IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA5/17

In the matter between:

SIPHO QALINGA	**Appellant**
and	
COMISSION FOR CONCILIATION MEDIATION	
AND ARBITRATION	**First Respondent**
FEIZAL FATAAR N. O.	**Second Respondent**
CADBURY SA (PTY) LTD	
now known as MONDELEZA SA (PTY) LTD	**Third Respondent**

Heard: 30 August 2018

Delivered: 17 October 2018

Summary: Review of arbitration award – employee dismissed for concealing products which were found after search located in several places in the storeroom managed by employee – probabilities favour employer's versions that employee concealed products for appropriation in an authorised manner – commissioner's outcome reasonable – appeal dismissed.

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appellant, Sipho Qalinga (Qalinga) was employed by the Third Respondent (Cadbury). He was dismissed on a charge of unauthorised possession of goods in that he allegedly concealed in a storeroom controlled by him full "outers" (full cartons) of chocolates taken from the production lines; by implication, preparatory to misappropriation by him. Aggrieved, he referred a dispute to the Commission for Conciliation, Mediation and Arbitration for arbitration. The award upheld the dismissal. A review court upheld the award. The appeal lies against that order of the Labour Court.

[2] The question on appeal is therefore whether the award satisfies the test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] that the conclusion was one to which a reasonable arbitrator could not come.

Common cause and undisputed facts

[3] Qalinga worked in a factory producing sweets. A number of the finished products would be placed into "outers" or cartons. The system was that samples from each production run were removed from the production line and reserved.

[4] Some samples were used for testing in taste trays; about 10 -15 per day. Once the samples had been tasted and tested, the remainder of the contents of these outers were not to be consumed, but rather, this "waste" from the outers was supposed to be stripped of the wrapping, put into red waste bags and dumped in a Wastetec bin. Qalinga was responsible for doing so.

[1] [2007] 12 BLLR 1097 (CC)

[5] Other samples were removed from the production lines by Qalinga for “retention’. The rationale for the retention of samples, albeit temporary, was to enable a check or audit to be carried out if product from a given run was alleged in the market place to not be up to standard. Five retention samples were to be taken per day and put into drums and be marked with a date. Then, after a prescribed period of about a month, they would be discarded in the waste. The drums were stored in the retention store. Qalinga was responsible for collecting the samples, storing them and later discard them.

[6] In addition to retention samples, at head office, the Research and Development Department also undertook testing and required samples to do so. Qalinga collected these from the production lines for onward dispatch to head office. These items were also stored in the retention store awaiting dispatch every Friday.

[7] The rest of the production run was distributed to the market for sale.

[8] The persons who had keys to this store were Qalinga and Andrew Klackers, the Security Manager. Qalinga suggested there was a third key, but this was an assumption not substantiated.

<u>The controversy</u>

The Facts

[9] According to Marie Wessels, the Quality Control and Laboratory Manager and Klackers, a tip had been received from an unnamed person that Qalinga was stealing chocolates. A meeting in Klacker’s office was held with Wessels and other management personnel. It was decided to inspect the retention store. On 27 January 2010, a snap inspection of the retention store was carried out by Wessels and Klackers, in the absence of Qalinga.

[10] The store is divided into two parts. The main part was packed with drums. At the back, there was a smaller room, off the main space, in which documents were kept in boxes. The windows had been sealed.

[11] Wessels stated that there should be a search for outers of chocolates which, given the procedure alluded to, ought not to be there. Some outers were found between the drums. In the back room, at the bottom of a box of documentation, more outers were found, concealed. They found about 20 outers in various places in the store. At a later time, more outers were unearthed in the store and it was said by Wessels to be a total of about 40. Moreover, the stock was in the condition it was as it came off the production lines; ie full outers. A handwritten list alleged to be the stock found was prepared. [record: 483] Wessels also stated that this volume of stock could not have been collected on a single occasion but had to have been accumulated over time. The list of the discovered stock included reference to the products' expiry dates; these expiry dates range from one in April 2009 and the rest ranging from July to November 2010. The types of products were varied. Qalinga later, when confronted, denied, unconvincingly, that more than five outers were in the store.

[12] Only after the snap inspection was Qalinga called to the scene and confronted with what was alleged to have been found. He was asked by Wessels why there were outers in the store when she had previously told him not to keep outers in the store. Qalinga at first replied that she, Wessels, had told him to do precisely that. She denied it. Qalinga then said that there was "something in writing" to confirm that he got an instruction to keep outers in the store. He said the note was in the Quality Department. They then trooped off to see Geraldine Rapping, the packing technologist, in the Quality Department office. In her office, a handwritten note was produced. According to Klackers it read: "Please keep these aside for Sipho". The note does not substantiate the claim by Qalinga, as it related to samples of unused packaging wanted for testing, not the product itself.

[13] Qalinga continued to give several different explanations. He claimed that the outers leftovers were from a taste tray sample and that Whitten, the Chocolate shop manager, had told him to take them to the shop. Further, he professed utter ignorance of how 40 outers could have found their way into the store.

<u>Analysis</u>

[14] The arbitrator held that the management version was to be preferred. In my view this conclusion is unassailable. The probabilities favour that outcome, no less than any considerations about individual credibility. Although there was one other key held by Klackers, the probabilities are against him appropriating the stock and concealing it in the store. Qalinga alone could roam about the factory with stock and not arouse suspicion. Thus, for all practical purposes, Qalinga had sole access. No reason exists to disturb these findings.

[15] The real substance of the defence put up on behalf of Qalinga is that he never was “in possession,” in any legal sense, of the stock. This stance was premised on the notion that the storeroom was not a “personal” space of Qalinga, hence the company was always in *de jure* and *de facto* possession.

[16] This view was correctly rejected by the arbitrator. The truly significant aspect of the evidence is that not only was stock in a place, albeit still on company property, where it ought not to have been but that it was located within the store concealed in several places, as described above. No explanation was offered as to why stock was secreted under documents in a box, or why some were tucked away in between drums of retention stock. In my view, this aspect of the evidence supports the inference that Qalinga appropriated the stock to himself in an unauthorised manner.

[17] The fact that the search was carried out in the absence of Qalinga does not present a legal problem *per se*. Having done so in his absence presents only an evidential issue in that, if denied, as it has been, credibility becomes a question

for decision. The arbitrator's view was appropriate on credibility in this regard, fortified as it was by the probabilities.

[18] Lastly, it was argued that in the absence of an express workplace rule regulating what was allowed to be in the retention store and what was forbidden, the culpability of Qalinga cannot be established. This stance is misconceived. The rule at issue is that it is forbidden to be in unauthorised possession of stock. The complaint about the absence of a rule about "concealment" is unsustainable as it is a logical outgrowth of the primary rule because it is plain that if an employee hides stock on company premises, that conduct amounts to unauthorised possession. The "control" of the employer over the stock is compromised by such conduct. On the facts adduced, it is incorrect to suggest that the company had unhindered access to the stock simply because it was still on company premises. It was established that there was no business reason for the stock, on that scale, to be in the store, moreover, concealed, and as such out of reach.

[19] The fact that no evidence could be adduced of an attempt to remove the stock from the factory, eg from footage on the CCTV cameras, is irrelevant. The higher threshold of theft was not the gravamen of the charge. The propriety of a rule against unauthorised possession has a long and justifiable pedigree in labour relations.

[20] The Labour Court upheld the Arbitrator's findings and its rationale is unassailable.

[21] The outcome, in this case, is consistent with the approach approved by this Court in *Woolworths (Pty) Ltd v CCMA and Others*.[2] In that matter, an employee secreted garments on her person on two occasions. That the concealment took place on her body rather than a hiding place elsewhere on the premises is the only distinguishing feature. However, the place of concealment is not itself critical but, rather, the explanation of the location of the goods. The nature of the misconduct is being in possession or exercising a control over stock that is not

[2] [2011] BLLR 963 (LAC). At [esp 38].

satisfactorily explained. The enquiry is fact-specific and dictated by rational inferences drawn from the fact of possession or control and the plausibility of the explanation.

The sanction

[22] The upshot was that Qalinga had been found guilty of persistent acts of dishonesty. The role he performed was one that required trust and confidence because of the need for him to have free and easy access to the production lines and other areas of the factory. Stock control and limitation of stock loss is critical to the business. Wessels, understandably and justifiably, testified that she could no longer trust Qalinga.

[23] Qalinga had about 25 years' service. This is a weighty factor in the consideration of sanction, especially when dismissal is an option. However, the perpetration of dishonest acts cuts very deeply into the employer/employee relationship. In this matter, there was also the absence of any remorse. The conduct was not impulsive, nor an isolated event, but rather a pattern of behaviour inimical to Cadbury's interests.

[24] The arbitrator properly applied his mind to these considerations and the decision to uphold the dismissal is indeed one that is reasonable in relation to the facts proven before him.

Conclusions

[25] The appeal must fail.

[26] No costs are sought by the parties.

The order

The Appeal is dismissed.

Sutherland JA

Sutherland JA (with whom Phatshoane ADJP and Kathree-Setiloane AJA concur)

APPEARANCES:

FOR THE APPELLANT:	Attorney E Van Staden
	of Legal Aid South Africa.
FOR THE THIRD RESPONDENT:	Adv G Fourie SC
	Instructed by Joubert Galpin and Searle.