REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: DA 15/2012

In the matter between:

UNILEVER AFRICA (PTY) LTD	**Appellant**
and	
N P MBEKWA, N.O	**First Respondent**
FAIZEL MOOI, N.O	**Second Respondent**
COMMISSIONER FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Third Respondent**
BONGA KWITSHANA	**Fourth Respondent**

Heard: **14 November 2013**

Delivered: **13 February 2015**

Summary: Review of arbitration award – employee charged and dismissed for breaching company vehicle policy- arbitrator reinstating employee- Labour Court finding that arbitrator not applying his mind to material evidence and that employee guilty of misconduct – Labour Court however finding that dismissal unfair because no evidence from line manager that employment relationship broken down. Appeal – evidence showing employee guilty of misconduct and that trust relationship broken down – employee in a senior management position owing a duty of trust – breaching that fiduciary duty compromising the trust employment relationship. Dismissal appropriate sanction – Labour Court and arbitration award set aside- Appeal upheld.

JUDGMENT

MOKGOATLHENG AJA

Introduction

[1] This is an appeal against the judgment of the *court a quo* (Cele J) in terms whereof the appellant's review application to set aside the second respondent's award was dismissed. The *court a quo* held that although the fourth respondent was guilty of the infraction with which he was charged, his dismissal was substantively unfair. Consequently, the *court a quo* ordered the reinstatement of the fourth respondent. The appeal is by leave of the *court a quo.*

Factual Matrix

[2] The fourth respondent was employed by the appellant as a senior divisional sales manager earning a salary of R500 000 per annum. Four regional sales managers and 15 sales representatives reported to the fourth respondent. In addition to his salary, pursuant to his employment contract, the fourth respondent received a monthly motor vehicle allowance in the amount of R10 000.00 which he used to fund the purchase and maintenance of his company vehicle.

[3] In terms of the appellant's vehicle policy, the fourth respondent was furnished with a company credit card which he utilised for fuel and his company vehicle expenses. The appellant's vehicle policy regulated the use of pool and hired vehicles in two circumstances: firstly, being in the case of a manager awaiting delivery of a new vehicle and secondly being in the case of business travel.

[4] In terms of clause 8.13 of the appellant's vehicle policy, the company was not required to provide a substitute vehicle in the event of the temporary unavailability for whatever reason of a manager's normal vehicle. In the case of business travel, the appellant's vehicle policy provided:

<u>*'Operational Managers*</u>

(a) clause 8.13(a) of the vehicle policy provides: *Managers who are newly promoted or engaged into a position that has been classified as operational sales and are awaiting delivery of a new vehicle, may have the use of a pool car until such time as the Manager has taken delivery of his/her car;*

<u>*Business Travel*</u>

(b) *clause 8.13(b)* provides: *where a Manager is temporarily without transport and is required to travel on company business, it is acceptable for the company to provide an alternate mode of transport for these business trips. This is in line with company policy as applicable to other members of staff who may be required to travel on company business; and*

(c) *clause 8.13(1)(b) provided: "outside of the above exceptions, employees are expected to make their own plans, at their own expense for substitute vehicles, and the company will not provide pool cars and the like.'*

[5] On or about 17 July 2009, the appellant received an anonymous tip off to the effect that the fourth respondent was making unauthorized use of pool vehicles. The whistle blower stated *inter alia* that the fourth respondent "*leaves his own vehicle at home and then drives the company vehicle on a daily basis, even over weekends.*"

[6] On 7 October 2009, the fourth respondent was charged with: *"gross misconduct in that he wrongfully utilized company pool vehicles without authority*." On 21 October 2009, and pursuant to a disciplinary enquiry, the fourth respondent was dismissed. The fourth respondent noted an appeal against his dismissal. On 27 October 2009, the appeal was dismissed. On 13 November 2009, the fourth respondent referred the dismissal dispute to the CCMA for conciliation contending that the appellant's sanction in dismissing him from his employment was unreasonably severe. The conciliation was unsuccessful and the dispute was referred to arbitration.

[7] On 3 June 2011, the second respondent in his award held that the dismissal of the fourth respondent was substantively unfair and retrospectively reinstated him. The second respondent amongst others held: "*Firstly, the crux of the appellant's case was that the fourth respondent did not have permission*

to utilize the appellant's pool vehicles. The appellant could not substantiate this contention with any documentation demonstrating a rule to this effect.

Secondly, the respondent contended that the use of the pool vehicle was unauthorised and unlawful as the fourth respondent had used it for 115 days. This cannot be the test for unlawfulness as Jardine the appellant's Human Resources Manager conceded that if the fourth respondent's vehicle was damaged for a day or two he would not require permission to utilise a policy vehicle. The fourth respondent's contention that his vehicle was damaged and was taken in for repairs a number of times was not refuted.

Thirdly, the appellant contended that the fourth respondent required the permission of his line manager to use the pool vehicle if he was going to require it for more than a day or two. No proof of this by the leading of the line manager's evidence was tendered nor was any documentation proving any such rule was tendered. The applicant's defence that as a manager he did not need to request permission of his line manager to use the pool vehicle for business purposes is therefore probable."

[8] The court *a quo,* after analysing and evaluating the evidence in the review, correctly found that the second respondent had misdirected himself in his assessment of the evidence tendered by Jardine on behalf of the appellant. The court *a quo* correctly found that the fourth respondent was obviously guilty of the infraction with which he was charged. Further the court *a quo* found that the "*applicant was able to show that it was very probable that the fourth respondent used the appellant's pool cars during the period of 88 days, that is between 16 March 2009 to 15 July 2009, while he was simultaneously using his subsidised motor vehicle that this was clearly prohibited by* clause 8.13(1)(b) *of the appellant's motor vehicle policy…"* Further the learned judge found that for the period 12 August to 31 August 2009, that is 20 days, the fourth respondent qualified to use the appellant's pool vehicles provided he could show that his company vehicle was out of commission.

[9] The learned judge correctly found that the fourth respondent bore the *onus* to show his entitlement to use the appellant's pool vehicles during the remainder

of the period but held that he had failed to discharge the *onus* he bore because his evidence lacked details of when exactly his company vehicle was in and out of garages for repairs.

[10] Further the court *a quo* correctly held: *"that the fourth respondent did not produce any records of such repairs. It remained doubtful whether he resorted to pool cars due to the unavailability of his vehicle. This is more so as in the preceding period he used pool cars while his car was up and running. The fourth respondent's version ought not therefore to have been accepted as probable. It follows that his use of the pool cars during this period was unauthorised...The fourth respondents unauthorised use of pool cars encompasses a period of 108 days.*"

[11] On 8 July 2011, the appellant launched an application to review and set aside the second respondent's award. The court *a quo* dismissed the review application and upheld the second respondent's award that the dismissal of the fourth respondent was substantively unfair. The court *a quo* retrospectively reinstated the fourth respondent with effect from 21 October 2011.

[12] With due respect, there are several striking anomalies in the judgment of the court *a quo* which renders its reasoning and conclusions unsustainable. The learned judge correctly found that the second respondent's award was flawed in that he had not properly applied his mind to the evidence before him, but the court *a quo,* despite this conclusion, failed to review and set aside the second respondent's award. The learned judge, nevertheless, in his order, amended the second respondent's award which ordered that the fourth respondent's reinstatement should be with effect from 1 January 2011, by ordering that the reinstatement should be with effect from 21 October 2011.

[13] After having found that the second respondent had committed a gross irregularity in the assessment of the evidential material before him because the evidence clearly demonstrated the guilt of the fourth respondent of having without lawful authority utilised the appellant's pool vehicles for a period of 108 days, the learned judge misdirected himself by dismissing the application

to review and set aside *“the second respondent ‘s award wherein he found that ‘the appellant had not proved on a balance of probabilities that the fourth respondent had acted wrongfully or unlawfully in using the company pool car, that consequently, that the fourth respondent’s dismissal was substantively unfair.”*

[14] Paradoxically the learned judge although he upheld the second respondent’s award, he pertinently held in the review application that the fourth respondent was guilty of the infraction he was charged with. This finding in essence contradicts the learned judge’s upholding of the second respondent’s award.

[15] Notwithstanding the learned judge’s express finding that the fourth respondent was guilty as charged, he found that in the absence of evidence from the fourth respondent’s line manager that the trust relationship had broken down, reinstatement of the fourth respondent was warranted. In my view, the learned judge’s premise that the appellant’s failure to call the fourth respondent’s immediate line manager to testify on this aspect was decisive is an erroneous misdirection.

[16] In my view, the learned judge incorrectly held that because Jardine as the appellant’s Human Resources Manager did not work directly with the fourth respondent, he was incompetent to testify regarding the breakdown of the trust and employment relationship, because “*Jardine’s bold but unsubstantiated statement made in this regard carried little evidential value when seen against the fact that the fourth respondent was remorseful for his misdeed.”*

[17] The learned judge reasoned that although the fourth respondent committed gross misconduct over a period of 108 days which could lead to dismissal depending on the circumstances of each case, in the absence of satisfactory evidence in this regard, reinstatement as a sanction as already alluded to by the second respondent appears to be fair in the circumstances. I demur.

[18] There is no lawful obligation on an employer to lead only the subjective evidence of a line manager to show that there has been a breakdown in the

trust and employment relationship which justifies the dismissal of an employee.

[19] Jardine is the appellant's Human Resources Manager and was the appellant's witness at the arbitration proceedings Jardine testified that as the appellant's Human Resources Manager, he was apprised of and *au fait* with the appellant's human resources development and employment policies. I agree with the appellant's counsel that because Jardine was not the fourth respondent's immediate manager he is not disqualified from expressing a view about the appellant's trust and employment policy regarding what the appellant regards as dismissible offences leading to the breakdown of the trust and employment relationship.

[20] In my view, the court *a quo* adopted a superficial fundamental flawed approach with regard to whether the fourth respondent was remorseful and also regarding the appropriate sanction having regard to the gravity of the misconduct. The fourth respondent was a senior divisional manager in charge of four sales managers and 15 sales representatives who also required the use of pool vehicles under his management.

[21] The fourth respondent grossly breached the appellant's vehicle policy over a period of 108 days. The fourth respondent's conduct involved a serious and sustained breach of trust amounting to misappropriation of the appellant's resources for his personal gain. The fourth respondent was a senior divisional manager in a position of trust. The fourth respondent's misconduct was severely gross and involved dishonesty and fraud.

[22] The fourth respondent's conduct was so manifestly dishonest and his lack of remorse or appreciation for his wrongdoing so egregious, that the appellant's decision of dismiss him was fully justified. The fact that the fourth respondent abused his fiduciary position of authority and trust to remove and utilise the appellant's pool vehicles at his will goes to the heart of the trust and employment relationship which an employer is entitled to demand or expect from a senior manager.

[23] The fourth respondent's misconduct amounts to dishonesty calculated to destroy the trust and employment relationship. When an employee neither acknowledges his/her wrongdoing nor does "*come clean*" with the full facts of the misconduct, the continuance of the trust and employment relationship is rendered impossible. In his case, the fourth respondent at his disciplinary enquiry pleaded guilty. In the arbitration proceedings, the fourth respondent recanted his plea of guilty which he tendered in the disciplinary enquiry, and he also recanted the statement he made in his plea in mitigation that he should not be dismissed by denying any wrongdoing in the arbitration proceedings.

[24] In the arbitration proceedings, the fourth respondent did not show remorse for breaching clause 8.13(1)(b) of the appellant's vehicle policy, but he incongruously stated that he did not knowingly breach the appellant's vehicle policy. He also denied that he required permission from his line manager before using the pool vehicles, but this denial contradicted his concession after pleading guilty when reading his statement in mitigation in the disciplinary enquiry that he did require his line manager's permission to utilise the appellant's pool vehicle.

[25] In this matter, it cannot be argued that the fourth respondent misconduct was a "*once off*" event which was unlikely to recur. The test remains whether the effect of the fourth respondent's misconduct was such as to undermine or seriously damage the trust and employment relationship. The following *dictum* from the judgment of this Court in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[1] is apposite in this regard:"*It would in my view be very difficult for an employer to re-employ and employee who has shown no remorse [for dishonest conduct]. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly*

[1] (2000) 21 ILJ 1051 (LAC) at 1059D-E.

where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptable great."

[26] Although this Court acknowledges that not every dishonest act by an employee necessarily justifies dismissal, the ultimate test for the fairness of a dismissal for a dishonest act is whether the employer can reasonably be expected to continue to trust the employee concerned (see *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 589-90). The same consideration is sometimes phrased as follows: whether the continuation of the employment relationship would be intolerable for the employer. See *Pitcher and another assisted by the Cape Omnibus & Salaried Staff Union v Golden Arrow Bus Services (Pty) Ltd* (1995) 16 ILJ 1201 (ICO).

[27] The position regarding the trust and employment relationship has been admirably summarised by Grogan AJ in *Carter v Value Truck Rental (Pty) Ltd*

> *'It is trite that, both at common law and under the equitable dispensation created by the LRA, the employment relationship is regarded as one of the highest good faith: Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26B-F; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (1998) 19 ILJ 903 (LC) at 913E-*H; Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para *7 and the copious authorities there cited. The success of any enterprise depends on the absolute integrity and honesty of its employees, and any form of dishonesty or deception potentially may have more serious and far-reaching consequences at executive level: see, for example, JD Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC) at 1112-13. *'Honesty' in the employment context does not merely mean refraining from criminal acts; it embraces any conduct which involves deceit. As was observed in the Sappi Novoboard* case at 787D: *'Even if the respondent did not act dishonestly, if his conduct "was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as manager' (Sinclair v*

> *Neighbour* [1966] 3 All ER 988 at 989E-F) *the appellant was entitled to dismiss him.'*[2]

[28] Jardine's undisputed evidence regarding the fourth respondent's dismissal was that the sanction was appropriate having regard to the gravity of the offence. The fourth respondent committed gross misconduct which is premised on dishonesty and fraud over a protracted period of 108 days. The nature of the misconduct was significant and serious enough to warrant the fourth respondent's dismissal because neither the appellant nor his line manager Mehan Naaido were aware of fourth respondent's misconduct and it was discovered through a whistle blower.

[29] The fourth respondent used a pool vehicle for company purposes despite the fact that he was in possession of a company motor vehicle funded by the appellant whilst his wife simultaneously used his company motor vehicle for her personal purposes. The fourth respondent as a senior manager occupied a fiduciary position. He owed the appellant a duty to be frank and to account for his use of the pool vehicle.

[30] The fourth respondent's failure to make full disclosure of his misconduct in circumstances where as a senior manager he was under a fiduciary duty to do so, constitutes aggravating circumstances which compromised the trust and employment relationship.

[31] The misconduct the fourth respondent is guilty of strikes at the heart of the trust and employment relationship and ought to be objectively evaluated with reference to the seriousness of the misconduct. The fourth respondent's misconduct accordingly justified dismissal as an appropriate sanction.

<u>The Order</u>

[32] The appeal is upheld. The order of the court *a quo* dismissing the review application is set aside and replaced with the following order:

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[2] (2005) 26 ILJ 1051 (LC) at paras 22 and 25.

(i) The arbitration award of the second respondent dated 3 June 2011 is reviewed and set aside.

(ii) The fourth respondent's dismissal is fair.

(iii) There is no order as to costs.

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Mokgoatlheng AJA

Tlaletsi DJP and Musi AJA concur in the judgment of Mokgoatlheng AJA

APPEARANCES:

FOR THE APPLICANT:	Mr Watt-Pringle
	Instructed by: Norton Rose South Africa (Incorporated as Deneys Reitz Inc.) La Lucia Ridge, Durban
FOR THE FOURTH RESPONDENT:	Mr Khoza of Retail & Allied Workers Union, Pretoria