



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1685/12

**MASSBUILD (PTY) LTD t/a BUILDERS
WAREHOUSE**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER D DIBAKWANA, N.O.

Second Respondent

P J LINDEQUE

Third Respondent

Heard: 30 July 2015

Delivered: 4 August 2015

Summary: Section 145 review application – commissioner’s finding that employee not guilty of unauthorised possession of company property and that dismissal procedurally unfair set aside on review.

JUDGMENT

MYBURGH, AJ*Introduction*

- [1] In his award, the second respondent (the commissioner) found the dismissal of the third respondent (the employee) substantively and procedurally unfair, and awarded him six months' remuneration in compensation. This in circumstances where the employee did not seek reinstatement.
- [2] The applicant (the company) now seeks to review the award in terms of section 145 of the LRA.¹ Although the matter was originally opposed by the employee, he has since withdrawn his opposition – it having been agreed between the parties that, in the event of the company succeeding on review, it will not seek costs against the employee. The matter was thus heard on an unopposed basis.

The employee's dismissal

- [3] The employee was employed as a departmental manager at the company's Centurion store. He was dismissed in January 2012 after having been found guilty of the charge of "being in unauthorised possession of company merchandise when searched at the search bay on 20 December 2011".
- [4] The essential facts surrounding the employee's dismissal were as follows. On 8 December 2011, the employee had purchased 18 Rolson products at the store to the value of some R1200. On 20 December 2011, when leaving work, the employee was subjected to a search in a search cubicle. The search was carried out by Magane (a security guard), with Chauke (another security guard who was assigned to searching women on that day) being in the vicinity. Both of the security guards worked for a company called SVA. On the company's version, in the process of conducting the search, Magane discovered a Rolson emergency cell phone charger in the employee's bag, which bag had been stored in a storeroom that day. (There is no dispute that the charger was on sale at the store and was valued at about R100, and that the employee was unable to produce any proof of purchase.) Magane brought

¹ Labour Relations Act 66 of 1995.

the issue to the attention of Chauke, and the matter was ultimately escalated to York (a manager and the initiator at the employee's disciplinary inquiry). The following day, York procured written statements from the employee and the two security guards. In the process, the employee suggested that he undergo a polygraph test, which was subsequently undertaken and "failed" by the employee.

- [5] As mentioned above, a charge of unauthorised possession was then brought against the employee, and he was dismissed after being found guilty thereof at a disciplinary inquiry. (For what it is worth, the employee subsequently arranged for another polygraph test by a different examiner, which he "passed".)

The arbitration award

- [6] At the arbitration, York and Chauke testified for the company, whereupon the employee gave evidence in his defence. Certain video evidence was also presented.
- [7] Turning to his award, the findings made by the commissioner in his award regarding the substantive fairness of the employee's dismissal were as follows:

"28. The [company] led two witnesses whose evidence was circumstantial and hearsay. Mr John York relied on what he was told by the security company and the statements of the two guards and the statement he prepared and asked the [employee] to append his signature in making arrangements for the disciplinary hearing of which the outcome was that the [employee] was found guilty and dismissed. Tintswalo Beauty Chauke was not a reliable witness as her statement ... contradicted with her oral evidence. In addition the video footage of 20 December 2011 ... clearly showed that she was just sitting in her chair and swinging not paying attention to the [employee] as well as his bag.

29. ... The security guard that is alleged to have searched and found the item in the [employee's] bag was not at this arbitration to testify. I was not given any evidence about his whereabouts. He who alleges must

prove and the [company] failed to prove the allegations in terms of the charge levelled against the [employee]. ...

31. ... The video footage disproved the testimony of Tintswalo Beauty Chauke. It is clear in the video footage that [she] sat in her chair all the time the [employee] was at the staff entrance / search bay.
32. The [employee's] testimony that he requested the polygraph test to be done to clear his name was supported by Mr John York and [he] admitted that he made arrangements for the [employee] to sit for the polygraph test. I do not believe that a guilty person can go [to] the length of asking for the polygraph test to be done. The [employee] did not give me any reason to doubt his credibility.
33. The evidence before me tells me that on the balance of probabilities the [company's] defence is dismissed therefore, the [employee's] application succeeds."

[8] Although it is difficult to discern the precise basis for the commissioner's finding of procedural unfairness, it appears that he found the employee's dismissal procedurally unfair because "the [company] failed to do a proper investigation before the [employee] was asked to attend the disciplinary hearing and the [employee] was dismissed on hearsay evidence".

[9] In relation to relief, the commissioner awarded the employee six months' remuneration in compensation, on the basis that the employee did not seek reinstatement and had been unemployed for six months.

Grounds of review and evaluation

[10] Mr Chiti (who appeared on behalf of the company) advanced two main grounds of review in oral argument. Firstly, that the commissioner had misdirected himself in unduly intervening in the cross-examination of the employee by the company's representative at the arbitration. Secondly, that the commissioner had gone wrong in finding that the employee had not been found in unauthorised possession of the charger, and ultimately finding the dismissal substantively unfair. In addition to this, a third ground of review

emerges from the review application – it being, in effect, that the commissioner's finding of procedural unfairness was unreasonable.

[11] To begin with the first ground of review, having read the passages in the transcript relied on by Mr Chiti in argument, I am not persuaded that the commissioner intervened unduly, either by asking questions himself or by putting a halt to a line of questions pursued by the company's representative. The commissioner was clearly intent on moving things along, as he was entitled to do in terms of section 138(1) of the LRA. I do not believe that the commissioner deprived the company of a fair hearing. In the result, the first ground of review fails.

[12] Turning to the second ground of review, in a case of unauthorised possession of company property, the employer bears the onus for establishing that (i) company property (ii) was in the possession of the employee (iii) without authorisation.² During the arbitration, the employee sought to advance a case that he was not caught in possession of the charger, as he had not seen Magane remove the charger from his (the employee's) bag, with the result that Magane may have pretended to have found it in his (the employee's) bag. (In the alternative, the employee contended that he had been framed.) The commissioner appears to have accepted the employee's primary defence, i.e. the *absence of possession*.

[13] In so doing, the commissioner failed to apply his mind to the following materially relevant facts.

a. Firstly, York's unchallenged evidence was that the defence advanced by the employee during their interview on 21 December 2011 was that he had been framed (as opposed to not having been found in possession of the charger).

b. Secondly, the statement taken from the employee by York on 21 December 2011, which the employee signed, clearly records the

² *Continental Oil Mills (Pty) Ltd v Singh No & others* (2013) 34 ILJ 2573 (LC) at para 27; *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 2698 (LC) at para 1.

employee as having accepted that the security guard found the charger inside his bag.

- c. Thirdly, the employee's evidence that how the statement stood to be interpreted is that he had accepted at the time what Magane had told him (i.e. that he had found the charger in the bag), and not that this had actually occurred, is an untenable construction. It was also not something put to York under cross-examination.
- d. Fourthly, the employee appears to have accepted at his disciplinary inquiry that he was found in possession of the charger, after he opened his bag for it to be searched.
- e. Fifthly, although there were some inconsistencies in Chauke's evidence and although she did not physically see Magane take the charger out of the employee's bag, she testified about the discussion that ensued between Magane and the employee after the charger came to light (the contents of which appears not to have been in dispute). It is clear from this evidence that the employee did not raise contemporaneously that the charger had not been discovered in his possession.
- f. Sixthly, the employee's answers under cross-examination to a line of questions to the effect that a reasonable person would have kept an eye on his bag while it was being searched, were unconvincing.

[14] On my assessment of the matter, if the commissioner had considered these material facts and considerations, he would probably have come to the conclusion that the employee was caught in possession of the charger. In the result, the award on guilt (to the effect of an absence of possession) is *prima facie* unreasonable, with the remaining question being whether there exists an evidentiary basis to displace the *prima facie* case of unreasonableness.³

[15] To my mind, there is none, and none of the findings made by the commissioner quoted above do so – this for the following reasons. The real

³ See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33.

significance of York's evidence lay in the interview he had conducted with the employee, which was not hearsay. The contradictions in Chauke's evidence do not appear to me to have been particularly material. Furthermore, while Chauke's evidence that she was told by Magane that he had found the charger in the employee's bag was hearsay (insofar as this was tendered as proof of this having occurred in circumstances where Chauke did not see this occurring), her evidence about what was discussed between Magane and the employee was not (with this evidence being of significance for the reasons mentioned above). In addition, contrary to what is stated by the commissioner, it was brought to his attention that Magane no longer worked for SVA, and that he could not be traced by the Sheriff. And finally, I do not believe that much can be read into the employee having volunteered to undergo a polygraph test.

[16] In the result, I am of the view that the commissioner's finding that the employee was not in *possession* of the charger, and thus not guilty of unauthorised possession of company property, was unreasonable.⁴ To my mind, this is a classic case of the distorting effect of a misdirection by a commissioner (in this instance, the failure to consider material facts) having caused an unreasonable result in relation to guilt.⁵

[17] Although not considered by the commissioner, it is necessary to consider the employee's alternative defence (i.e. that he was framed), insofar as the company seeks to assail on review the overall finding of substantive unfairness by the commissioner. On an analysis of the evidence, I am by no means persuaded that the employee discharged the evidentiary burden⁶ of establishing this defence for the following reasons. Firstly, no one had ever previously sought to frame the employee. Secondly, although employees had access to the storeroom, only two people (other than the employee himself)

⁴ See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 110

⁵ See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33.

⁶ Where an employee is found in unauthorised possession of company property, the evidentiary burden shifts to him to justify such misconduct. See generally, *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2455 (LAC) at para 34.

entered the storeroom on 20 December 2011 (neither of whom appeared to have remained in there for long), with one of them being a merchandiser employed by RMS (and not by the company). Thirdly, there was no evidence that the employee's bag (stored in the storeroom) was conspicuous or known to others. Fourthly, the employee himself could think of no reason for why any staff member would have wanted to get him dismissed. Indeed, he painted himself as someone who had a cordial relationship with everyone, including the security guards.

- [18] Having rejected the employee's alternative contention of having been framed, what remains for consideration is whether the sanction of dismissal was appropriate, albeit that this was also not something considered by the commissioner (because he found the employee not guilty). While the issue of penalty was not specifically addressed in evidence, this seems to have been on account of the fact that the arbitration centred entirely around the issue of the employee's guilt. This notwithstanding, it appears from the documentary record that the company has in place a rule that the misconduct in question attracts the penalty of dismissal. Insofar as evidence was not led to demonstrate the destruction of the employment relationship, in terms of two recent judgments by the LAC, it is not an invariable rule that this has to occur, and a breach of trust can be inferred in the case of certain instances of misconduct.⁷ In my view, unauthorised possession of company property (in the circumstances that occurred herein) is one of them. There are some 200 – 300 employees engaged at the store, which sells all manner of building supplies. It is difficult to imagine how everyone could be given a chance to be found at least once in unauthorised possession of company property before resorting to dismissal. Dismissal for a first instance of such misconduct was fair in all the circumstances of the matter.

⁷ *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC) at para 19; *Department of Home Affairs and another v Ndlovu and others* [2014] 9 BLLR 851 (LAC) at para 18. The finding in *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA) at para 23, is thus not an invariable rule and must be read in the light of the facts of the case.

[19] Turning to the third ground of review, to my mind, the commissioner's finding of procedural unfairness is plainly unreasonable. As the company correctly avers in its founding affidavit, the disciplinary inquiry was convened after York had obtained statements from the two security guards and the employee himself, and a polygraph test had been undertaken. Furthermore, the minutes of the hearing reflect that the two security guards gave evidence at the disciplinary inquiry. Notwithstanding that the commissioner's factual findings on this score are not reasonably supported by the evidence, the fact that an employer does not properly investigate a matter before a disciplinary inquiry and relies on a degree of hearsay evidence is, in any event, not grounds for a finding of procedural unfairness.

Order

[20] In the premises, the following order is made:

1. The arbitration award issued by the second respondent is set aside on review;
2. The award is replaced with an order that the dismissal of the third respondent was fair;
3. There is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: D Cithi of Mervyn Taback Inc

On behalf of the Third Respondent: no appearance

LABOUR COURT