

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J3020/98

In the matter between:

DAIRYBELLE (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

MR E R MAFOLO

Second Respondent

DANIEL CASPARUS FREDERIK HENDRIK

DE BRUYN

Third Respondent

JUDGMENT

MARCUS AJ:

INTRODUCTION:

1. On 1 August 1996, Mr Daniel de Bruyn ("the employee") commenced employment as a production supervisor for

Dairybelle (Pty) Ltd ("the company"). In February 1998 the employee was charged with various counts of misconduct. A disciplinary hearing was convened and he was found guilty on the following charges:

Charge 1: Misappropriation of company funds relating to the use of company labour for personal gain.

Charge 2: Unauthorised possession of company property relating to certain product ingredients ...

Charge 3: Breach of confidentiality relating to the unauthorised manufacturing of processed cheese as well as the unauthorised use of company confidential information.

Charge 4: Breach of confidentiality for personal gain.

The employee was dismissed by the company. An internal appeal was unsuccessful.

2. Aggrieved by his dismissal, the employee invoked the mechanisms created by the Labour Relations Act 66 of 1995 ("the Act"). The matter came before the second respondent ("the Commissioner") for purposes of arbitration. The Commissioner delivered the following award which I propose to quote verbatim:

"1. Details of hearing and representation:

Mr E R Mafolo CCMA Commissioner, Mr D H de Bruyn employee, Mr C J van Rooyen NETU, Mr de Neef employer

representative, Mr Dolamo employer representative.

2. Issue to be decided:

I am asked to determine if the dismissal of the employee was effected for a fair reason and in accordance with a fair procedure and in the circumstances what remedy to dispense with.

3. Background to the issue:

The following facts are common cause to the parties:

3.1 The employee started working in May 1995 as learner cheese maker.

3.2 The employee was the assistant to Mr Peens.

3.3 Cheesemaking utensils were found at Mr de Bruyn's house.

3.4 An employee of the company had made burglar bars for Mr de Bruyn.

3.5 An anonymous letter had landed in the employer's hands alleging theft of the employer's commodities.

4. Survey of evidence and argument:

4.1 Substantive fairness:

The employee has challenged the substantive fairness of his dismissal on the basis that he did not commit the alleged offences and that nothing had been found in his possession. The employee admits that he had the burglar

bars fitted at his house by Alfred Phokwane, an employee of the company, during his spare time. Further the employee concurs in that left overs of cheese were for everybody and that he had utensils at his house which he used for his experiments for manufacturing cheese. These were of a very small capacity to can be able to manufacture cheese as it is alleged. This was corroborated by the employer's witnesses who were honest and agreed these were of a small scale operation and did not find any products from the employee's evidence as highly probable as opposed to the employer's allegation. There is no evidence to support the employer's allegation of theft save for the hearsay in the form of the anonymous letter alleging theft and sent to the employer. The employee's version is highly probable in that farmers and other people from the public would pick the left overs up as nothing was ever found in his possession. Evidence at my disposal show clearly that Alfred Phokwane was instructed by a certain Myles to do burglar bars for the employee. The employee had proceeded to install them at his house. The last issue to deal with was whether the dismissal of the employee is an appropriate sanction for the alleged misconduct or not. In addressing this

question I need to think about whether the employer acted fairly in dismissing the employee under the circumstances. The employer argues that the employee's actions have irreparably damaged the trust relationship between the employer and the employee. I do not agree. The employer had exaggerated this misunderstanding with the employee. In fact, at the initial hearing a lot of charges against the employee were dismissed and he was found not guilty.

4.2 Procedural fairness:

I am unable to find fault with the procedure followed by the employer in dismissing the employee. I accept that nothing was omitted that may have prejudiced the employee.

5. Award:

5.1 The employer is ordered to compensate the employee an amount equivalent to six months salary calculated at the rate of the employee's earning at the time of the dismissal.

5.2 The employer to comply with section 195 of the Act.

5.3 The employer to comply with the terms of this award within 14 days of receipt of this award."

3. The company seeks to have the Commissioner's award reviewed and set aside. The Commissioner has filed the record of the proceedings under review but does not oppose the relief. There has been a last minute response from the employee but no appearance by him or on his behalf.

4. It is necessary for me to assess whether the grounds of review are well founded. The company has raised a number of complaints concerning the conduct of the

Commissioner and the reasoning underpinning the award.

THE GROUNDS OF REVIEW:

5. I do not propose to deal with each and every allegation levelled at the Commissioner. I deal only with those which appear to be the more significant. In paragraph 7.7 of the founding affidavit the following is stated:

"At the commencement of the proceedings at approximately 09h00 the second respondent duly informed the parties that he had been double booked and that he therefore intended to finalise the arbitration proceedings by no later than 12h00 on 3 August 1998. The second respondent

furthermore advised that he had to attend a funeral later during the course of the afternoon of 3 August 1998. I wish to draw the above Honourable Court's attention to the fact that I already at that stage envisaged that unless the proceedings were somewhat shortened and/or executed in a hurried fashion, it would be not only improbable but impossible to finalise the proceedings based upon the evidence that had to be heard during the course of the proceedings."

6. As indicated above, there has been no answer from the Commissioner. The employee, however, answers this allegation in the following manner:

"Bo en behalwe dat die tweede respondent aangetoon het dat hy slegs beskikbaar sal wees tot na 12:00 word die balans bewerings ontken. Die applikant en/of applikant se verteenwoordigers het op geen stadium aangedui dat hulle baie getuies sal benodig en dat hulle benadeel sal word vanweë die feit dat daar sogenaamd nie tyd beskikbaar sou gewees het nie."

What is not denied, however, is the allegation that the Commissioner stated that he was double booked. Nor is it disputed that he intended to finalise the arbitration proceedings by no later than 12h00. Nor is it disputed

that the reason for the haste was that the Commissioner was required to attend a funeral later that afternoon.

7. The company states further in paragraph 7.8 of the founding affidavit:

"The second respondent furthermore intimated that he would attempt to have the matter resolved in an amicable fashion and accordingly entered the arena as a mediator cum conciliator. The second respondent laboured the issue of possible settlement for approximately 45 minutes before being satisfied that no settlement was forthcoming. In accordance with the foregoing I therefore wish to highlight that the arbitration proceedings only commenced at approximately 09h45 on 3 August 1998."

The employee answers this allegation as follows:

"Die tweede respondent en die applikant het inderdaad gepoog om die saak te skik maar was dit nie suksesvol nie. Die arbitrasie verhoor het eers ongeveer 09:45 begin. Die balans bewerings word ontken. Tweede respondent was in elk geval geregtig om met die toestemming van die partye, wat inderdaad gedoen is, die arbitrasie verrigtinge op te skort en te poog om die verskil deur versoening te besleg. Die applikant het nie

hierteen beswaar gemaak nie."

8. The employee misses the point of the allegation made by the company. The intention behind the allegations concerning the attempts at settlement is merely to highlight that not only did the Commissioner place time constraints on the duration of the arbitration, but that the arbitration commenced late due to the attempts at settlement. I do not understand the company as suggesting any impropriety on the part of the Commissioner in his endeavours to settle the dispute.

9. The company then states the following concerning the manner in which the arbitration was conducted:

"7.13 I wish to draw the above Honourable Court's attention to the following with specific reference to the leading of the aforesaid evidence:

7.13.1 During the course of my leading the witness during their examination in chief, the second respondent on numerous occasions enquired as to whether the evidence that I was leading is 'really necessary';

7.13.2 the second respondent questioned me on repeated occasions as to whether the applicant intended calling any more witnesses;

7.13.3 based on the foregoing it was abundantly clear

to myself that the second respondent was in a hurry and wanted to finalise the proceedings as quickly as possible;

7.13.4 based upon the foregoing undue pressure exerted by the second respondent, I failed to inter alia properly present a case and more pertinently want to state the following:

7.13.4.1 I was not in a position to lead detailed evidence pertaining to each and every of the witnesses during my examination in chief.

7.13.4.2 The question of an appropriate and fair sanction was left unattended and I accordingly did not lead any specific evidence relating to the relationship having become untenable as between the applicant and third respondent.

7.13.4.3 I myself in the capacity as an appeal chairperson did not give evidence.

7.13.4.4 Based upon the foregoing I hoped that the second respondent would thoroughly peruse the contents of Annexure DB3 (the record of the proceedings of the disciplinary enquiry) as it contains specific details pertaining to the merits of each and every charge that was levelled against the third respondent as well as

dealt with the question of the imposition of an appropriate and fair sanction.

7.13.4.5 I confirm that subsequent to having finalised the applicant's case the third respondent called a witness, one Mrs Blom, and thereafter testified himself in a similar vein to what I stated pertaining to my examination in chief. I was not given a sufficient opportunity to properly cross-examine, more particularly the said Mrs Blom. It was abundantly clear to myself that the second respondent at this stage of the proceedings was in a great hurry to finalise the proceedings.

7.13.4.6 After the third respondent had closed his case, the second respondent immediately called for closing arguments/ statements by the respective parties. I was caught unawares and was completely unprepared to make such a closing statement. Notwithstanding this the second respondent expected me to make such statement which I did in a gingerly and unprepared manner. I was furthermore prevented by the second respondent from responding and/or amplifying my already flimsy closing argument when I wanted to respond to the third respondent's argument. I distinctly recall that the

second respondent posed the question as to whether 'we are not finished yet' at this specific point in time during the course of proceedings."

10. I do not propose to deal with the employee's responses to these paragraphs in detail. In the main they constitute bare denials. Of importance, however, is that the allegations raised by the company are directed to the manner in which the Commissioner conducted the proceedings and it is therefore primarily the task of the Commissioner to respond to these allegations should he so choose. What emerges from this account, in my view, is that the company appears to have been placed under considerable pressure to complete the arbitration within the allotted time.

11. With regard to the contents of the award itself, I will deal only with those allegations made by the company which appear to be most significant. In paragraph 8.2 of the founding affidavit the company states the following:

1. "In terms of paragraph 4.1 of Annexure DB2 (the arbitration award) it would seem that the second respondent deals with the body of evidence that was led during the course of the arbitration proceedings as well

as findings with regard to the facts in dispute as well as credibility issues. I wish to highlight that the ... charge sheet .. deals specifically with separate and distinct charges that were originally brought against the third respondent. I have already alluded to the fact that at the initial disciplinary stage the third respondent was found not guilty of a certain number of these charges."

12. I have indicated above the charges of which the employee was found guilty. The company states further:

"The second respondent in no way whatsoever has identified any of the aforesaid charges in terms of clause 4.1. Nor does he identify those charges of which he found the third respondent guilty. Indeed, the second respondent does not disclose at all as to whether he found the third respondent guilty of any charges whatsoever."

The company also states:

"On further perusal of paragraph 4.1, one makes the deduction that the second respondent must have found the third respondent guilty of one or some of the charges as the second respondent specifically states that the 'last issue' that he has to deal with is whether dismissal was

'an appropriate sanction'. Based upon the foregoing, as well as the fact that the second respondent has failed to identify the charges of which he found the third respondent guilty, I respectfully submit that the second respondent could not have made an objective or rational finding pertaining to the merits of the matter, nor the question as to whether the employment relationship has been irreparably damaged."

13. Although the employee responds to some of these allegations, the task of determining the meaning of the arbitration award lies with this court. It is therefore not necessary to deal with the employee's response.

14. The company also states that the Commissioner improperly permitted the employee to be represented by a union official but failed to inform the company's representative that he could make an application for legal representation in terms of the Act. As a result of these allegations the company contends, inter alia, the following:

"10.3 It is respectfully submitted that the following grounds fall within the ambit of one or more of the aforementioned defects:

10.3.1 The second respondent improperly and wrongly exerted pressure on the applicant directly based upon the fact that the second respondent was subject to certain constraints of time and/or movement;

10.3.2 the second respondent wrongfully and/or on an irregular basis failed to attempt to adhere to any pre-arbitration proceedings in order to deal with the facts in dispute. This situation was exacerbated directly based upon the fact that the applicant handed up a lengthy bundle of documents at the commencement of the arbitration proceedings;

10.3.3 the second respondent wrongfully allowed the third respondent external representation;

10.3.4 the second respondent failed in his duty to inform the applicants that it could obtain legal representation;

10.3.5 the second respondent improperly pressurised the applicant in presenting evidence at the arbitration proceedings.

...

10.3.8 the second respondent failed to distinguish the material facts in dispute in his award and did not apply his mind objectively and rationally to those facts in

dispute."

REVIEW:

15. The standard of review is now settled by the decision of the Labour Appeal Court in Carephone (Pty) Ltd v Marcus NO and Others (1998) 19 ILJ 1425 (LAC). In the present case the allegations of misconduct remain unanswered by the Commissioner although the employee has offered an explanation of sorts. In my view the evidence presented demonstrates that the Commissioner failed to conduct the proceedings fairly inasmuch as he sought to pressurise the company into completing its case by reason of self-imposed time constraints. I do not suggest that a Commissioner must simply bow to the dictates of the parties. On the contrary, a Commissioner must exercise reasonable control over the proceedings. On what has been alleged, the control exercised amounted to undue and unfair pressure. Why the proceedings had to be completed within the space of a few hours is not explained. No explanation is furnished as to why the arbitration could not have continued the next day or at some other convenient time.

1.

16. As to the award itself, I have some difficulty in comprehending what the Commissioner actually found.

There is merit in the complaint that there has not been separate treatment of the individual charges and there is also merit in the contention that the Commissioner appears to have found some misconduct established. While mindful of the fact that Commissioners are required only to furnish "brief reasons" (see section 138(7)(a) of the Act) this does not relieve the Commissioner of the obligation to justify his or her decision. Brevity is a question of degree. Much will depend on the nature and complexity of the case. The furnishing of reasons for arbitration awards underpins the accountability of commissioners and serves to discipline the process of reasoning. Dealing with this issue, Wade and Forsyth, Administrative Law, (7th ed) state at 542:

"There is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant consideration and errors of

law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not and so he may be

deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."

The learned authors were, of course, dealing with the position at common law. Both under the Act and under the Constitution the furnishing of reasons is obligatory. The Constitution permits scrutiny of these reasons to assess the justifiability of the decision. Commissioners need to be aware of the fact that however brief the reasons may be, they must demonstrate "a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at" (Carephone (supra) at 1435E).

17. A consideration of the Commissioner reasons makes it impossible to ascertain precisely what misconduct was found to have been proved and why the employee was acquitted of other charges. The Commissioner's discussion of the appropriate sanction suggests that he

found some misconduct to have been proved but the precise nature of that misconduct is nowhere stated. Where, as in the present case, there are several charges of misconduct, each ought to be separately dealt with and the arbitrator's analysis and conclusions in relation to each count ought to be clearly set out. It is only in this way that the arbitrator's reasoning and conclusions will be comprehensible. In my view the standard of justifiability has not been met in the present matter.

18. I accordingly make the following order:

1. The arbitration award made by the second respondent on or about 10 September 1998 is reviewed and set aside.

2. The matter is referred to the first respondent for a fresh hearing by another commissioner appointed by the Commission for Conciliation, Mediation and Arbitration.

MARCUS AJ

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

SIGNED AND DATED THIS DAY OF JUNE 1999

DATE OF HEARING: 1 JUNE 1999

DATE OF JUDGMENT: 1 JUNE 1999

For the applicant: Mr C Van Zyl of VAN ZYL'S INC

For the respondent: No appearance