

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no: JA /97

In the matter between

MAFEMANE WILLIAM MINYUKU

Appellant

and

SHIELD SECURITY GROUP (PTY) LTD

Notes:

The appellant, Mr MW Minyuku, was employed by the respondent, Shield Security Group (Pty) Ltd as a security guard from August 1991 until his dismissal in January 1995.

On the night of 28/29 November 1994, the appellant was on night duty at Boerstra Bakery ("the bakery"). At the end of his shift the appellant was found in possession of bread and biscuits. A statement was taken from him on 29 November. On 14 December the appellant appeared before a disciplinary enquiry on two charges:

- "1. Unauthorised possession of client's property (bread and biscuits) at Boerstra on 29/11/94.
2. Absent from duty on 2nd and 3rd of December after his off days."

The appellant was found guilty on both accounts. On 18 January 1995 he was given a final warning on the second charge and was dismissed on the first charge.

The appellant instituted proceedings in the industrial court in terms of s 46(9) of the Labour Relations Act, act 66 of 1995, in which he applied for a determination that his

dismissal constituted an unfair labour practice. He sought reinstatement, alternatively damages.

At the industrial court on 22 and 23 April 1996, the appellant testified on his behalf. The respondent called three security guards to testify: Mr S Monkwe, Ms R Rampone, and Mr AT Sawoti. The industrial court found that the dismissal was procedurally and substantively fair and dismissed the application, with costs.

The appellant appeals against that finding.

The respondent's case, put simply, is that after the appellant came off duty early on the morning of 29 November 1994 his bag was searched. Four loaves of bread and a packet of twelve biscuits were found in the bag. All employees of the bakery, and the respondent's security guards at the bakery, were entitled to take one loaf of bread home each day. Waste biscuits could be obtained from "dispatch" for consumption at the bakery. Any other products of the bakery could be purchased and on removal from the bakery, an invoice had to be produced as proof of purchase. The appellant's explanation at the time was that he had taken the bread from a guard room and the biscuits from dispatch, in the belief that the biscuits were scrap. As the appellant did not have an invoice for the three extra loaves of bread and the biscuits, the respondent contended that the appellant was in unauthorised possession of the bread and the biscuits.

The respondent contended that the appellant knew that he was not entitled to remove more than one loaf of bread, unless he was in possession of an invoice, for two reasons. The first was that he was informed of the rule on his arrival at the bakery by Monkwe. The second was that there was a notice displayed in the guard room in these terms:

"Notice to all staff: 10 November 1994. As from today, Thursday, 10

November 1994, depending upon availability, one loaf of bread will be given to each member of staff each day, Monday to Friday.

This bread will be the returns that our salesmen bring back each day, and will be issued to you by security at the security entrance on Soutter Street as you leave the bakery.

Admin staff who wish to take advantage of this should contact Martie Coetzer, who will arrange to have the bread collected from security and brought to the

admin offices.

A flimsy bag will be issued with each loaf.

Those wishing to continue purchasing fresh bread may do so *via* the shop or the ticket system.”

In evidence in the industrial court, the appellant placed each element of the respondent's case in issue:-

- he testified that the incident occurred at the end of his first shift at the bakery;
- he denied that Monkwe had explained the bakery's rules in regard to the removal of bread to him;
- he said that he did not see the notice that was displayed in the guard room;
- he said that he had found three biscuits, and not a packet of twelve biscuits, “inside” which he intended to eat with his tea;
- he testified that he was in possession of four scraps of bread which he had found in a dustbin.

It was contended on appeal on behalf of the appellant that the industrial court should have accepted the evidence of the appellant and rejected that of the respondent. The evidence was criticised on the basis that there were contradictions between the evidence in the industrial court, the evidence in the disciplinary enquiry and the written statements made by the respondent's witnesses in early December 1994. Reliance was placed, for example, on a contradiction between Monkwe's evidence in the industrial court and a statement he made in the disciplinary hearing. In the industrial court he testified that after confiscating the biscuits, he gave them to Mr P Kekane, an employee of the bakery, for safe keeping. The biscuits were later produced as an exhibit at the disciplinary enquiry. The biscuits were not, however, produced at the disciplinary enquiry and when Monkwe was asked for an explanation he said that the biscuits had been consumed by guards in the guard room who had eaten them not knowing that they were an exhibit.

The appellant also contradicted a statement he had made on 24 November 1994. In the statement he said that he was in possession of three loaves of bread with the permission of a superior, Lucas, and after discussing the matter with a fellow security officer, Paulls. As pointed out earlier, the appellant's version in the industrial court was that he had found scraps of bread in a dustbin.

The industrial court cannot be faulted for accepting the evidence of the respondent's witnesses and rejecting that of the appellant on the material issues. The respondent's witnesses corroborated each other in the following important respects: that the respondent was in possession of four loaves of bread, and not scraps of bread, that he was in possession of a packet of biscuits and not three waste biscuits, and that all those items were found in the respondent's bag.

The one issue on which there was no corroboration was Monkwe's evidence that he had explained the procedure in regard to removing bread from the premises to the appellant on the appellant's arrival at the bakery. But it is not in dispute that the notice was displayed in the guard room. The appellant's evidence that he was unaware of its contents is not credible. Any experienced security guard must know that he is not entitled to remove the property of the owner of the property he is guarding without the permission of the owner. The appellant could not honestly have believed that he was entitled to remove four loaves of bread and a packet of biscuits without the permission of the owner. It is interesting to note that on the appellant's original version, he did seek permission to remove the bread and obtained permission. Presumably because he knew that he would not be corroborated by the supervisor, Lucas, the appellant changed his version to allege that he found scrap pieces of bread in a dustbin.

There was no evidence that the appellant knew that he was not entitled to remove biscuit scraps from the premises and that he was required to consume the biscuits on the premises. However, the appellant was not found in possession of scrap biscuits. He was found in possession of a packet of biscuits. The bakery's rules were that he was not entitled to remove its products without an invoice, showing payment. He did not pay for the biscuits.

It follows that the respondent and the industrial court correctly found that the first charge had been proved.

What remains to consider is whether dismissal was the appropriate remedy. The appellant was a security guard. It was his job to guard the bakery's premises and to prevent the removal of the bakery's products from the bakery. The appellant, instead, intended to remove the bread and biscuits without the permission of the bakery. In short, he intended to commit theft. He demonstrated that he was no longer a trustworthy employee. He had breached the trust placed in him by his employer. Dismissal was the appropriate remedy.

A reading of the proceedings in the disciplinary enquiry reveal that the appellant was given an opportunity to state his case, he was represented, his representative cross-examined the witnesses called by the company. After conviction, he was given the opportunity to give evidence in mitigation. Fair procedure was followed.

The appeal is dismissed.

Myburgh JP

I concur

I concur

Dr David John

Date of Hearing : 97/06/12

Date of Judgement :

On behalf of the appellant :

Snyman Van Der Heever

Heyns Inc

On behalf of the respondent :

Shield Security Group (Pty)

Ltd

Date of judgment: 16 October 1997