

IN THE LABOUR APPEAL COURT

HELD AT JOHANNESBURG

CASE NO JA 49/97

In the matter between

NEDCOR BANK LTD

Appellant

and

FAUD JAPPIE

Respondent

JUDGMENT

NICHOLSON JA

[1] The respondent was employed by the appellant in July 1985 and on the date of his dismissal (19 March 1996) was a client service point manager. At his disciplinary enquiry on 6 March he was charged with

(1) not adhering to bank policy

(i) in making payments to a service provider before the service

provider had rendered the service,

(ii) not scrutinising costs of excessive repairs and

(2) dishonesty by receiving monetary benefits from a service provider during December 1995.

He was discharged on the charge set out in (1)(ii). He pleaded guilty to the charge in (1)(i) and received a first warning. On charge (2) he was found guilty and dismissed. The dismissal was confirmed on appeal.

[2] The respondent approached the industrial court in terms of section 46(9) of the Labour Relations Act, 28 of 1956. The respondent called four witnesses, Messrs Bailey, van Niekerk, Pienaar and Zucconi, and respondent testified on his own behalf. He was reinstated on 10 June 1997 on the basis that the dismissal was both procedurally and substantively unfair.

[3] It is common cause that at all material times Merck Motorcycles ('Merck') serviced and repaired motorcycles used by appellant. Furthermore the respondent had his personal vehicle repaired and luxury items added to a total value of R 7 276,00 during December 1995. The repairs and additions comprised the overhaul of the cylinder head, the fitting of tyres, mag rims, and an airconditioner and the colour coding of the bumpers and mirrors.

Procedural unfairness

- [4] The respondent approached the industrial court on the basis of substantive unfairness alone. Mr Makinta, in opening the case of respondent, said the following

“And lastly, Madam President, the issue of procedure. The [respondent] is not challenging the procedure so the only issues will be on the substance - substantive fairness, not the procedural fairness, Madam President.”

Given this unequivocal statement of the issues before the industrial court, it is difficult to understand on what basis it found that there was procedural unfairness. Evidence was led that the appellant has guidelines on what is termed ‘ethical purchasing practice’ which prohibit “soliciting or accepting monies, loans, credits or prejudicial discount, and the acceptance of gifts, entertainment, favours or service from present or potential suppliers which may influence or appear to influence purchasing decisions.” These guidelines were part of the conditions of employment and were available for inspection and were on the appellant’s computer system. Respondent maintained that he was not aware of the specific terms of the guidelines and that he had not ever been charged with a breach thereof. In addition, so the argument ran, a breach of the guidelines only entitled the appellant to issue a final written warning.

- [5] It was upon that basis that the industrial court found that there was procedural unfairness. It is normally improper for a court to give relief to the respondent on the basis of procedural unfairness where that was not an issue on the pleadings. See **Yskor Bpk v Meyer 1995 (16)**

ILJ 864 at 875 (LAC) and **Sentraal Wes (Koooperatief) Bpk v Food & Allied Workers Union & Others 1990 (11) ILJ 977 (LAC)**. In the **Sentraal-Wes** case at page 991 E-F the court found that an issue which was not pleaded can be taken into account providing that such issue was fully canvassed at the trial.

- [6] Respondent was charged, as I have mentioned, with dishonesty by receiving monetary benefits from a service provider. Pienaar, who chaired the disciplinary enquiry, testified to the guidelines of which I have made mention. Zucconi, who testified that he presided over the appeal hearing, also made mention of the fact that the disciplinary code was not exhaustive and that there was flexibility in framing charges and imposing sanctions. The complaint, it seems to me, is that respondent was never charged with a breach of policy but with dishonesty. The appellant by introducing the guidelines, so it was alleged, was moving the goal posts after the concession had been made that procedural unfairness would not be relied on. In my judgment the breach of the policy alleged by appellant does involve dishonesty and it does not seem to matter that chapter and verse of the guidelines was not quoted. The guidelines constituted an amplification of the original charge. I accept that the alleged change in the charge occurred after the undertaking not to rely on procedural unfairness and that the evidence covered the issue sufficiently to enable the court to deal with it. I do not accept, however, that the respondent was prejudiced by the amplification of the charge by reference to the guidelines. I am also prepared to deal with this appeal on the basis of the original charge; namely, whether respondent dishonestly received a

monetary benefit. It was never respondent's case that he was entitled to be dishonest.

Substantive unfairness

[7] Respondent's evidence was that he received no favour and that the repairs were an arms' length transaction in which he had agreed to pay off the indebtedness by means of instalments of R200 per month. The first enquiry in the appeal was whether he genuinely made such an arrangement or whether it was concocted after the fact to provide a defence at the disciplinary enquiry. In determining this matter it is necessary to examine the evidence and the probabilities in the case. Respondent was not forthcoming in disclosing details of the repairs. Initially he told Bailey and van Niekerk of the appellant's investigation department that the repairs were a private matter. Thereafter he disclosed that new tyres and mag rims were added. Finally he revealed the full extent of the repairs. Respondent was not able to tell Bailey and van Niekerk the value of the work done despite himself being in personal difficulties and relying on his wife's income with the bank and certain private work that she did. Respondent was not able to come out on his own salary of R 4754 and during January he was not able to pay the instalment of R200 until his wife sold some clothes. He initially estimated the value of the additions to his car to be R10 000. His straitened financial circumstances make it more probable that he would not have incurred such extravagant expenses and that such were in the nature of a favour by a business concern that he had introduced to the appellant as a more competitive rival to the two predecessors. It is common cause in this matter that the motor cycles of the appellant

were previously repaired by two concerns namely R & S Motorcycles and Selwyn Lurner. The appearance on the scene of Merck was as a result of recommendations made by respondent, who led the appellant to believe that they provided a more competent and competitive service.

[8] In evaluating the manner in which Merck and respondent transacted their business, more especially in relation to his private vehicle, it is necessary to take account of certain probabilities and business practices. Under normal circumstances a garage is reluctant to release a vehicle to a customer without payment as it exercises a lien to cover the repairs. The evidence revealed that most of the luxury additions to respondent's vehicle were done by outsiders i.e. not Merck and the latter would have been out of pocket to that extent. These circumstances suggest very strongly a special relationship with respondent which resulted in Merck foregoing normal legal safeguards.

[9] There are a number of strange features relating to the receipts and invoices provided by Merck. Van Niekerk interviewed respondent on 12 February 1996 and he explained that no documents were provided in connection with his deal with Merck. By this I understood him to be saying that no receipts were issued for his payments nor were invoices provided particularising the work done on the vehicle. It was only thereafter that respondent obtained receipts to prove his payments for December and January and the relevant invoices. These receipts follow a numerical sequence which is extremely strange given that the payments were made allegedly a month apart.

Furthermore, that no payments would have been made during the intervening period justifying receipts, seems incredible given the volume of work done by the garage.

[10] The respondent testified that he could not afford to pay the January instalment as he had been on holiday. The receipt, which records such a payment as having been effected on 22 January, is accordingly false and it is difficult to escape the conclusion that respondent had a hand in the fabrication thereof. The invoices languish under the same cloud of suspicion as their numerical sequence is also consecutive.

[11] Mr Makinta, who appeared for the respondent both in this court and the industrial court, submitted that the payment of R200 per month did not necessarily provide proof that respondent was receiving more favourable treatment at the hands of Merck. He was dealing with the suggestion that the agreement that respondent pay the sum of R200 per month was a most generous arrangement which did not include any provision for interest. He submitted that the charges for the repairs and additions might well have included a generous profit margin on the work done and the interest which would have accrued over the thirty six month period it would take to pay off the debt. Given the strong prima facie proof of a favour being given, evidenced by the relaxed attitude adopted by Merck to repayment by respondent, it seems to me that an evidential burden fell on respondent to counter such proof by evidence of such a pricing structure. Respondent did not call Mr Julian, who could have easily provided the necessary proof. It is true that Julian feared the loss of the appellant's business if

he testified, but that is unfortunately one of the consequences of litigation. The informality and laxness in business efficiency evidenced by Merck tends in my view to counter the suggestion that Merck would have suddenly manifested a very sophisticated pricing structure to offset the small monthly payment.

[12] It is true that there was no evidence of any benefit reaped by Merck as a result of their preferential treatment afforded to the respondent. That, however, is not the test. The mischief targeted by the rule, relating to receiving monetary benefits, is that the perception must not arise that the support or continued support of Merck by appellant arises, not because of an independent business choice, but by virtue of the benefits. Respondent's primary duty was to serve his employer faithfully and not to benefit himself or any other person at the employer's expense.

[13] I am of the judgment that the appellant showed in the industrial court that there was no arrangement by respondent to pay Merck before the respondent realised he was in trouble. Once respondent realised his problem he arranged with Merck to pay off the total amount in instalments of R200 per month. The industrial court ought to have rejected his version that the transaction was at arms' length.

[14] The respondent was not a credible witness and ought to have been disbelieved by the industrial court. He was clearly not telling the truth when he had no explanation for Merck issuing a receipt in January when no payment had been made in that month. It would have been foolhardy in the extreme to have issued a receipt when no money had been paid. None of Merck's books would have balanced in relation to the sum of

R200. In a letter dated 13 February 1996 respondent indicated that he had made a payment of R 200 for December and he adds afterwards ‘& Jan’. This is clearly false given his later evidence.

[15] There was a material contradiction on an important point in the case relating to whether Merck approached respondent to attend to the problem with his cylinder head - the version given by respondent to Van Niekerk - and his evidence in court that he had approached them. This is significant as the likelihood that Merck would have guessed that he had such a problem is so improbable as to have been rejected out of hand. It is also grossly improbable that respondent would incur over R 7 000,00 including luxury items, when he had an overdrawn account of R 25 000,00 which necessitated a second bond on his house. Respondent was also most evasive when dealing with questions relating to whether the colour coding and other additions were luxuries or not. He was clearly anxious to establish that they were necessary in order to justify the sacrifices the family would have to make.

[16] Respondent was clearly ill at ease when asked about the casual nature of the transaction and why no written agreement had been drafted reflecting the payment period, the interest rates and other relevant information. The respondent’s answer to this questioning is quite revealing. He says:

“I mean it wasn’t in my position - when a man was helping me to ask him ‘Give me a written agreement on it’. The man was giving - when I said I had a problem the man said he would help me.”

[17] Respondent's explanation of the sequence of numbers in the invoices and receipts is that they were not issued at the time but when he asked for them. This would appear to be the truth. The problem is that such conduct on behalf of Merck is inconsistent with an arms' length transaction and consistent with an intimate relationship in which there was to be no charge at all. Only when respondent was found out did he scurry off to obtain evidence of a genuine transaction.

[18] Respondent claims not to be familiar with the conditions set out in the guidelines. These relate to the receiving of favours. In his letters to the appellant he indicates that he has been charged with taking bribes. He clearly understands that bribery is improper. Bribery is the colloquial usage for dishonestly receiving monetary benefits from a service provider. When Miss Otto, who appeared for the appellant in the industrial court, put to respondent that he breached his contract of employment and that there has been a breakdown of trust he answers as follows:

“The way it's going on as if I am the only person who has made a mistake and has been treated like this at Nedbank. You know how many people are making mistakes and they just get away with it at Nedbank.”

This candid admission by respondent indicates that he has no real faith in his version that this was an arms' length transaction and that he dealt with Merck in the way any citizen would have done so.

[19] In my view the appellant was justified in dismissing the respondent. Respondent acted in his own interests and contrary to those of the bank by accepting the monetary

favours he did from Merck. No employer can have the requisite faith in an employee who acts in that manner. It follows that the appeal must succeed.

[20] In the premises the order date 10 June 1997 declaring the dismissal of respondent to be an unfair labour practice and reinstating him, is set aside. There is substituted the following order

“1. The application in terms of section 46(9) of the Labour Relations Act, 28 of 1956 is dismissed.

2. There will be no order as to costs.”

[21] The appeal succeeds with costs.

C R NICHOLSON JA.

I agree.

J MYBURGH JP.

I agree.

J C FRONEMAN DJP.

Date of hearing: 28 May 1998.

Date of judgment: 10 June 1998.

APPEARANCES

For appellant: Stephen Hardie of Edward Nathan and Friedland Inc.

For respondent: E.S Makinta Attorneys.

This judgment is available on the Internet on website: <http://www.law.wits.ac.za/labourcrt>