



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR342/ 11

Not Reportable

In the matter between:

LA CRUSHERS

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER JOSIAS SELLO MAAKE N.O.

Second Respondent

THOMAS NORTON MALEPE

Third Respondent

Heard: 1 June 2017

Delivered: 18 December 2017

JUDGMENT

WHITCHER, J:

- [1] The third respondent was dismissed after been found guilty of theft of diesel from the applicant during the period 7 February 2008 to February 2009. At the time of his dismissal, the third respondent was a manager.

- [2] The second respondent found that the dismissal was substantively unfair, and awarded the third respondent compensation equivalent to six (6) month's remuneration.¹
- [3] The Commissioner reasoned that the case against the third respondent was purely circumstantial with no direct evidence from a witness that had actually witnessed the theft. He essentially accepted the third respondent's defence. The Commissioner was of the view that the appropriate charge should have been gross dishonesty or abuse of company property, and in the absence thereof the third respondent could not be found guilty of the charge proffered against him.
- [4] The applicant submitted that the Commissioner committed serious errors of law and fact. He failed to appreciate the law on circumstantial evidence and evidentiary burdens and applied the incorrect standard proof. He further failed to appreciate that disciplinary proceedings are not criminal proceedings and a degree of latitude is permissible in interpreting the ambit of disciplinary charges.
- [5] The applicant submitted that had the Commissioner correctly applied the above law, he would have found that, irrespective of the labelling of the charge, the third respondent had been guilty of gross misconduct, which was dismissible. He would then also have found that, considering the third respondent had committed the offence while he had occupied a position of trust, his dismissal had been fair, notwithstanding his length of service.
- [6] In *Distell Limited v CCMA & others*² the Court reiterated the trite law that circumstantial evidence is an appropriate and "powerful tool in proving the existence of an issue in dispute".
- [7] In *Federal Cold Storage Co Ltd v Angehrn & Piel*³ the court stated:

But the burden of proving to be honest what admittedly on its face looked dishonest rested upon the respondents themselves, not upon the appellants.

¹ Award LP2272-09 dated 22 December 2010.

² (2014) 35 ILJ 2176 (LC)

³ 1910 TS 1347

Once the appellants had proved a prima facie case of misconduct on the part of the respondents..., the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal must be taken to be established. With all respect to the learned Judges of the Supreme Court, they seem to their lordships to have failed to keep steadily before their minds this shifting of the burden of proof, and to have erred in consequence. They seem to have thought that the respondents were entitled to the benefit of any doubt, as to the convincing nature of the explanation and justification of their own action.⁴

[8] In *National Battery (Pty) Ltd v Matshoba and Others*,⁵ the court pointed out that the labels assigned to the misconduct are irrelevant – the point is whether the evidence demonstrates a case of wrongdoing.

[9] In *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁶ the LAC stated:

“[32] Unlike in criminal proceedings where it is said that 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient', the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux & Van Niekerk where the learned authors offer a suitable example, with which I agree:

⁴ At 1352

⁵ (2010) 5 BLLR 534 (LC)

⁶ (2011) 32 ILJ 2455 (LAC)

'Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.'

- [10] Turning to the material facts in this review, the applicant led the following undisputed evidence before the Commissioner.
- [11] The third respondent was a manager. As part of his duties, he was allocated a vehicle to use as transport to and from his residence and as a working tool for stand-by purposes. He lived about 25 km from the workplace and sometimes needed to travel not more than 20 km away from work. Other employees sometimes used the vehicle during working hours. The rule was that the vehicle had to be refuelled at the loop bay yard, not at the refinery yard. This - because there were proper controls in place and an attendant on duty 24 hours at the loop bay. Any problem with the pumps at the loop bay would not persist for more than a day as they serviced numerous vehicles.
- [12] An investigation into excessive fuel usage conducted by the applicant revealed that the refuelling of the vehicle was primarily done at the loop bay yard. In the period in question, fuel amounting to R1348.07 was filled at the loop bay and R16 605.29 at the refinery.
- [13] The records further revealed that on numerous occasions the vehicle had been refuelled 3 times per day at the refinery yard before working hours, in the late afternoon and after working hours when the attendant at the refinery yard was off duty.

- [14] On average the refuelling would have required the vehicle to have been driven at least 300 to 388km in the day, which was impossible given the nature of the third respondent's job and the location of his residence.
- [15] To illustrate a few damning examples in the investigation report – on 25th, 27th and 29th December the vehicle was refilled twice a day when vehicle was clearly in the possession of the third respondent only.
- [16] Finally, and most significantly, the records revealed that when the respondent was on leave, the vehicle was not refuelled in one day and no other incidents of excessive usage were detected. The pattern of excessive refuelling was absent when he did not have the vehicle.
- [17] The Commissioner failed to appreciate that through this evidence the applicant had established a strong *prima facie* case against the third respondent and that the evidentiary burden thereupon shifted to the third respondent to provide a credible explanation, which the third respondent failed to do. The Commissioner failed to appreciate this as he was preoccupied with finding a missing link – a witness who would say that he had seen the employee filling up the vehicle an inordinate amount of times.
- [18] The third respondent had to give an explanation for not adhering to the refuelling procedure, for the inordinate amount of fuel dispensed into the vehicle, particularly outside of working hours when he would have had the vehicle and the fact that when he was on leave, excessive refuelling ceased.
- [19] The third respondent's explanation was that the petrol nozzle at the loop bay yard was sometimes broken. This was not a plausible explanation given that he never reported same, the inordinate number of times the vehicle was refilled at the refinery outside of working hours and the specific instruction not to use the refinery pump. Moreover, this version was not put to the applicant's witnesses.
- [20] He also claimed that sometimes employees would fetch the vehicle from his home to use at work, but failed to identify even one of these employees. This version was also not out to the applicant's witnesses. In any event it did not

explain the extraordinary refilling of the vehicle outside of working times when it was clearly only in his possession.

[21] Simply, the third respondent failed to provide a sufficient and plausible explanation in response to the case laid out by the applicant, and therefore the prima facie case against him had to prevail. It is incomprehensible how the Commissioner saw the third respondent's version as more convincing than the applicant's case.

[22] Irrespective of the label attached to charge, the facts proved by the applicant established gross dishonesty on the part of the third respondent, the nature of which was sufficient to destroy the element of trust essential to his position as a manager and an employment relationship.

[23] In the premises, the applicant has established in this review that the Commissioner made serious errors of law and fact which resulted in an unreasonable outcome.

Order

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

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

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Geldenhuys C J at Law Inc

For the third respondent: Nomali Tshabalala Attorneys

LABOUR COURT