



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA12/2013

In the matter between:

NATIONAL UNION OF MINE WORKERS

OBO JOHAN SMITH

Appellant

and

NAMAKWA SANDS, A DIVISION OF

EXXARO TSA SANDS (PTY) LIMITED

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

ELVISO ADAM N.O.

Third Respondent

Heard: 27 February 2014

Delivered: 23 October 2014

Summary: review of arbitration award- employee dismissed for misconduct- employee electing not to answer questions relating to his alleged accomplice during arbitration proceedings. – Commissioner drawing adverse inference against employee- Commissioner finding dismissal fair- Labour Court upholding award- Appeal – evidence showing that employee made aware that adverse inference may be drawn against him – commissioner’s drawing of adverse inference against employee reasonable. Appeal dismissed with costs.

CORAM: Tlaletsi DJP, Hlophe et Coppin AJJA

JUDGMENT

TLALETSI DJP

Introduction

- [1] In this matter, the appellant, acting on behalf of Johan Smith (the employee), appeals against the decision of the Labour Court (per Steenkamp J) dismissing the review application brought by the appellant in respect of the award issued by the third respondent (the Commissioner) under the auspices of the Second Respondent (the CCMA). In the award, the commissioner upheld the dismissal of the employee by the first respondent ("the respondent"), his employer.
- [2] The appellant relied on three grounds of review, namely; that the commissioner committed a reviewable irregularity in mentioning to the employee that he may refuse to answer questions relating to one Shaun Coetzee (Coetzee) without warning him that an adverse inference may be drawn about his failure to answer such questions; that the commissioner failed to conduct a proper assessment of the evidence before him and, lastly, that the commissioner's finding was one that a reasonable decision-maker could not have made.
- [3] The appellant is in this Court with leave of the Labour Court. However, in its ruling on the application for Leave to Appeal, the Labour Court did not specify the reasons why leave to appeal was granted.

Background

- [4] Except where otherwise indicated, the following background facts are largely common cause. The employee was employed by the respondent as a Plant Operator from 5 January 2009 at its Namakwa Sands plant smelter. He was summoned to a disciplinary hearing on 8 August 2011 on the following misconduct charges:

- a. Falsifying records at weighbridges;
- b. Conspiring in theft of pig iron;
- c. Conspiring in granting site access to a contractor under a false name;
- d. Breach of the contract of employment and undertakings; and
- e. Breach of the trust relationship between employer and employee.

[5] The employee failed to testify at his disciplinary hearing. He elected to give no account of his actions contending that it was up to the respondent to prove his guilt. He was found guilty of the instances of misconduct and was subsequently dismissed on 29 September 2011.

[6] Aggrieved by his dismissal, the appellant, acting on behalf of the employee, referred a dispute to the CCMA contending that his dismissal was substantively unfair. The respondent opposed the referral, contending that the employee's dismissal was fair. The matter was arbitrated on 4 May 2012 after an unsuccessful conciliation. At the arbitration, the employee was assisted and represented by two trade union officials. The respondent was represented by an official of the "Afrikaanse Handels Instituut", an employers' organisation.

[7] The respondent tendered the evidence of several witnesses, namely, Claudene Bouwer (Bouwer), who was employed as the Logistics Coordinator; Frederick Johannes Potgieter (Potgieter), who was the head of Risk Management and Internal Investigations; Pietie Mouton (Mouton), the truck driver employed by Mouton Transport; Pierre Cornelissen (Cornelissen), who was the respondent's Information Technology technician, Devern Isaacs (Isaacs), the Training Practitioner and Junior Koegelenberg (Koegelenberg). The employee testified in his defence this time around.

[8] The employee's duties entailed among others, working at the smelter's weighbridge office and supervising the bagging of orders. The purpose of the weighbridge is to weigh and process consignments of materials, either leaving Namakwa Sands on their way to various clients, or coming in to Namakwa Sands from some or other suppliers.

- [9] It is common cause that the weighbridge operated through an IT system, which automatically generated and stored a transaction number for each consignment that is weighed. The times and date of each weighing and the weight of each consignment were automatically recorded. The respondent's version was that the information on the IT system was capable of being manipulated. Further details namely, the product, pig iron or oxygen, for example, and its source or destination were entered into the system by the weighbridge operator through a computer located in the weighbridge office.
- [10] According to the evidence, the weighing and processing of each consignment was termed a "transaction". Each transaction was recorded in three databases; the "local database" (from the Personal Computer (PC) in the weighbridge office); a "master database" and an "archive database". The latter two were located in a server room in the administrative section of the company.
- [11] It is further common cause that the system was designed to allow for corrections to be made to the product description, as well as to the customer's name, which had been entered into the database in respect of any given transaction. However, it did not allow any changes to be made to the automatically generated data, namely, the transaction number, the weight of the consignment and the time and date. Furthermore, the system did not allow any changes whatsoever to be made to a transaction, unless a "reason" for making the change was specifically recorded.
- [12] In addition, the original entry in respect of each transaction was automatically recorded on the central database, notwithstanding any changes that may subsequently have been made to the record of the transaction. The system was designed not to allow any modifications to the record of the original entry. The effect was that while the local database would reflect a transaction as modified, the central database would separately record the original entry and any subsequent modifications. The modifications would be classified under the headings "Original Transactions"; "First Modifications"; "Second Modifications" and so on.

[13] The standard procedure for processing a shipment at the Namakwa Sands was as follows:

13.1 Namakwa Sands used external contractors to transport its products. The empty truck due to transport the shipment arrives at the smelter and is weighed at the weighbridge. At this stage a transaction number is generated.

13.2 The truck is then loaded with pig iron, oxygen, or whatever the product may be, and weighed again. The difference between the weights of the truck when loaded and when empty gives the weight of the consignment.

13.3 All three weights of the truck before and after loading and of the consignment itself, are automatically recorded, as are the times of the weigh-ins. The other details, the customer's name and the type of product are entered into the system by the weighbridge operator.

13.4 Three tickets are then printed out, reflecting all of the details of the transaction. Each ticket is signed over carbon paper by the driver and on behalf of the company, creating two additional copies of each. Each transaction is thereby recorded in hardcopy form in three sets of tickets, each set in triplicate as well as electronically on the database.

13.5 One set of tickets is left at the security gate by the truck driver on his way out. The hard copy of a ticket would be forwarded to Namakwa Sands internal departments, such as the marketing department on the evening following the day on which the ticket was generated.

[14] Access to the smelter was controlled by requiring employees to use access cards. Other visitors had to sign in at a security gate. There was no further access control to R&D's weighbridge office and tea room. The tea room was housed in a separate building, situated about 50 metres away from the office. These buildings were always open to all smelter staff and shift workers. It is common cause that there would be a number of smelter staff and shift workers on duty at any given time. However, the respondent's version is that

the employee was the only employee in his shift on the evening of 12 May 2011 that had the knowledge to operate and possibly to “manipulate” the weighbridge systems.

[15] What follows is what led to the dispute in this case. During April 2011, someone phoned the respondent. He presented himself as a client who intended to purchase pig-iron from an undertaking called Reclamation Group. He was enquiring on the specification of the respondent’s pig-iron. The enquiry aroused some suspicion as the respondent never supplied Reclamation Group with pig iron. An investigation was initiated by Potgieter as the head of Risk Management. He began by checking all transactions involving pig iron with some special care and attention.

[16] During June 2011, a certain weighbridge ticket with transaction number 45669, which was considered suspicious, was brought to the attention of Potgieter. The latter’s investigation into the circumstances of that transaction revealed the following facts:

16.1 The electronic record of the transaction reflected an incoming shipment of 21 tons of oxygen on 12 May 2011 with Afrox recorded as the “handler” (the undertaking contracted to transport the consignment). The truck had first been weighed shortly before 14:00; and again at around 14:27, this time loaded.

16.2 The original hard-copies of the corresponding weighbridge ticket were apparently missing, and only one carbon copy located at security, could be found.

16.3 The security’s copy of the ticket reflected a consignment of pig-iron bound for a company called Atlantis Foundaries (Pty) Ltd and showed the transporter to have been Mouton’s Transport. The ticket was signed by the driver and by Chris de Wee, who had been working as the weighbridge operator at the relevant time. The transaction, number, date, times and tonnage were all similar to those shown on the electronic database.

16.4 Mouton's Transport replied to enquiries that they had not invoiced for this shipment as it had been cancelled. Atlantis Foundaries, for its part, had not received the shipment. Further investigations, which included an examination of the CCTV footage, revealed that there had been no Afrox trucks at the smelter on 12 May 2011. A Mouton's Transport truck had, however, arrived at the smelter. It had apparently been loaded with pig iron and had remained parked outside the premises until 17:00, when it had driven off.

16.5 It is common cause that the electronic records showed that changes had been made to the transaction at around 21:16 on the evening of 12 May 2011. In other words, the data showing a shipment of 21 tons of oxygen transported by Afrox and so on, was not the original record of the transaction. This was evident because a reason had been entered into the system at 21:16 being the word "CHANGER", which could only have been provided as a reason why changes had been made.

16.6 When the transaction was traced to the central database, it was discovered that the modified entry referred to above was saved as the original transaction, which indicated that the original transaction had somehow been deleted and the modified version saved in its place. This was however something that the IT system was not supposed to allow. An IT employee employed by the respondent confessed that he could not comprehend how this had been achieved.

[17] From the above information, the respondent suspected that a consignment of pig-iron had indeed been loaded onto a Mouton's Transport truck on the afternoon of 12 May 2011, that the pig- iron had been stolen, and that the electronic record of the transaction had been altered and manipulated that night in order to conceal the theft. According to the respondent, the employee was the only one on duty that evening that had knowledge as to how the weighbridge system operated.

[18] Potgieter managed to establish through the investigations that Mouton was the driver of the particular truck that had been parked outside the premises

until 17h00. Mouton was interviewed on the recommendation of the owner of the truck, Abraham Mouton. Mouton confirmed that he was the one who drove the truck, stole the consignment and delivered it to a scrap yard in Atlantis on the instruction of Coetzee who is the respondent's former employee.

- [19] Further investigation by Potgieter confirmed that the employee was working on the night of 12 May 2012 and had access to the weighbridge system on which the information was changed at 21h16. He drew all the reports and noticed that the employee started working at 18h37 for the 19h00 to 07h00 nightshift. He further discovered that the last dayshift employee left the premises at 21h13. Potgieter drew telephone records made from the weighbridge tea room and office telephones and discovered that numerous telephone calls were made to Coetzee with the most suspicious one being at 21h08 lasting 11 minutes. This is the time when the changes were made to the system.
- [20] Although every transaction is normally completed in triplicate, Potgieter could only get a carbon copy at the security gate. But for this carbon copy, his investigation would have been impossible. According to him, only a person who had the knowledge of the electronic system would have been able to change the information on the system. He testified that during his interview with Mouton, he received an access card from him, which he claimed to have obtained from the employee as a present from Coetzee. Mouton told him further that the employee phoned him to arrange for the access card to be dropped in his motor vehicle.
- [21] Mouton testified that he knew Coetzee from a previous occasion when the two of them stole a truck load of ash. He confirmed that he signed the document identified as A16 being the original weighbridge ticket for the pig-iron transaction of 12 May 2011. A certain Chris' signature is also on the document. He confirmed that Coetzee stole the consignment in issue. Mouton testified that his truck was loaded and parked outside the premises of the respondent. He then received a telephone call from Coetzee who enquired about the consignment. He undertook to phone him again. Coetzee phoned him again later, after about 10 minutes, and told him to drive away with the

load and drop it at West Coast Metals in Atlantis. He was reluctant to do so but Coetzee told him that he must co-operate as he never “dropped him” in the past. He assured him his inmates at the respondent (who he did not mention by name) would sort out the paperwork and the cameras. Mouton mentioned further that Coetzee threatened to hurt him and his family if he did not co-operate. As a result of the threat, he drove the truck and off loaded the pig- iron as planned.

[22] Mouton testified that he was at some stage phoned by the employee. He identified him by his voice, which was familiar to him. The employee told him that he had a small present from Coetzee that he wanted to put in his motor vehicle. He later found that an access card had been placed in the ashtray of his motor vehicle. He had been told that the reason for the access card was that no one at the respondent would notice the time he entered the premises. He did not personally see the employee placing the access card in his motor vehicle.

[23] Cornelissen’s evidence related to the workings of the IT system. He was responsible for designing the IT systems at the weighbridge. He traced the information path of document A17,(the changed document), but could not trace A16, which is the original transaction. He was unable to explain how it happened that the information on A16 was not in the system. He conceded that it could only have been done by someone “cleverer” than him. The loophole had now been closed. He confirmed that it would require someone with a basic understanding of the weighbridge system to make changes on the system. He was referred to transactions on documents A6 and C1 which were two different transactions and could not explain why they were made more or less at the same time. He, however, maintained that even if there was a system failure, the information such as the product details, vehicle registration etc. on the system, would not change.

[24] Isaacs’ evidence was tendered to show that the employee had some training in the weighbridge system. He testified that although he could not confirm that the employee received practical training, he obtained 100% mark in the theoretical component of the training. Furthermore, the undisputed copies of

the weighbridge tickets in the bundle of documents were proof that the employee ought to have been subjected to practical training as he would not have been allowed to sign off those consignments without the practical component.

[25] Koegelenberg confirmed that the employee was the only employee of the respondent who was on duty on the night of 12 May 2011 and was in charge of the team of contractors. Their functions that night were 'bagging', which involved "hanging up", "filling up", stacking pallets and their transportation by forklift to the warehouse. He mentioned that although there were five employees, the work they were doing could be done by three people. He confirmed that there were no shipments for the night and as such no one was supposed to be in the weighbridge office. He could not explain why there were two telephone calls made almost simultaneously to Coetzee from the office and the tea room respectively. He however, mentioned that the telephone calls did not show the duration of the calls i.e. in terms of the seconds. According to him, the tea room was about 50 metres from the office. He contended that the employee never tendered evidence that he was at all times at the "bagging", as he now contended in order to remove himself from the weighbridge office.

[26] As pointed out already, the employee elected to testify in the arbitration proceedings. His evidence, in a nutshell, was that on 12 May 2011, he was "on bagging duty" with four contractors. Their orders were set out and each member of the team had his duties on the plant. His duties entailed operating the forklift. Their target was 200 bags for the night and as such they had a lot to do and had no time to waste. They only had two breaks at 22h55 and at 02h55. He testified that he never received any practical training on the weighbridge. He was therefore assisted by a competent fellow worker at all times. Because of the role he played he had to have his signatures on the weighbridge slips. The employee admitted that he obtained a 100% mark on the theoretical component of the training, but explained that it was an open book test. Although he agreed under cross-examination that he was a weighbridge operator for the night and in charge of the LO Rall contract

workers, he deviated from this version in re-examination and mentioned that he was the supervisor and not the weighbridge operator as there were no shipments for the night. He mentioned that the weighbridge stayed open and was accessible to everybody.

- [27] The employee refused to answer any question relating to Coetzee. He was only prepared to admit that he knew him as an ex-employee. He questioned why Coetzee was not called as a witness. With regard to Mouton, he contended that the latter was uncertain about who phoned him and further that there were no telephone numbers to prove the telephone call.

The Arbitration Award

- [28] The commissioner analysed the evidence and considered the respective submissions made by the parties. He accepted Mouton's incriminating evidence that he was the driver of the truck that was used to steal the pig-iron; that Atlantis Foundaries did not receive the load or paid for it; that the changed documents relating to the transaction confirmed Mouton's evidence that he operated with an insider who dealt with the paperwork as promised; that the insider, who changed the documentation, phoned Coetzee's telephone number on numerous occasions during the night and at the relevant time when the weighbridge system had changes made to it, thereby connecting Coetzee to the theft, and that the latter aspect confirmed the reliability of Mouton's testimony as well as the witness.

- [29] The commissioner continued thus;

‘.....Pietie Mouton appeared to be a reliable witness. There was nothing personally for him to gain, but to incriminate himself. He was confident that it was [the employee] who phoned him as he recognised his voice and the [employee] said that it was him. The access card was indeed subsequently delivered with reference to Shaun Coetzee and the witness gave it to Mr Potgieter.’

- [30] On the suggestion that workers from other departments also had access to the weighbridge and could have tampered with the system by making changes to the transaction, the commissioner held that:

‘...this would have been risky for another person to take this chance knowing that a weighbridge staff member was on duty. Unless of course this staff member was aware of the scheme of things.’

- [31] On the suggestion that system failure could have caused the changes, the commissioner accepted the uncontroverted version that system failure would not only cause a specific data field change, but would completely erase the data and that it would be too much of a coincidence that only this transaction was altered that night. On the employee's refusal to answer questions, the commissioner held:

‘The [employee's] outright refusal to answer questions relating to Shaun Coetzee was also a matter of concern, in particular after Pietie Mouton connected him with Coetzee. This made it difficult for the respondent to test the credibility of the applicant's contention that they were only work colleagues. An inference could be drawn that he did not want to implicate Coetzee or himself under oath in considering the possibility of criminal proceeding. An isolated denial was not good enough under the circumstances.’

- [32] The commissioner concluded thus:

‘It appeared that based on the above that the most probable inference was that the [employee] made the changes to the weighbridge system on 12 May 2011 or at the very least was aware of the scheme of things. It appeared right through proceedings that the applicant was assessing his case based on the criminal standard of proof as he kept on referring to an outside court. It is correct that the onus of proof was on the respondent, but the standard was that of proof on a balance of probabilities. What was required was that the probabilities in the case be such that, on a preponderance, it was probable that a particular state of affairs existed. It is my finding looking at the circumstances of this case and weighing up the evidence that it was probable that the applicant was the one who changed the data on the system to conceal the theft or was at least aware of the person changing it and that he was connected to Shaun Coetzee in terms of this transaction or aware that Coetzee was running the scheme.’

The commissioner concluded that dismissal was the appropriate sanction as there was irreparable breakdown in the trust relationship. The theft was premeditated, carefully planned and involved substantial amount of money.

The Review

- [33] The appellant instituted review proceedings contending that the award of the commissioner was reviewable on the grounds that (a) the commissioner committed an irregularity in the conduct of the proceedings by failing to consider material evidence and misconduct in relation to her duties, by advising the employee not to answer any questions put to him in cross-examination about Coetzee and then using his refusal to answer questions to draw an adverse inference against him; (b) the commissioner failed to conduct a proper assessment of the evidence before him; (c) the commissioner's finding was one that a reasonable decision-maker could not have made.
- [34] The Labour Court found that there was no merit on the contention that the commissioner advised the employee not to answer questions but that it was in fact the employee's representative at the arbitration, Ms Thomas, who objected to the employee answering questions about Coetzee. With regard to the second ground that the commissioner did not properly consider the evidence before him in coming to the conclusion, that on a balance of probabilities, the employee had committed the misconduct, the Labour Court found that the commissioner could not be faulted for having found Mouton to be a credible witness, because the latter had been subpoenaed to testify, did not willingly assist the employer and had nothing to gain, but all to lose for incriminating himself. The contention therefore that he had every reason to lie was rejected. The further contention that the commissioner found that Mouton's evidence was "corroborated" by Coetzee, whereas Coetzee did not testify, was also rejected because that was not what the commissioner found. The Labour Court held that Mouton mentioned that Coetzee had phoned him and that that was not hearsay but Mouton's first-hand evidence.

[35] As regards the reasonableness or otherwise of the commissioner's award, the Labour Court held that:

'The arbitrator came to the reasonable conclusion, on a balance of probabilities that the most probable inference from all the evidence was that [the employee] had committed the misconduct. This was a reasonable inference and is not open to review based on the civil and not criminal, standard of proof'.

and concluded thus

'...the "most probable inference" to be drawn from the evidence before him, as the arbitrator found – was that [the employee] was involved in the conspiracy to steal pig-iron from Namakwa Sands on the evening of 12 May 2012. Mouton did not need access to the premises for that to occur; he had already stolen cargo. All that needed to be done on the evening was to change the information on the database; and the most probable person to have done that, was [the employee]. He was the only Namakwa Sands employee with the necessary knowledge who had access to the weighbridge; he knew Coetzee; and a number of telephone calls, including the one of 11 minutes were made to Coetzee while the [employee] was on duty. Taking all of these factors into account and disregarding the question whether the [employee] had left an access card in Mouton's car – the overwhelming inference is still that the [employee] was the one who committed the misconduct.'

The application for review was consequently dismissed with costs after both parties had submitted that costs should follow the result.

The Appeal

[36] The appellant's grounds of appeal against the judgment of the Labour Court boils down to that the Labour Court below erred in:

36.1 finding that the Commissioner had not committed a reviewable irregularity by failing to warn the employee after advising him that he did not need to answer questions, that an adverse inference could be

drawn from his silence or that the respondent's evidence could be accepted if not contradicted by him.

36.2 failing to find as a matter of fact that the commissioner had advised the employee that he did not have to answer questions.

36.3 finding that the conclusion of guilt reached was reasonable in all the circumstances, when the commissioner had misconstrued the test relating to proof by way of circumstantial evidence.

[37] In this Court, the main submission made by counsel on behalf of the appellant was based on the alleged reviewable irregularity of failure to warn the employee that after advising him that he needed not to testify about the alleged co-conspirator Coetzee, an unfavourable inference could be drawn from his failure so to testify. It was contended that because of this alleged reviewable irregularity, a large number of the aspects of the evidence were tainted by this irregularity which aspects the commissioner took into account in reaching his conclusion that, on the circumstantial evidence in existence, the employee was guilty as charged.

[38] Like the Labour Court did, it is, in my view, appropriate to quote from the relevant extract of the transcript where the appellant bases its main ground of appeal. The extract needs to be extended to cover the relevant parts of the cross-examination of the employee by the respondent's representative at the arbitration and not limit it to a small portion quoted out of context by the appellant. The transcript is in the Afrikaans language and reads thus:

Mnr Van Vuuren: Ek sien. Nou kom ons gesels 'n bietjie oor jou groot vriend Shaun Coetzee. Vertel 'n bietjie vir ons van Shaun Coetzee Mnr Smith.

Mnr Smith: Hy is 'n werkskollega

Mnr Van Vuuren: 'n Werkskollega. Hoe lank het julle mekaar geken?

Mnr Smith: Die tydperk wat ek nog by R&D gewerk het, die tydperk wat ek by R&D gewerk het.

Mnr Van Vuuren: Hoe lank was dit?

Mnr Smith: Daai was sewe maande.

Mnr Van Vuuren: Sewe maande?

ME Thomas: Commissioner kan ek gou 'n objeksie maak, as hy vir hom vrae vra oor Shaun, ek dink hy moet direkte vrae vir hom vra en nie vir hom vra wat weet hy van Shaun nie. Hy moet vir hom direkte vrae aan [the employee] rig.

Kommissaris: Die getuie wat nou getuig is nie die meneer se getuie nie. Die getuie kan of saamstem or nie saamstem nie. Dit maak nie saak nie, verstaan? Hy hoef nie saam te stem nie. Hy kan sê hy weet nie. Hy kan sê "moenie vir my sulke vrae vra nie..."

ME Thomas: So dit beteken hy hoef ook nie die antwoord te hê, die vrae te beantwoord nie?

Kommassaris: Hy kan se "Ek will nie antwoord nie."

Mnr Smith Ek sal geen vrae van Shaun Coetzee beantwoord nie, Commissioner.

Mnr Van Vuuren: Jammer, u sê Mnr Smith

Mnr Smith: Ek sal geen vrae in verband met Shaun Coetzee nie

Mnr Van Vuuren: Waarom nie?

Mnr Smith: Hy is 'n werkskollega en hy was gewees, 'and that is it.'

Mnr Van Vuuren: Ek sien, nou u se julle het sewe maande saam gewerk.

Mnr Smith: Ek het nou pas vir jou gesê ek gaan nie oor Shuan praat nie. Shaun is nie teenwoordig nie.

Mnr Van Vuuren: Ek sien. So kom ons kry dit net op record Mnr Smith want u se vir ons u is glad nie beried om enige vrae met betrekking tot Shaun Coetzee te antwoord nie?"

Mnr Smith: Kan u die persoon laat kom meneer? U bly sommer...(tussenbei)

Mnr Van Vuuren: Mnr Smith antwoord my vraag asseblief. Se u vir ons op record u is nie bereid om enige vrae oor Shaun Coetzee to antwoord nie?

Mnr Smith: Sekere vrae sal ek antwoord

Mnr Van Vuuren: Dankie. Nou kom ons kyk watter wil u antwoord.

Kommissaris: Hang gou vas. Watter vrae meneer – elke keer gaan ek nou moet ‘cover’ watter vrae nie, watter vrae of wat? How ver is u beried om te antwoord of sê u u gaan niks vra antwoord nie? Ek moet weet hoor? Ek wil hê – ek moet u beskerm en ek moet weet.....(tussenbei)

Mnr Smith: Ek kan vir u se Kommissaris...(tussenbei)

Kommissaris: Watter tipe vrae....(tussenbei)

Mnr Smith: Jammer, ek vra verskoning.

Kommissaris: Kan u vir u verteenwoordiger – dis die direkte vrae, moet direkte vrae vra.

Me Thomas: Direkte vrae vra....(tussenbei)

Kommissaris: En jy sal geen vrae antwoord...(tussenbei)

Mnr Smith: Ek sal – sorry, jammer....(tussenbei)

Kommissaris: Okay, hang gou vas, ne, hang gou vas. Hou net dit in gedagte wat ek gesê het met u verteenwoordiger, dan hoor ons nou watter vrae daar kom ne. Meneer, meneer, as u weer met die getuie praat dan gaan ek u vra om buitekant te sit, verstaan u, Mnr Apools.

Mnr Apools: Ja, okay.

Kommissaris: Verstaan u, as u weer met die getuie praat dan gaan ek u vra om buitekant te sit. Die verhoor het vir die

afgeloop twee dae baie goed afgeloop en ek gaan nou Mnr Van Vuuren vra ook om die 'temp' die 'volume' 'n bietjie af te bring, want die vrae was rustig gewees die hele verhoor gewees, reg, so....(tussenbei)

Mnr Van Vuuren: Ek neem kennis Kommissaris.

Kommissaris: So moenie dat ons hom nou uitrafel nie.

Mnr Van Vuuren: Ek sal my stemtoon sal ek aanpas. Ek is u dank verskuldig.

Kommissaris: Okay.

Mnr Smith: Kan ek gou-gou iets 'clear' maak?

Kommissaris: Okay laat ons hoor meneer.

Mnr Smith: Die meneer kan ek dan so vra, kom laat roep die persoon asseblief, dan sal ek die vraag antwoord. Ek sal geen vraag antwoord van Shaun Coetzee nie.

Kommissaris: U sê verder gaan u geen vrae beantwoord ... (tussenbei)

Mnr Smith: Van Shaun Coetzee nie.

Kommissaris: Okay

Mnr Van Vuuren: Kan u kyk na bladsy....(tussenbei)

Kommissaris: Reg, staan gou vas, staan gou vas. U sê u gaan geen vrae beantwoord van Shaun Coetzee nie. Mnr Van Vuuren u het gehoor wat die getuie sê en Juffrou Thomas u het gehoor wat die getuie sê. U verstaan dat van die goeters jou 'connect' aan Shaun Coetzee, maar dit is u reg om nie vrae te vra of te antwoord oor hom nie, hoor. Goed so. Waar was u?

[39] Later on during cross-examination, the respondent's representative put the following to the employee.

'Mnr Van Vuuren: Nou Mnr Smith luister na die volgende en dit gaan my argument aan die einde van die saak voor die Kommissaris wees. Jy is die weegbrugoperateur op skof daardie aand.

Mnr Smith: Dis korrek

Mnr Van Vuuren: Sestien minute oor nege word 'n weeg brug transaksie verander. Daardie vrag word gesteel. Ons weet mos al, daar is onbetwiste getuienis daaroor. Shaun Coetzee word wat ons weet wat reeds weg is by Namakwa Sands wat deel is van hierdie diefstal van hierdie vrag word uit jou weegbrug stasie uit word daardie aand nege keer gebel. Jy kom en jy sê vir ons jy wil nie vrae oor Shaun Coetzee antwoord nie. Die enigste afleiding daaruit gaan ek argumenteer is jy het geweet hierdie transaksie is daardie aand manipuleer; of jy het hom gemanipuleer terwyl jy met Shaun Coetzee oor die foon gepraat het.

Mnr Smith: U spekulêr nou. U maak....(tussenbei)

Mnr Van Vuuren: Ek maak 'n afleiding uit 'n klomp feite uit.

Mnr Smith: En ek kom terug na wat ek vir u gesê het, toe dit net – as ons van die 'tearoom' af beweeg ek en my group, en ek het vir u die tye al genome, die brug is nie sigbaar vir my daar wat ons werk nie, dis onmoontlik en die brug staan oop. Hy is nie uit 'ge-log' nie. Enige een kan in die brug beweeg, sekuriteit soos ek gesê het, die 'cleaners', Eldred se span, die 'furnace', die 'iron' daar, enige iemand kan in die brug in gaan.

Mnr Van Vuuren: Ek sien.

Mnr Smith: (onduidelik) Ek sê mos daai persoon weet dat hier gebel is meneer. Hoekom – hy het nie die persoon wat daar inkom gevra: "Shaun, wie het vir jou gebel nie?" Wie het hom gebel? U kan hom in roep en hom bel en

vra, Shaun Coetzee. Kontak vir daai man en vra vir hom wie het gebel.

Mnr Van Vuuren: Ek hoef nie vir Shaun Coetzee te bel nie. Die polisie sal Shaun Coetzee vorentoe met die strafsak uitsorteer en wie ook al saam met hom. Ek is net betrokke met hierdie arbeidsdispuut en ek wil vir u sê alles dui daarop dat u wat op die weegbrug gewerk het wat opleiding gehad het, wat vir Shaun Coetzee geken het, dat u hom daardie aand gebel het om die transaksie te kom manipuleer.

Mnr Smith: Wat vra u my eintlik nou?

Mnr Van Vuuren: Ek sê alles dui daarop dat u betrokke was by die manipulerings van die transaksie.

Mnr Smith: Meneer u maak wille allegasies. Kan dit in die Buitehof bewys wat u nou daar se meneer? Kan u dit bewys in die buitehof?

Mnr Van Vuuren: Ek hoef niks in 'n buite hof te gaan bewys nie.

Mnr Smith: U is aangewys meneer

Mnr Van Vuuren: Ek is nie in 'n buitehof nie, nou(tussenbei)

Mnr Smith: Sorry meneer, kan ek gou iets vra? Dit gaan oor my naam, my reputasie....(tussenbei)

Mnr Van Vuuren: Nou maar...(tussenbei)

Mnr Smith: U is nou besig om my naam weg te vat, my toekomst deur wilde allegasies te praat, hoekom laat u eers daai persoon laat kom nie, en vra vir Shaun wie het vir hom die hele tyd die aand gebel met die 'change' van die transaksie.'

[40] The grounds of review on this aspect are without merit. It is clear from the quoted excerpts of the transcript that the employee was asked about his

relationship with Coetzee and he answered the questions. His representative (Ms Thomas) is the one who objected to the line of questioning insisting that direct questions be asked. It was after this objection that the commissioner intervened and said that the employee could agree or not agree. He mentioned that the employee did not necessarily have to agree to what was asked. He could also say that he does not know, or say don't ask me such questions. His representative then asked whether it also meant that he could respond by saying he is not willing to answer the question. The commissioner responded that he could even say "I will not answer". The employee then made it clear that he will not answer any question about Coetzee. The respondent's representative asked him why not and the employee replied that he was a work colleague and "that is it". He was asked if he was now saying they worked together for seven months and the employee replied that he had just said to him that he was not going to talk about Coetzee, he was not present.

[41] The employee was questioned further and asked if he was placing it on record that he was not prepared to answer any question about Coetzee and he replied that he will only answer certain questions. An interaction ensued between the commissioner, respective representatives and the deponent to the founding affidavit, Pretorius. The latter was warned not to speak to the employee during the proceedings. The employee having insisted that he was not going to answer questions about Coetzee, the commissioner intervened by communicating that the two representatives had heard what the witness said and directly communicated as follows to the employee "You understand about the things that connect you to Shaun Coetzee, but it is your right not to ask or answer questions about him, hear."

[42] The commissioner, in my view, did explain to the employee that there were things that connected him to Coetzee. It should have been clear to the employee and his two representatives that he was also implicated through Coetzee in the commission of the misconduct and as such his failure to deal with that evidence would be fatal to him. To say therefore that the commissioner should or ought to have told the employee if he failed to answer

questions about Coetzee an adverse inference would be drawn is in my view taking the matter too far. It is clear from the quoted transcript that the employee understood that he was implicated by the evidence relating to Coetzee and did not want to implicate himself further. He was selective in answering questions electing to answer those that did not implicate him. To now contend that the commissioner advised the employee not to answer questions is not only false but misleading. What the commissioner said is quoted out of context with most of what he said in response to the objection by Ms Thomas and the employee's refusal to answer being excluded.

[43] It is not correct to say that the employee was not at all made aware of the consequences of him not answering questions about Coetzee. The respondent's representative from the quoted excerpt did indicate to him that he was going to argue to the commissioner at the end that the employee was the weighbridge operator that evening and he replied in the positive. He continued to say 16 minutes after nine the weighbridge transaction was changed; that Coetzee who was no longer employed at Namakwa Sands who was part of the theft was phoned nine times from your weighbridge station and yet "you come and say to us you do not want to answer questions about Coetzee". He mentioned further that "the only inference therefrom, I am going to argue, is that you knew that this transaction was manipulated that night, or you manipulated it whilst you and Coetzee were speaking on the telephone. The employee's answer was that he was speculating. To say therefore that the employee was not made aware or warned that an adverse inference would be drawn against his refusal to answer questions about Coetzee is therefore incorrect. The commissioner may not have said it word by word as contended, however the employee's attention thereto was drawn by the commissioner and the respondent's representative.

[44] The submission by the respondent's counsel that the cases relied upon by the appellant are all distinguishable from the facts and circumstances of this case has merit. In *Klaasen v CCMA and Others*,¹ the employee was unrepresented and the irregularity was a failure to advise him that he had to

¹ (2005) 26 ILJ 1447 (LC).

testify and not merely believe that his exculpatory statements constituted evidence. The employee made these statements during his opening remarks and made an attempt to put his version to the witnesses during cross-examination. When asked to present his case he called eight witnesses to testify on his behalf. The evidence of his witnesses was not at all relevant to the issue in dispute. He did not testify believing that he had already placed his version before the commissioner. In his written submissions at the end of the hearing he again made reference to his version that he related during his opening statement. The commissioner without advising him that he was supposed to place his version under oath relied solely on his failure to testify and accepted the employer's evidence as uncontroverted. In *casu*, the employee was represented and had an opportunity to answer questions relating to Coetzee and consciously refused to do so. Furthermore, his refusal to answer some of the question is not the sole reason why he was found guilty of misconduct allegations against him.

[45] In *Consolidated Wire Industries (Pty) Ltd v CCMA and Others*,² the Court dealt with laymen who were unrepresented by legal practitioners and the arbitrator having found in his award that a witness testified on an issue when it was in fact common cause that he had not. The Court remarked that when a version was changed or a new version was suddenly presented, the arbitrator must take charge of the proceedings since there were no pleadings to tie the parties to a version or legal representative to advise the parties. These are not the circumstances in this case.

[46] The adverse inference drawn against failure to answer questions about Coetzee is but one of the many factors that were taken into account in finding the employee guilty. There are several reasons which have been referred to above in the award and in the judgment of the Labour Court supporting the award of the commissioner. His decision is supported by the evidential material on record and is one that a reasonable decision-maker can make. What the appellant is trying to do is to subject the decision of the commissioner to an appeal and not review. It in fact challenges the factual

² (1999) 20 ILJ 2602 (LC).

findings made by the commissioner which are supported by the evidence on record. The rest of the grounds of the appeal are for the above reasons also without merit. The inference drawn by the commissioner to the effect that the employee is the person that phoned Coetzee and also manipulated the computer system is supported by the objective facts outlined above. These objective facts exclude any other reasonable inference being drawn.³

[47] For the reasons set out above, the appeal should fail. It would be in accordance with the requirements of the law and fairness that the appellant should pay the costs of the appeal.

[48] In the result, the following order is made:

The Appeal is dismissed with costs.

Tlaletsi DJP

Hlophe et Coppin AJJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT:

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Instructed by Cheadle Thompson & Haysom

FOR THE RESPONDENT:

Mr G.C. Pretorius SC

Instructed by Shepstone & Wylie

³ See R v Blom 1939 AD 188, Schmidt & Rademeyer: *Law of Evidence*, LexisNexis at 3-8.