

[2] The appeal before us is against the Labour Court's dismissal of a review of an arbitrator's award upholding a claim of unfair dismissal. The case on appeal is unsustainable. Before us, Mr Boda, brought into this matter at the last minute to rescue the case, argued the only tenable point; i.e, that the arbitrator applied a criminal onus rather a civil onus. There is good ground to interpret the text of the award of having committed that error. Alas, the argument cannot assist the case of the appellant because, bizarrely, there was no real case put before the arbitrator to which the onus could indeed be applied.

[3] The respondent, an employee of the appellant was charged with what was, in effect, theft of company property and dismissed. The allegation was that he had obtained use of the respondent's smart shopper loyalty points and used them to buy goods at Pick 'n Pay for personal use on four occasions. There was no authorisation to do so.

[4] Before the arbitration, the evidence adduced by the appellant made out no case of misconduct by the appellant. The case presented was a study in ineptitude.

[5] A bundle of documents was put before the arbitrator. It is not apparent that any were actually introduced into evidence. The key document was a report from forensic investigators SSG. This report was in any event, hearsay, and in the absence of the investigators who composed same, of no value in the absence of an agreement to admit it as common cause facts.

[6] The only witness called by the respondent was Ms Salome Mtsheni the assistant manager of Pick 'n Pay, Steelpoort. She explained the smart shopper system. Apparently, smart shopper loyalty points can be used in two ways; first, by presenting a card in the possession of the customer and second, in the case of large institutional shoppers, using a card kept in the store. The large customer's representative when buying would cite the number of a smart shopper account which is then credited electronically. When the large customer wants to use the accumulated points, the card is produced, and the debit recorded.

[7] Ms Mtsheni became embroiled in the matter when it was noticed that the respondents' card had been blocked. Why had this happened? Ms Mtsweni had no first-hand knowledge. She then gave hearsay evidence of her conversation with Ms Mary Anne Hatting (Hattingh?) who works in the smart shopper office. Ms Hattingh revealed to her that a person phoned her and introduced himself as 'Elvis Shikwanmbana'. This person claimed the card which was actually that of the respondent was his and that he had lost it. A new card was issued, and the smart shopper points transferred to the new card. Perhaps astonishing and perhaps suspicious, this all happen over the phone. Neither of these two employees of Pick 'n Pay connected the respondent to the incident they described.

[8] This is the totality of the case presented by the appellant.

[9] The respondent testified. He admitted using a card that was not his to buy goods at the store. He said the card he used was lent to him by 'Ernest' to use the points. He alleged that Ernest had bought car parts from the appellant but could not

pay - hence, the loan of the card to defray the sum owed. Ernest's whereabouts were completely unknown – he was just a person from the street who the respondent saw sporadically.

[10] On this body of evidence, the award was rendered. The arbitrator voiced observations that a strong suspicion existed that the appellant was party to the scam. However, on what was before him, he could not make a finding of guilt. In our view, this was wholly reasonable.

[11] The affidavit of the respondent in the review application is replete with allegations of fact not adduced in the arbitration hearing. Various complaints are made about the conduct of the arbitrator.

11.1. First, the appellant is aggrieved that the SSG report was not relied upon. As alluded to, was it adduced in evidence? All that exists of a "record" of the proceedings is a handwritten set of notes by the arbitrator, largely illegible and cryptic. Furthermore, as alluded to earlier, the report alone is inadequate to make a factual finding. The report contains damning information, all from a witness that does indeed link the appellant to the scam. However, inexplicably, that key witness was not called.

11.2. The second grievance is the idea that the arbitrator did not assist the appellant's representative to put forward a proper case. Whilst it is true enough that in appropriate circumstances an arbitrator may intervene to guide a party, it is untenable to criticise an arbitrator for not shepherding the person, who a major employer such as the appellant has sent, to present a case.

[12] The entire affair is unfortunate. It seems likely that a proper case could have been presented. The appellant's ineptitude is responsible for the failure of the case, not the actions of the arbitrator. The result is that the case is hopeless. The appeal must be dismissed.

[13] It is also in our view appropriate that in this exceptional case the appellant bear the costs of the appeal. It is not tolerable that a party who has access to legal advice persists in case after case to try their luck with the courts in a demonstrably

hopeless case. Court time is precious and the demand on judicial time and energy exceeds supply. The appropriate order is that the appellant bear the respondent's costs.

[14] In the premise the following order is made:

Order

1. The appeal is dismissed.
2. The appellant shall bear the respondent's costs of appeal.

PP

R. Sutherland

Acting Judge of the Labour Appeal Court

Sutherland AJA (with whom Van Niekerk and Nkutha – Nkontwana JJA concurring.

APPEARANCES:

FOR THE APPELLANT: Adv F.A. Boda
Instructed by Malatji and Co Attorneys

FOR THE RESPONDENT: Adv. T. Langa
Instructed by Mashabela Attorneys