

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Durban

CASE No.: DA 24/98

In the matter between:

R Reddy First Appellant

M Naidoo Second Appellant

K Reddy Third Appellant

I Kannigan Fourth Appellant

and

Mondi Paper Limited Respondent

Judgment

Ngcobo AJP

[1] The appellants were employed by the respondent, Mondi Paper Limited, until their dismissal. They were all members of a medical aid scheme, Anglo American Corporation Medical Scheme, which was administered by Affiliated Medical Administrators (Pty) Ltd, (“AMA”). The respondent contributed 80% of the employee’s monthly medical aid contribution. The appellants were dismissed after the respondent had discovered that appellants had received and deposited cheques from the medical aid in circumstances where they were not entitled to do so. They unsuccessfully claimed in the Industrial Court that they had been unfairly dismissed.

[2] The present appeal is against the determination of the Industrial Court that appellants

were not unfairly dismissed.

[3] During the period March to August 1995 Mr Kevin Reddy, an employee of AMA, who is not one of the appellants, authorised cheques for various amounts in favour of the appellants. Each cheque was accompanied by an advice statement indicating that the cheque was in respect of medical services rendered either to each appellant or their respective dependants. The appellants deposited these cheques into their bank accounts. Neither the appellants nor their dependants had received any medical services in respect of the said cheques. These cheques were authorised by Reddy pursuant to a fraudulent scheme which he perpetrated upon the medical aid and to which he later confessed. A subsequent investigation led to the appellants being charged with disciplinary misconduct and later dismissed.

[4] At the enquiry, and in the court below, Reddy testified that the appellants were willing participants in the fraudulent scheme perpetrated by him on the medical aid. In terms of this scheme Reddy, using appellant's medical aid numbers, generated false claims in respect of the appellants or their dependants, and thereafter authorised cheques in favour of the appellants in respect of such false claims. The appellants deposited these cheques and thereafter paid Reddy half the amounts of the cheques and retained the other half. All the appellants are related to Reddy in one way or the other.

[5] Initially at the enquiry, the appellants took the point that the alleged misconduct had nothing to do with the respondent. When this point did not avail them, only second, third and fourth appellants testified at a subsequent enquiry. At the enquiry and in the court below, the appellant's version was that they were innocent victims of the said fraudulent scheme perpetrated by Reddy.

[6] The version testified to by the appellants was substantially the same. Each received a telephone call from Reddy announcing that a medical aid cheque in his favour was on its way. They were given instructions by Reddy to deposit the cheques into their bank accounts and thereafter withdraw the amounts of the cheques and pay them to him so that he can in turn pay the money back to the medical aid. It was necessary to do this, each was told, in order to avoid the amounts of the cheques being deducted from their respective salaries. Each was told that the cheques had been authorised in his favour as a result of a computer error. The appellants complied with Reddy's instructions and paid him back the full amounts of the cheques. Each received a receipt for the full amounts of the cheques received from Reddy.

[7] The sole issue for determination in the appeal, as in the court below, is whether the appellants were innocent victims of the fraudulent scheme by Reddy or whether they were willing participants in such a scheme. On this issue, the court below was faced with two diametrically opposed versions.

[8] The onus was on the respondent to justify the fairness of the dismissal of the appellants. Where, as here, there are two mutually destructive stories, the respondent could only succeed if it satisfied the Industrial Court on a preponderance of probabilities that the version testified to by Reddy is true and accurate and therefore acceptable, and that the

appellant's version is therefore false or mistaken and ought to be rejected. Before rejecting the appellants' version, it was necessary for the Industrial Court to weigh up and test each version against the probabilities. In that process, the estimate of the credibility of witnesses is inextricably bound up with the consideration of the probabilities of the case. If at the end of the process, the Industrial Court was satisfied that the balance of probabilities favoured the version testified to by Reddy, then the court was entitled to accept his version as being probably true and to hold that the respondent had discharged the onus. National Employers' General Insurance v Jagers, 1984 (4) 437 (ECD) at 440 D - G.

[9] Mr Soni, who appeared on behalf of the appellants, reminded us that the court below made credibility findings against both Reddy and the appellants. He sought to draw a distinction between the finding that Reddy was "a self-confessed liar" and "unimpressive witness" on the one hand and that appellants were described merely as "unsatisfactory witnesses". This distinction, he submitted, is significant, and must weigh heavily in the assessment of the evidence of Reddy. In my view, this case is not so much about the credibility of witnesses - it is about probabilities. In my view, a consideration of the probabilities in this case indicates where the truth probably lies. The estimate of credibility is inextricably bound up with a consideration of the probabilities. It is therefore not necessary to have recourse to an estimate of relative credibility apart from the probabilities. National Employers' General Insurance v Jagers, supra, at 441A. The question presented in this appeal is which of the two versions is more probable than the other.

[10] The probabilities here are overwhelmingly in favour of the version testified to by Reddy. I do not propose to examine the version of the appellants in any great detail in order to illustrate this. For the purposes of this judgment it is sufficient to refer to the key aspects of the appellants' version.

[11] Appellant's version rests on evidence that they paid in full the amounts of cheques they had received. In order to bolster their version they each relied upon receipts alleged to have been issued to them by Reddy upon making the said payment. In addition, though to a lesser extent, they relied upon their respective bank statements reflecting amounts withdrawn, even though these amounts were not the amounts reflected on the receipts and furthermore, these amounts had not been withdrawn on the date of the alleged payment to Reddy. The appellants, therefore, must stand or fall by the receipts. If the receipts are shown, on a balance of probabilities, to have been manufactured, the appellants must fail.

[12] It must be recalled that Reddy testified that during 1996 appellants confronted him and demanded that he issue them with receipts reflecting that they had paid the full amounts of the cheques they had received. They required him to space out these receipts such that they do not follow one another in sequence. These receipts, he testified, were a forgery and were issued on the same day to all the appellants. He estimated that they were issued during April 1996.

[13] The record reflects that the original receipt book was produced in the court below. It had disappeared by the time the record of the appeal was prepared. However, the contents of the receipt book emerge from the record. The schedule below reflects the receipt number, date of issue or purported issue and the person to whom it was issued.

<u>Receipt Number</u>	<u>Date</u>	<u>Name</u>
1	5 April 1996	Mrs Qoloko
2	Blank	Unissued
3	Torn out	
4	15 April 1996	Mrs Koloko
5	3 July 1995	First Appellant
6 - 13	Blank	Unissued
14	27 July 1995	Fourth Appellant
15	14 September	Fourth Appellant
19	2 August 1995	Fourth Appellant
23	4 September 1995	First Appellant
37	15 September 1995	Second Appellant
42	9 September 1995	Third Appellant

[14] It is evident from the record that the receipts issued to the appellants were issued from the same receipt book. This being the case one would have expected the receipts to follow one another in sequence. Yet they do not. Instead there are blank receipts in-between. The receipts issued to appellants were deliberately spaced out to create the impression that they were not issued on the same day. Receipts Numbers 1 and 4 dated 5 April 1996 and 15 April

1996 respectively, were in all probability, although preceding them, issued subsequent to the receipts issued to the appellants and were issued prior to the receipts which had been left in blank.

[15] There is no explanation why later receipts should bear a date earlier than that reflected on earlier receipts. The only probable explanation for the discrepancy in the dates of the receipts is that these receipts were issued on the same day from the same receipt book. They were deliberately spaced out so that it would appear that they were not issued on the same day. What the designers of the receipt scheme did not consider is that if the receipt book was made available, it would become evident not only that the receipts issued to appellants were issued from the same receipt book, but also that the receipts were deliberately spaced out. More importantly, they did not consider the fact that the receipts that had not been issued would subsequently be issued and bear a date later than the date reflected in their receipts even though, in sequence, they should have reflected an earlier date. For example Mrs Qoloko receipts Numbers 1 and 4 reflect the dates 5 April 1996 and 15 April 1996, respectively. Yet they are followed by receipt Number 5 issued to the first appellant which is dated 3 July 1995. This is where the receipt scheme collapsed. The probabilities are that all the receipts issued to the appellants were issued on the same day and at the same time. They were deliberately spaced out to create a false impression that they were issued on different dates. They were deliberately manufactured to provide the appellants with a defence.

[16] In the course of his argument Mr Soni drew our attention to the fact that some of the appellants offered receipts at the second enquiry which was held on or about 3 April 1996. He submitted that this shows, on a probability, that when the first legitimate receipt was issued to Mrs Qoloko on 5 April 1996, appellants had already been issued with their receipts. This, he contended, undermined the evidence by Reddy that the receipt were issued to the appellants after April 15. In my view, what this does is merely to demonstrate that Reddy is probably mistaken as to the date when he issued the receipts to the appellants. Indeed Reddy conceded that he might be mistaken as to the dates. However, this does not detract from the fact that the receipts were manufactured.

[17] There is a further difficulty with the alleged payment. None of the appellants withdrew the exact amount of the cheque each had received from the medical aid. Each withdrew a portion and supplemented such amount from large amounts of cash, which each claimed to keep at home. One would have expected them to have withdrawn the same amount of the cheque they had deposited instead of using the money which was destined for other purposes. None of the appellants withdrew the money on the date that payment was supposedly made to Reddy. In some instances the amount was withdrawn some three weeks earlier and kept at home for Reddy to come and collect. What emerges here are strikingly similar discrepancies in respect of all the appellants which are inexplicable except on the basis of design.

[18] The probable explanation for these strikingly similar discrepancies is that once the receipts had been manufactured, the appellants realised that they might be called upon to provide proof of having withdrawn the amounts paid to Reddy. As none of the dates in the

receipts coincided with the dates of withdrawal from their respective bank accounts, the only option they were left with was to point to withdrawals which were close in time to the dates of the receipts as being the withdrawals made for the purposes of making the alleged repayments. As a result of this the withdrawals alleged to have been made neither reflect the amounts of the cheques they had received nor the dates of the alleged payment.

[19] In their dealings with Reddy all the appellants demonstrate behaviour which is strikingly similar. Each appellant was told he was about to receive a cheque authorised in error in his favour. The easiest thing to have done was to return the cheque back to the medical aid without depositing it. Instead, each appellant chose to deposit the cheque, thereafter withdrew a portion of the amount of the cheque and supplemented this from money that was destined for some other purpose, waited for Reddy to come and collect the money, and in the process of doing so, incurred unnecessary bank charges and subjected themselves to great inconvenience. Some of the appellants did not only do this once, they went through this process more than once. None appear to have thought it wise to simply tell Reddy that they would not deposit the cheque but instead would simply send it back to the medical aid.

[20] The foregoing difficulties in the version testified to by the appellants must further be seen against the fact that at the enquiry, three of the appellants gave a version different from that which they later relied upon. Mr Govender, who represented second, third and fourth appellants at the second enquiry, gave a false version according to these appellants. In the case of the second appellant it was stated that he cashed the cheque under the impression that his wife had either paid cash or in some way settled the medical account. In the case of the third appellant it was stated that his wife deposited the cheque without informing him. While in the case of the fourth appellant it was stated that he thought the cheques were for the paediatrician. These three appellants testified that what was stated on their behalf was false. Yet they did nothing to correct the false impression. Once again they claimed that they simply followed the advice of Govender, their union representative. In my view it is difficult to understand how appellants, who on their version were innocent of any misconduct could have stood by and allowed Govender to give false versions on their behalf. In my view the false versions were put up with the consent and the cooperation of the appellants.

[21] For these reasons, I conclude that the version testified to by Reddy is more probable than that of the appellants. All the appellants were willing participants in the fraudulent scheme perpetrated by Reddy upon the medical aid. Their version was accordingly, rightly rejected by the court a quo.

[22] There being no question as to the appropriateness of the sanction of dismissal, it follows that the appeal must fail.

[23] In the event the appeal is dismissed with costs.

Ngcobo AJP
I agree

Conradie JA

I agree

Nicholson JA

Date of hearing: 11 June 1999
Date of judgment: 24 June 1999

Appearances:

For appellants: V. Soni

Instructed by: Chennels Albertyn & Tanner
For respondent: A.E. Franklin
Instructed by: Deneys Reitz