JUDGMENT

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: JA10/99

In the matter between:

BMW (SOUTH AFRICA) (PTY) LTD Appellant

and

L VAN DER WALT Respondent

CONRADIE JA

[1] The appellant dismissed the respondent on 28 February 1995 after he had, at a disciplinary enquiry, been found guilty on a charge of 'misrepresentation by removing two FMC wheel alignment equipment to Garaquip for repairs'. The wheel alignment equipment had early in 1994 been declared redundant by the appellant. When the respondent came to hear of this it aroused his interest in acquiring the equipment. He set about

having a scrap authorisation form completed. This was the first step in obtaining an invoice which would serve as a gate pass and enable the respondent to remove the equipment from the appellant's premises. Much to the respondent's surprise the scrap authorisation form, and consequently the invoice, did not reflect a value for the equipment.

[2] The fact that the equipment had been designated as scrap did not mean that it was valueless. Moreover, it was the appellant's policy not to permit any employee to acquire any asset of the appellant for nothing. It was later discovered that the equipment had mistakenly been given a nil valuation by the finance department. It is probable that the respondent realised at the time that a mistake had been made. He nevertheless did nothing to put the mistake right. He requested a Mr Labuschagne, who was the managing member of a close corporation called Garaquip South Africa ('Garaquip') (the South African agent for the FMC wheel alignment equipment) to come to the appellant's premises to give him a quotation for the repair of the equipment. In the course of inspecting the equipment Labuschagne mentioned that he thought it might be worth R 15 000.00. If this turned out to be the case the respondent stood to make quite a profit. He was not sufficiently dismayed by this prospect to then take the matter up with the appellant. Instead, he concealed the fact that he had acquired the equipment. He did so by approaching the finance department and

requesting another invoice which might serve as a gate pass to get the equipment out of the premises. This invoice reflected that the equipment was to be taken to Garaquip for repairs. The information on the invoice could only have come from the respondent who knew, of course, that it was false. One would not have thought that the respondent would give false information to the finance department unless it served some purpose. The purpose which it served is reasonably clear. It would avoid the risk of queries by the security personnel at the exit from the appellant's premises, who might, if they looked at the nil value invoice, have become concerned at the breach of the appellant's standard procedure and might also have been alarmed at the fact that a very large piece of equipment – indeed two large pieces of equipment – were said to have no commercial value.

[3] The other person whom it was, in furtherance of the respondent's scheme, prudent to deceive was Labuschagne. If the respondent had given him the nil value invoice with which to remove the equipment from the premises he might very well have realised that it was unlikely that the appellant could have assigned a nil value to equipment which he, at the first inspection thereof, considered to be worth R 15 000.00. If he were to take up the matter with the appellant the respondent's scheme would founder. The respondent resolved, as he put it, under no circumstances to disclose to

Labuschagne that he was the owner of the equipment. Labuschagne did not ask him who the owner was, but given the circumstances under which he found the equipment, it is highly unlikely that he could have believed that it did not belong to the appellant.

[4] The equipment was removed by Labuschagne's men, using the false invoice which the respondent had supplied. On 9 August 1994 Garaquip quoted R 11 000.00 for the repair of the equipment. The quotation was, naturally enough, addressed to the appellant but marked for the respondent's attention. Not having the money to pay for the repairs, the respondent then requested Labuschagne to value the equipment. Garaquip offered to buy the equipment for R 50 000.00. The delight which the respondent no doubt experienced at learning this news was, I would think, tempered by the realisation that it was now, more than ever, essential to conceal from Labuschagne that he had acquired the equipment. He accordingly resorted to the stratagem of telling Labuschagne that he would be contacted by a company which had bought the equipment. The 'company' was no company at all. The respondent seems to have been the sole proprietor of the business. The respondent and a friend, one Karl Filter, had from time to time done business under the trading name of Danheimer. A banking account was conducted by the respondent under this name and when, on 24 August 1994, an invoice for

R 50 000.00 in the name of Danheimer was faxed to Garaquip, it gave as the account into which the purchase price had to be deposited, the number of this very bank account.

[5] As it happened, the supposed acquisition by a company of the equipment after it had been sent for repairs (for this is what Labuschagne was asked to believe) excited the latter's suspicion. He accordingly contacted the person with whom he had dealt in originally selling the equipment to the appellant, who in turn alerted the appellant's security department.

[6] The probabilities leave little doubt that the respondent took the opportunity which he thought the nil valuation of the equipment provided to enrich himself at the expense of the appellant. He was surprised when he first received the nil valued invoice. He said so himself in evidence. His surprise must have turned into astonishment when he heard the first valuation figure of R 15 000.00. Each of these occasions presented an opportunity for him to fulfil the fiduciary duty which he owed to his employer and tell the appellant that a serious mistake appeared to have been made. He was not a junior employee. He held a responsible position as a road testing manager. He compounded his lack of candour by his disgraceful conduct in seeking to conceal the appellant's mistake well-knowing that if it was discovered, it would mean the end of his windfall.

[7] Where there is calculated silence in the face of a duty to speak, one has to do with that species of fraudulent misrepresentation known as fraudulent concealment or fraudulent non-disclosure. In my view the respondent was guilty of a fraudulent misrepresentation by non-disclosure. His explanation for having requested the second invoice and for having concealed the true position from Labuschagne is not plausible. It was, in my view, correctly rejected by a second disciplinary enquiry held into the respondent's conduct.

[8] The judgment of the industrial court contains no explicit order in relation to the claim based on procedural unfairness. The closest the presiding member comes to a conclusion is this:

> 'It would accordingly be of lesser significance to deal with procedural issues at length, as yet, but one has to agree with Mr Jonker that what had transpired on that score cannot have been above criticism.'

I doubt whether this comment in passing by the presiding member can be equated to a finding that the respondent's dismissal had been procedurally unfair. It seems to me that, having found the dismissal to have been substantively unfair, the presiding member found it unnecessary to come to a firm conclusion on the question of procedural fairness. The appellant

seems to have read the judgment in this way for there is no appeal against any finding of procedural unfairness. The respondent's attorneys (at the time he was still represented) appear to have read the judgment differently: there is no cross-appeal against the failure or refusal of the member to grant the respondent's prayer for an order that he had been substantively *and procedurally* unfairly dismissed. For the sake of full ventilation of the dispute, I am, despite my doubt, prepared to consider the matter as though there had been a finding of procedural unfairness.

[9] The removal of the wheel alignment equipment had led to another, earlier, disciplinary enquiry on 10 January 1995 at which the respondent had been charged with having –

a. Committed a fraud by arranging or having arranged that the appellant's procedures were not adhered to when the equipment was scrapped;

b. Committed a fraud by arranging for the equipment after it had been scrapped to leave the appellant's premises to Garaquip;

c. Committed a fraud by informing Garaquip that the equipment had been bought by Karl Filter of Danheimer.

The disciplinary finding was that the respondent had not made himself guilty of any transgression save for 'a misrepresentation by him when removing the equipment for repairs.' No sanction was imposed on the respondent. From this it is to be inferred that the respondent was not considered to have committed any disciplinary offence.

[10] The appellant alleged in its statement of case before the industrial court that 'subsequent to the hearing on or about 11 January 1995, further and new information became known to the respondent and on or about 17 February 1995, applicant was charged with a new and different charge of misconduct in that it was alleged that applicant made certain misrepresentations when the wheel alignment equipment in question was removed from respondent's premises to Garaquip.'

[11] The 'new and different charge of misconduct' is the one cited at the beginning of this judgment on which the respondent was found guilty. The 'further and new information' was a quotation for the repair of the equipment from Garaquip addressed to the appellant, and marked for the attention of the respondent. This quotation brought home to the appellant the enormity of the respondent's deception. Up till then it was thought that the equipment had been acquired by the respondent. It is true that the scrapping procedures had not been meticulously followed and that a false

invoice had, on the respondent's instructions, been made out, a transgression which the respondent had, at the earlier disciplinary hearing been found to have committed, but the quotation seems to have alerted the appellant to the fact that the respondent had either considered the equipment still to belong to the appellant or was concealing that it did not. If the respondent was to have attempted to sell equipment belonging to the appellant, it would obviously be a serious transgression whereas selling his own equipment would not have been an offence at all. The Garaquip quotation made it look as if the respondent had smuggled the appellant's equipment out of the premises and then attempted to sell it. The attempted sale of the equipment now took on a different colour. It demonstrated fraudulent intent far beyond making a false representation in order to move his own goods out of the premises.

[12] Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in Amalgamated Engineering Union of SA & Others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588 (IC) at 596 A – D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may

in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also Botha v Gengold [1996] BLLR 441 (IC); Maliwa v Free State Consolidated Gold Mines (Operations) Ltd (1989) 10 ILJ 934 (IC)) I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code (Strydom v Usko Limited [1997] 3 BLLR 343 (CCMA) at 350 F – G. That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.

[13] *In casu* the appellant was perfectly *bona fide* throughout. The respondent was the one who concealed what he had done. That concealment was carried into the first disciplinary enquiry. It may be that the appellant should have seen through the respondent's scheme sooner than it did, but that did not make it fair that the respondent should have come away scot free. Although the charges both involved misrepresentation, the full import of the deception was not realised at the first disciplinary enquiry. It would be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence. That must have been the case here when the full extent of the respondent's deceit became apparent. And since this loss of confidence justifiably occurred only after a first disciplinary enquiry had been held, I do not consider that it was be unfair to hold another. In

my view the respondent's dismissal was both substantively and procedurally fair.

[14] There is a good explanation for the appellant's failure to have filed a power of attorney. The failure is therefore condoned.

The appeal succeeds with costs.

The order of the industrial court is set aside and replaced by an order reading: 'The application is dismissed with no order as to costs.'

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CONRADIE JA

I agree

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ZONDO DJP

I agree

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NICHOLSON JA

Date of Judgment:

Attorney for the plaintiff: MacRobert de Villiers Lunnon & Tindall Inc.
Mr G Van der Westhuizen.

Respondent appeared in person