

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No.: JA87/09

Minerals Technologies South Africa (Pty) Ltd **Appellant**

and

**Commission for Conciliation,
Mediation and Arbitration** **First Respondent**

Advocate R. Bracks N.O. **Second Respondent**

Harvey S. Radebe **Third Respondent**

JUDGMENT

WAGLAY DJP

Introduction

[1] This is an appeal against the judgment of the Labour Court (Molahlehi J) dismissing the application to review and set aside an award handed down by the commissioner (the second respondent)

of the Commission for Conciliation Mediation and Arbitration (the CCMA). The commissioner had found that the dismissal of the third respondent was substantively unfair and ordered the appellant to reinstate the third respondent retrospectively to the date of his dismissal to the position he held prior to his dismissal on conditions no different to that which governed his employment on the date of his dismissal. The commissioner also ordered that the appellant pay the third respondent back pay from the date of his dismissal to the date of his reinstatement.

Background

- [2] The appellant company provided services to ISCOR an iron producing company. The exact nature of the services is not set out in the review papers nor was it set out at the arbitration hearing, save that the services provided by the appellant to ISCOR included servicing and operating ISCOR's machinery and operating a scanner linked to its furnaces.
- [3] In providing the services to ISCOR, the appellant's employees had to observe the rules binding on ISCOR's personnel. One of the rules was that any private property brought onto ISCOR's premises had to be declared on a prescribed form known as a "B2100 form". This form serves as a security clearance when an item brought into ISCOR's premises is removed from the premises. In the absence of a "B2100 form" an employee must obtain a "gate release note" that is issued by his or her manager to remove any item out of the ISCOR premises.

- [4] The third respondent carried out the duties of a servicer and machine operator for the appellant at ISCOR. On 11 February 2005, while approaching his motor vehicle, he was stopped by ISCOR's security officer and was found to be in possession of a box labelled "Dysan 100 discs". This box contained what was commonly referred to as "floppy discs". The "floppy discs" (Discs) are today's equivalent of computer discs which contain information that can normally be read on a computer. The third respondent admitted that he was taking the Discs to his motor vehicle. As a result of the admission, the third respondent was prohibited from entering ISCOR's premises.
- [5] On the day of the incident ISCOR wrote a letter to the appellant and advised it that the third respondent "*was found in possession of goods ... which he wanted to remove from the premises without a gate release note or authorization*" and consequently the third respondent would not "*be allowed to enter the premises anymore.*"
- [6] The appellant then charged the third respondent with misconduct alleging that he was in "*unauthorized possession of company property on 11/2/2005*"; and, for "*bringing the company into disrepute*".
- [7] A disciplinary hearing was held on 7 March 2005. The third respondent was found to be in unauthorised possession of company property and was dismissed.
- [8] The third respondent did not utilise the internal appeal process and referred the matter as an unfair dismissal dispute to the CCMA first

for conciliation and then when conciliation failed to resolve the dispute, to arbitration.

The arbitration proceedings

The evidence

- [9] At the arbitration hearing one, W.J. Van Waveren (Van Waveran), gave evidence on behalf of the appellant and the third respondent testified on his own behalf. A transcript of the internal disciplinary hearing was also handed in at the arbitration. The evidence of Van Waveren was that the third respondent was aware of the rule that he was not allowed to take any private property into ISCOR premises without completing the “B2100 form” and in the absence of the form nothing could be removed from the ISCOR premises without a “gate release note”.
- [10] Van Waveren’s testimony was further to the effect that the Discs found in the third respondent’s possession were the property of ISCOR. According to him, at least four of the Discs were marked “LR2000”. These markings indicated that those Discs contained software to the scanner which was operated by him (Van Waveren) and only accessible to him and the ISCOR engineering staff. Another Disc was marked “blokwerf” which is a name of a specific plant within ISCOR premises and yet another Disc was marked “skrotwerf” which is a name of the scrapyard within ISCOR.
- [11] The third respondent’s evidence was to the effect that he had found the Discs outside the ISCOR premises, more particular in a rubbish bin near to where he resides. Because he did not own a computer, he handed the Discs to his friend Mr Thomas Delihlazo, a co-

employee, who has access to a friend's computer, to inspect them as he thought the Discs might contain games. Mr Delihlazo was, however, unable to inspect the Discs because the computer, to which he may have had access, was in a state of disrepair. Mr Delihlazo, according to the third respondent, returned the Discs to him and did so at the work place (ISCOR). After receiving the Discs the third respondent was on his way, taking the Discs to his motor vehicle, and doing so openly when he was stopped by the security guard.

[12] The above evidence notwithstanding, the commissioner records the following as being part of the evidence led by the third respondent: *"A friend of his [the third respondent's] had found these discs outside ISCOR premises among some magazines in a bin and asked the Applicant [the third respondent] to check what was on it..."*

[13] Additionally, and from the transcript of the arbitration hearing it appears that after the two witnesses testified, the commissioner stated that before he hears closing arguments he would like to view the Discs. The transcript also indicates that the Discs could only be viewed at ISCOR premises because the Discs would only work *"on the machine itself."* The transcripts also reflect that the commissioner did not view the Discs and that no objection thereto was raised in the closing argument that was presented at a later date.

The commissioner's findings

- [14] The commissioner found that the third respondent was aware of the rule that no person was entitled to take any private property into ISCOR's premises without completing the "B2100 form" or, in its absence, remove anything from ISCOR's premises without a "gate release note". He then found that the third respondent had breached the rule but said that the rule was not breached wilfully because the third respondent had openly carried the box with the Discs to his motor vehicle. The commissioner concluded that he was not satisfied that the breach of the rule justified the dismissal of the third respondent and thus found the dismissal substantively unfair. The dismissal was found to be procedurally fair as no challenge was raised in that respect at the arbitration and the transcript did, on the face of it, evince a procedurally fair hearing.
- [15] With regard to the ownership of the Discs or whether or not the third respondent's possession was "*unauthorised*" the commissioner states that because the third respondent walked openly with the Discs in his hand it "*could hardly be the actions of a person trying to steal company information*" and that "*the Respondent has failed to convince me that the discs contained confidential information relating to the client's operations.*"
- [16] Having found that the third respondent had unintentionally breached a rule, the commissioner then stated that "*in deciding whether or not the Applicant [the third respondent] should be dismissed, the following factors need to be taken into account: the Applicant's length of service, in this case 16 years; his disciplinary record which is clean and most importantly, the circumstances*

under which the conduct was committed.” The commissioner went on to state that dismissal was reserved for serious transgressions like theft, dishonesty, physical assault and endangering the safety of others and concluded that a final warning would have been the appropriate sanction. The commissioner however, failed to impose any sanction and ordered reinstatement as recorded earlier in this judgment.

The Labour Court

- [17] The appellant sought to review and set aside the award of the commissioner on a number of grounds. One of the grounds which was emphasised by the appellant was the commissioner’s failure to view the Discs and to nevertheless find that the respondent had failed to prove that the Discs contained confidential information. However, the two critical grounds upon which it sought to set aside the award were: (i) the commissioner’s failure to consider all of the evidence before arriving at his decision; and (ii) that the award was not justified in relation to the evidence presented at the arbitration.
- [18] The Labour Court took the view that the “*commissioner gave the parties a fair trial*” and that his failure to view the Discs did not result in either party being prejudiced, more particularly neither party appeared to object to the commissioner’s failure to view the Discs at the time that closing arguments were presented. The Labour Court also said that an incorrect recordal of evidence did not *per se* render an arbitration award reviewable and after surveying the evidence took the view that the incorrect recordal of the third respondent’s evidence did not materially affect the conclusion reached by him because the third respondent was found

“*guilty as charged*”. The Labour Court then went on to consider the appropriateness of the sanction with respect to the breach of the rule which the commissioner had found the third respondent to have committed and found that the commissioner could not be faulted in finding that there was no dishonesty involved in the misconduct committed by the third respondent and therefore concluded that the decision of the commissioner was not one that a “reasonable decision maker in the position of the commissioner could not reach”.

- [19] The Labour Court thus dismissed the application with costs. The matter is now before us with the leave of that court.

The Appeal

- [20] The appellant argued that the commissioner committed a gross irregularity in that he recorded “evidence” that was not presented at the arbitration hearing and drew a conclusion based thereon. The appellant *inter alia* also argued that the only justifiable finding based on the evidence presented at the arbitration hearing would be that the third respondent had committed the misconduct alleged by the appellant and dismissal was the only appropriate sanction for that misconduct.

- [21] Firstly, it is clear to me that the Labour Court erred in finding that the third respondent was found “*guilty as charged*”. What the commissioner found was that the third respondent failed to comply with a rule that required him to have proper authorisation to remove items from the company premises. The findings of the

commissioner pre-supposed that the items being removed were his, whereas the charge was a slightly watered down version of theft.

[22] From the testimony presented at the arbitration, it is evident that the third respondent was found in possession of a box of Discs, at least six of which were the property of ISCOR, the employer of his employer and that he intended removing this box from ISCOR. The crucial question is whether or not the third respondent was in lawful possession of these Discs, and not what was contained in the Discs. In this regard the evidence led by the appellant was that the Discs were the property of ISCOR: two of the Discs dealt with ISCOR departments and four others dealt with measuring and maintaining the furnaces; that only the appellant's witness and ISCOR engineers were entitled to be in possession of those Discs; and, that the Discs could only be viewed on the ISCOR computer. The next issue was how did the third respondent come to be in possession thereof? According to the third respondent's evidence he found the Discs in a bin. What he was doing scavenging in a bin is beyond comprehension. Secondly, the bin in which he claims to have found the box of Discs was the one near to a shop in the vicinity of where he resides and not at the ISCOR premises. It takes a leap of faith to believe that Discs under the control of one's employer would find its way to a rubbish bin nearby a shop near one's residence.

[23] If the third respondent is to be believed, not only does he then take possession of these Discs from the bin, he asks Mr Delihlazo to inspect the Discs on a computer owned by his friend (Mr

Delihlazo's) to ascertain if there were any games on the Discs. To what end did he want to establish this when he did not own a computer to operate the games is not known. According to him, because Mr Delihlazo could not get access to a computer, he brought the Discs back to work. Everyone knew that if private property is brought into ISCOR a form needed to be completed. Why did Mr Delihlazo not fill in the form, or if he did why was it not produced at the hearing. Mr Delihlazo was not called to testify at the arbitration¹. In any event, if the possession by the third respondent of the Discs was as innocent as he claimed why did he not seek to view them at work to ascertain if they contained any games.

[24] The version of the third respondent was clearly so farfetched that the only reasonable conclusion that can be drawn from it is that he had lied at the arbitration hearing. Consequently, the only logical deduction that can be made from the evidence presented at the arbitration was that the third respondent was at the very least guilty of being in unauthorised possession of ISCOR's property, that is, he was guilty of the charge preferred against him.

[25] In the matter of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² it was held that a court would only review and set aside the decision of a commissioner if it is found that the award is "one that a reasonable decision maker could not reach" but, in arriving at that conclusion the court must determine whether or not the commissioner had due regard to all of the evidence that was

¹ Mr. Delihlazo did testify on behalf of the third respondent at the internal disciplinary hearing but his evidence differed from that of the third respondent in crucial respects.

² 2008 (2) SA 24 (CC)

properly placed before him or her. Where a commissioner records the evidence led before him totally incorrect and the evidence is material to the determination of the misconduct, then clearly the commissioner has committed a gross irregularity which renders his decision liable to be set aside. How the third respondent came to be in possession of the Discs was a material issue to the misconduct charge levelled against him and the commissioner got it totally incorrect, what he records as being the evidence led by the third respondent was not led at the arbitration hearing but at the disciplinary hearing. This error on his part evinces a failure to consider the evidence properly before him and thus renders his award liable to be set aside.

[26] An evaluation of the evidence, as I have said earlier can lead to only one conclusion and that is, that the third respondent had committed the misconduct of being in unauthorised possession of the property of ISCOR as found by the Disciplinary Hearing.

[27] Turning then to the issue of sanction, it is so that the sanction should be that of the commissioner. In this matter the commissioner correctly indicated that dismissal is a drastic measure and must be reserved for serious transgressions. There can be no doubt that, had he properly considered the evidence and came to the only conclusion that I believe he should have come to, with respect to the misconduct, then he would have found the transgression committed by the third respondent extremely serious compounded by the giving of false testimony. Not only did the third respondent lie about where he found the Discs, but continued to maintain his innocence; he was in possession of property that

was not owned by his employer but ISCOR that had contracted his employer to provide a service, thus potentially risking the possible continuation of his employer's contract with ISCOR with the possible prejudicial consequences to his fellow workers. The third respondent was clearly dishonest. His 17 years of service and clean record cannot, in my view, serve to lessen the seriousness of his misconduct and save his employment, particularly where ISCOR has indicated that it will not allow him to return to its premises.

[28] In the circumstances dismissal is the only appropriate sanction for the misconduct committed by the third respondent and as such I am of the view that because the evidence presented at the arbitration hearing could also only lead to the finding that the dismissal of the third respondent was for a fair reason.

[29] While I am cognizant of the fact that the Labour Court or the Labour Appeal Court should not substitute its decision for that of the commissioner, I am the view that it may do so where the factors as set out in Baxter: Administrative Law³ are present, these include:

- (i) where the end result is any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;
- (ii) where further delay would cause unjustifiable prejudice to the applicant; or,
- (iii) where the court is in a good position to make the decision itself.

³ Baxter: Administrative Law 3rd Edition at pages 682 to 685 and the authorities therein cited.

[30] In this matter all of the factors listed in the above paragraph are present and it would thus serve no purpose to refer the matter back to the CCMA for a rehearing *albeit* by a commissioner other than the second respondent.

[31] Finally with regard to costs in terms of law and equity I believe this is a matter in which there should be no order as to costs.

Order

[32] In the result I make the following order:

(i) The appeal is upheld

(ii) The order of the Labour Court is amended to read as follows:

“(a) The arbitration award dated 20 May 2006 issued by the Commission for Conciliation, Mediation and Arbitration under its case no GAJB 8996-05 is hereby reviewed and set aside and replaced with the following:

‘The dismissal of the employee party was both substantively and procedurally fair.’

(b) There is no order as to costs.”

(iii) There is no order as to costs in the appeal.

Waglay DJP

I agree.

Zondi AJA

I agree.

Molemela AJA

Date of Hearing: 23 November 2011

Date of Judgment: 17 February 2011

Appearance for the Appellant: Adv. S Du T Maritz

Instructed by: D J Greyling Inc

for the Third Respondent: N.F. Masenamela Inc