



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 633-16

Not Reportable

In the matter between:

COMPASS GROUP SOUTHERN AFRICA (PTY) LTD

Applicant

and

M VAN DER MERWE N.O

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

NASECGWU obo MOKETE DORCAS MELAMU

Third Respondent

Heard: 8 February 2017

Delivered: 9 February 2018

JUDGMENT

WHITCHER J

- [1] The applicant seeks to have reviewed and set aside the arbitration award of Commissioner Van der Merwe, wherein she found that the dismissal of the third respondent was substantively and procedurally unfair and ordered the applicant to retrospectively reinstate the employee.

- [2] In my view the application is meritorious. The applicant's submissions coincided with my independent notes on the matter.
- [3] As correctly pointed out by the applicant: In an unfair dismissal case relating to misconduct, the 'evidentiary burden' starts with the employer but once the employer provides *prima facie* proof of the misconduct as alleged, the 'evidentiary burden' shifts to the employee to prove his own defence. If the employee then fails to put up a defence or fails to prove his defence, the employers *prima facie* proof of misconduct becomes conclusive proof and the employer has then discharged the 'overall onus' that always rested with it.¹
- [4] The applicant, through its witnesses established a *prima facie* case of misappropriation of company property/dishonest conduct on the part of the employee, which then shifted the evidentiary burden to the employee to present evidence as would exonerate her from blame in this regard.² In my view, the employee failed to discharge the shifting evidentiary burden that rested on her, or as the applicant put it, failed to "[prove] to be honest what admittedly on its face looked dishonest".
- [5] On a balance of probabilities, the apples were in fact the property of the applicant and the employee attempted to misappropriate same. This I say for the reasons set out hereunder.
- [6] It was common cause that the employee stored and served apples in the ordinary course of her duties in the hospital. It was also common cause that apples were served in the ward on the day of the incident. The employee therefore had access to such apples.
- [7] The employee conceded that the apples found in her possession were strikingly similar to the apples that had been served in the ward.
- [8] The employee carried the apples in a ward bag.

¹ *Woolworths (Pty) Ltd v CCMA & others* (2011) 32 ILJ 2455 (LAC) at par 34.

² See *Woolworths (Pty) Ltd v CCMA* (2011) 32 ILJ 2455 (LAC) at par 34.

- [9] According to Ngwenya, when he asked the employee about the apples, she apologised and begged forgiveness – in other words, she essentially admitted that she had misappropriated them.
- [10] The commissioner correctly described Ngwenya as a good witness. The record reveals that he gave clear and unambiguous testimony and he had had no prior relationship with any of the parties and therefore no reason to implicate the employee.
- [11] Significantly, he mentioned that in her appeal to him at the scene she made reference to a specific family tragedy – an item of information he could not have known been able to testify to unless she had told him, considering they had never met before.
- [12] The employee and the vendor on the other hand were poor witnesses, even in the commissioner's view. They were unable to present a coherent and comparable version about the sale of the apples. To cite just one example, the employee contends that she purchased the apples and then went to work and placed them somewhere. In other she immediately took them with her. The vendor, however, testified that she left them with him and went all the way back into the hospital to fetch a plastic bag. As submitted by the applicant, the contradiction is material and destroys the credence of their version.
- [13] Significantly, when first confronted with the goods in her possession, the employee did not claim that she had bought them from the vendor. As submitted by the applicant, a reasonable person in the position of the employee who had been found with the apples that she purchased would have at the very least insisted that she bought the apples from a particular place and person. She instead apologised and pleaded forgiveness. This behaviour is more consistent with the behaviour of a person who had been caught stealing.
- [14] In the premises, the employee presented a version which was improbable. This must mean that the applicant's prima facie case, presented by an objective and credible witness must be accepted and that the evidence before

the commissioner clearly demonstrated that the employee was guilty as charged.

- [15] The question now is whether it was fair to dismiss her.
- [16] I considered the LAC judgments in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement*³ and *Shoprite Checkers (Pty) Ltd v CCMA*.⁴ The employee's case is however distinguishable because she was charged and found guilty of essentially theft, concocted a mendacious defence, showed no genuine remorse and occupied a position where trust is a key factor.
- [17] Although Ngwenya testified that, when first confronted, the employee apologised and admitted guilt [and thus appeared to show remorse], the problem is that she denied the entire version of Ngwenya and chose to attack his credibility.
- [18] Subsequent to *Shoprite Checkers (Pty) Ltd v CCMA*,⁵ the LAC has followed the approach adopted in the often quoted decision of the LAC in *De Beers Consolidated Mines Ltd v CCMA & Others*⁶, also followed in *Shoprite Checkers (Pty) Ltd v CCMA & Others*⁷, which justifies a strict approach to dishonest conduct in the workplace on the basis of the employer's operational requirements.⁸ This approach is applicable in this case considering the nature of the applicant's business and the fact that a business at risk through persistent pilfering also places in jeopardy the security of employment of all employees.
- [19] Furthermore, the rule was made clear to the employee when she was employed as evidenced by her signature on the document which contained the rule. This document further informed the employee that the rule had been borne out a major problem that the applicant faced, namely persistent loss of business through pilfering and that any transgression of the rule is a dismissal offence.

³ [2015] 9 BLLR 887 (LAC)

⁴ [2008] 12 BLLR 1211 (LAC)

⁵ [2008] 12 BLLR 1211 (LAC)

⁶ [2000] 9 BLLR 995 (LAC)

⁷ [2008] 9 BLLR 838 (LAC)

⁸ *Miyambo v CCMA & others* [2010] 10 ILJ 1017 (LAC)

- [20] On the issue of procedural fairness, the testimony of the employee's witnesses was very confusing and could not have placed the commissioner in a position to determine this aspect in favour of the employee. In any event, it would appear from even this confused version that the witness [the vendor] was only named after the dismissal was effected.
- [21] Moreover, the minutes of the disciplinary hearing reflect that the employee was given an opportunity to call witnesses, but did not call the vendor. She conceded in her testimony that the chairperson of the enquiry actually asked her if she has got a witness.
- [22] In light of this there is no basis for the commissioner's finding that the dismissal was procedurally unfair because the employee was not given the right to call the vendor.

Order

- [23] In the premises the following order is made:
1. The arbitration award issued by the first respondent is set aside on review and substituted with an award that the dismissal of the third respondent [Mokete Dorcas Melamu] was substantively and procedurally fair.
 2. There is no order as to costs.

B. Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:

R J C Orton from Snyman Attorneys

For the third respondent:

Mr V. Tshabalala of NASECGWU

LABOUR COURT