

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: DA18/2000

In the matter between

Sitimu Luthuli

Appellant

and

Portnet

Respondent

JUDGMENT

VAN DIJKHORST AJA

1. This appeal is against an order of the Industrial Court which upheld the dismissal of the appellant on the grounds of theft.
2. At the commencement of this appeal counsel for the appellant moved for a postponement of the hearing on the grounds that the appellant had now changed his attorneys and had been advised by his present attorneys that he should have given evidence in the Industrial Court, which he, allegedly on the advice of his previous attorney, had failed to do. We were told that the purpose of the postponement was to lead such evidence, to our surprise, in this Court. The application did not set out what the content of the proposed evidence was to be, or the reasons for this advice of the erstwhile attorney, and we were wholly unable to determine the weight and materiality of this evidence.

3. It is essential that trials come to finality. Unless there are exceptional circumstances, a litigant must stand or fall by the evidence he adduces at the trial. A Court will be very reluctant to allow new evidence after a case has been tried. *Shein v Excess Insurance Company Ltd* 1912 AD 418, 428-9; *Colman v Dunbar* 1933 AD 141, 160-1; *Oosthuizen v Stanley* 1938 AD 322, 333; *Mkwanazi v van der Merwe* 1970 1 SA 609 (A) 626E-H; The fact that on the advice of his attorney a party presents evidence or refrains from doing so, is not an exceptional circumstance. It is the way in which litigation is normally conducted. A client is bound by the decision of his legal representative to call or not to call a witness, including the client himself. *R v Matonsi* 1958 2 SA 450 (A) 456-7; *S v Louw* 1990 3 SA 116 (A) 124A-125E. To hold that this fact is a ground for reopening would create chaos and open the door to fraud and perjury.
4. For these reasons we dismissed the application for a postponement. Thereupon counsel, who had only been briefed for that purpose, withdrew and the appellant argued his case in person through an interpreter.
5. We granted condonation to the appellant for the late filing of the record and the notice of appeal.
6. The appellant worked for the respondent as a “hyster” driver in shed 100 on the respondent’s premises at the new pier section of the Durban harbour. One Johan Mantengu also worked for the respondent as a hyster driver although he worked at Maydon Wharf. During December 1995 a large quantity of nickel sheets was stored in shed 101 which was adjacent to shed 100 where the appellant worked. On 15 December 1995 the appellant had to work from 14H00 to 22H00.

7. During that evening the operations manager of the respondent was informed telephonically that nickel was being removed from shed 101. He alerted the security personnel. Whilst two security guards were driving towards shed 101 they observed a BMW vehicle coming in their direction from the direction of shed 101. Mr Mantengu was the driver of the BMW. The vehicle was searched and nickel was found inside the vehicle as well as in the boot thereof. Mantengu informed them that he had been hired by the appellant. He was taken to the security office and the police were called. Mantengu indicated that the appellant could be found at the MHA garage and they went there in search for him. When they arrived there they saw a hyster that was left with its lights on and with nickel sheets in its bin. Enquiries were made by the security personnel from the people inside the bathroom area and the reply was received that the appellant had already left. He was later arrested.
8. At a disciplinary enquiry that commenced on 24 January 1996 the appellant and Mantengu were charged with theft. The appellant was not present on that day and the matter was adjourned to secure his presence. Telegrams were sent to the address that the appellant had supplied to the respondent, but when the enquiry was reconvened on 2 February 1996 there was still no appearance by the appellant. The matter was adjourned to 19 February 1996 for further attempts to be made to secure his attendance. On 19 February 1996 there was again no appearance by the appellant and the matter proceeded in his absence.
9. Mr Pillay, the investigating officer on behalf of the respondent testified that at court, where the criminal proceedings were pending, he had spoken to the appellant and had told him that his disciplinary enquiry would be held on 19 February 1996 and

that his attendance was required.

10. As stated, the enquiry proceeded in the appellant's absence. Mantengu pleaded guilty to the charge and stated the following. The appellant had hired him to convey nickel to the MHA garage for an amount of R1000.00. The appellant indicated to him that he wanted to use the nickel sheets to build a squatter shack. The appellant had loaded the nickel into Mantengu's vehicle and Mantengu was on his way to the MHA garage when he was stopped by security officers. Prior to that the appellant was following him, but upon him being stopped turned off towards shed 101. Mr M P Shabalala informed the enquiry that he and his colleague after stopping Mantengu's car and taking Mantengu to the security office, were told by the South African Police to go back to the scene and look for the hyster used. They could not find it and upon advice from Mantengu, who was in the van, that the appellant dressed for work at the MHA, they went there and were shocked to see a big hyster carrying an iron bin and inside it a lot of nickel sheet, stationary but with the engine idling and no driver. They were informed that the appellant had left.

11. A witness, Mr S David, informed the enquiry that he had accompanied Shabalala, and corroborated his evidence. He further said that on two occasions they met the appellant at court. He informed the appellant of the hearing of the enquiry and the dates thereof. On 14 February 1996 he informed him that the enquiry would resume on 19 February 1996. The appellant acknowledged to David that he understood this information.

12. At the end of the enquiry the appellant and Mantengu were both found guilty and dismissed from the respondent's employ. After the usual number of postponements the criminal case was heard in the magistrates court on 17 October 1996. Mantengu

in protesting his innocence, became an unsatisfactory witness. The appellant did not give evidence. Mantengu was convicted and the appellant acquitted. Only thereafter did the appellant approach the respondent through his attorneys and ask for another enquiry to be convened to establish whether he was guilty of misconduct. This request was refused.

13. After further lengthy delays of which the particulars are not relevant to this appeal, the hearing before the Industrial Court in terms of section 46(9) of Act 28 of 1956 took place on 26 and 27 June 2000, the Portnet Bargaining Council having failed to resolve the matter. The appellant was represented by an attorney and by agreement evidence for the appellant was led first. The appellant did not testify but called one Khumalo as a witness who testified that somebody else and not the appellant had loaded the nickel into Mantengu's car. He stated that this was Mantengu. He knew the appellant and heard that he had been arrested but did not report this to the police. There were various other unsatisfactory aspects in his evidence and he was rightly labeled a mendacious witness. On behalf of the respondent Mantengu testified, as did a number of other witnesses. Mantengu repeated his version that the appellant had loaded the nickel into his BMW but stated that this was done without any prior arrangement. When questioned the appellant had indicated that he would remunerate him to the tune of R1000.00 for transporting the nickel to Kwa-mashu. Mr Shabalala gave the evidence which I have already set out, as did Mr Pillay. Pillay further testified that he took Mantengu out of the police cells on 15 December 1995 and that Mantengu took him to shed 101 where he saw a hyster outside the shed. Mantengu identified the hyster as belonging to the appellant. Pillay took the registration number of the hyster and went to the MHA garage to check whether the information was correct. The records proved that it was. The hyster was booked out in the appellant's name. The

appellant's shift was from 14H00 to 22H00. It was not yet 22H00 and he waited for the appellant to arrive, but the appellant never came. At the MHA garage there was another hyster with nickel in its bin which had been booked out to one Biyela against whom another case was still pending. During the course of his investigations Mr Pillay questioned the appellant, who elected to remain silent.

14. Mr Bosch, the appellant's supervisor, testified that on 15 January 1996 he had handed the appellant a notice to attend the disciplinary enquiry on 24 January 1996. The appellant refused to sign a copy acknowledging receipt. Mr Masinga testified that he had sent telegrams to the appellant's address notifying him of the enquiry. It was put to him that the appellant's address had changed and that the appellant never received them. No evidence of a change of address was led.

15. On the basis of the facts set out the Court found that there was a clear need for the appellant to testify during the hearing and that as he had failed to do so there were strong indications that his version as put to the respondent's witnesses was false. The Court found that the charge of which the appellant was found guilty was a serious one that warranted the sanction of dismissal. It rejected the argument that the procedure was unfair because the disciplinary enquiry was held in the appellant's absence and because the respondent thereafter refused to convene another one. For that the appellant had only himself to blame. It concluded that the appellant's dismissal was substantively and procedurally fair.

16. Short shrift can be made of this appeal. Procedurally the disciplinary hearing is unassailable. Due notice was given to the appellant and he failed to attend. In these circumstances the respondent had no option but to proceed. Substantively the dismissal was fair. The theft of nickel, some 22 sheets at night by a hyster driver

at the docks, is very serious misconduct indeed. It warrants dismissal. On the merits the appellant did not present any acceptable evidence. His guilt was proven unequivocally.

17. The appeal is dismissed with costs. The costs include the costs of the applications for postponement and condonation.

Van Dijkhorst AJA
I agree

I agree

Zondo JP

Comrie AJA

For appellant: Adv A M Kwitshana
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For Respondent: Adv S R Balton
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Date of argument: 13 June 2001

Date of judgment: 29 June 2001