

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J3054/98

In the matter between:

CITY LODGE HOTELS LTD

Applicant

and

ANNELIE GILDENHUYS NO AND OTHERS

Respondent

JUDGMENT

MARCUS AJ:

[1] On 9 September 1998 the first respondent ("the Commissioner") delivered an arbitration award in which she held that the dismissal by the applicant ("the company") of Eunice Mathe, Maggie Ngomane and Gladys Mkwana ("the employees") was substantively unfair. The Commissioner ordered the reinstatement of the employees with retrospective effect.

[2] The company now seeks to review and set aside the

arbitration award in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act").

[3] The company conducts business as a hotel at a number of business centres including the Johannesburg International Airport. The company employs approximately 30 employees at its Johannesburg International Airport Town Lodge. The employees were all employed at Town Lodge Airport before their dismissal.

[4] At the time of their employment by the company the employees were all furnished with a staff handbook setting out the rules and regulations applicable to their contracts of employment. Furthermore, the employees were required to sign acknowledgements confirming that they had received a copy of the staff handbook and had read it. It is clearly stated in the staff handbook that unauthorised removal of company property may lead to the summary dismissal of an employee. A sanction of this sort in the hotel industry is common and understandable.

[5] On or about 3 April 1998, as a result of information received from other employees, Dorothy Mchunu, a housekeeper employed by the company, investigated a particular incident in

which it was suspected that there had been unauthorised removal of company property. Pursuant to this investigation the company furnished the employees with a notification to attend a disciplinary enquiry. These notices advised the employees that they were to be charged with "unauthorised removal of company property on Wednesday, 1 April 1998 without prior permission from management and without the required pass out forms".

[6] The disciplinary enquiry was held on 6 April 1998. The employees were found guilty and dismissed.

[7] An internal appeal was unsuccessful. The employees thereafter declared a dispute and the matter was referred to the CCMA for arbitration. As I have already indicated, the Commissioner ordered the re-instatement of the employees.

[8] The company now seeks to review the arbitration award handed down by the Commissioner. It is appropriate to highlight certain aspects of the arbitration award.

[9] Under the heading "Background to the Issue" the Commissioner states the following in her award:

"The company dismissed the employees for unauthorised

removal of company property on the 1st April 1998 without prior permission from management and without the required pass out form. The company have specific rules with regard to the removal of any property from the premises of their hotels no matter what the value of it may be. The company stated that there are no exceptions to this rule. The company dismissed the employees for removing certain items from the premises of the hotel. The dispute revolves around the fact that the company did not find the goods on the employees and further that the security guard did not catch them leaving the premises with the goods. The company stated that there was, however, a certain procedure to be used if hotel items were regarded as not being usable any more. The procedure would require of such items to be sold to individual employees of the hotel or be donated to charity. The company stated that they hardly ever gave away non-usable items to employees at no cost. The only items would be given away if items were of no value at all.

The union did argue that the dismissals were unfair because the employer did indeed not prove that the employees did remove the items from the company and that the penalty of dismissal was inappropriate."

(emphasis added)

[10] Later on in the award the Commissioner states the following:

"The procedures and rules referred to in the employee handbook 'unauthorised removal of any items including lost property' is not contested by the employees. It is accepted that the rule and procedure regarding the authorisation to remove certain items from the premises of the hotel is well established and that the employees knew the procedures. ... The reason for importing such a rule is also accepted and that the company consistently applied the rules regardless of what the monetary or other value of goods might be. ...

The employees admitted their knowledge of the rules which means that the items in question would either be donated to charity or sold to employees."

[11] I should pause to explain at this point that there is a system in place at the company in terms of which items collected from guests' rooms are taken to what is called a compacting room where they are compacted. It has been explained to me that this process entails a form of crushing the goods into blocks for ultimate disposal.

[12] In the arbitration award the Commissioner states further:

"The employee responsible for the compacting of goods confirms ... his intention with these items was to compact them. This is a clear indication to the three employees that the goods were not to be donated or sold but indeed compacted. The company witness, Mr Simon Ramuthla, testified that the goods were in the compacting area and that he compacted them ..."

[13] In her award the Commissioner found that Simon Ramuthla "admitted to compacting everything in the compacting room". The Commissioner concluded that the employees could thus not have removed the goods. She stated further, however, that the employees all admitted to taking goods which they believed were to be compacted.

[14] It is not entirely clear to me what the Commissioner intended to convey by this, but as will appear in due course, she filed an affidavit in clarification of certain issues.

[15] There are disputes of fact on the papers. Subject to what I shall say in due course, these disputes fall to be determined

according to established principles (see Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)). I propose to highlight what in my view are the most important of these disputed issues. In the founding affidavit deposed to on behalf of the company, the following is stated:-

"5.20The applicant presented its evidence at the arbitration proceedings. Mchunu again testified that the affected employees had all admitted to her that they had removed items of clothing from the compacting area without obtaining the necessary pass outs from management of the applicant. Neither Mr Swabilo nor the affected employees challenged this evidence under cross-examination.

5.21Ramuthla also testified at the arbitration proceedings and again confirmed that he had witnessed the affected employees removing items of clothing from the compacting area. Ramuthla conceded under cross-examination by Mr Swabilo that he had not told the affected employees not to remove the items of clothing from the bags in the compacting area.

5.22At no stage during the arbitration proceedings did Ramuthla testify that he had compacted the items of clothing which had been removed from the bags by the

affected employees.

5.23 The affected employees all testified at the arbitration proceedings. Their versions were virtually identical in that they admitted that they had removed items of clothing from the said bags but intended securing pass outs for these items of clothing before leaving the applicant's premises. However, after returning from their change room in order to collect the removed items of clothing, the affected employees testified that the items of clothing had been removed, presumably by Ramuthla who had compacted them."

[16] The Commissioner, while abiding the decision of this court, furnished a brief affidavit in amplification of the reasons for her award. The relevant part of this affidavit states:

"Based on the evidence presented to me at the arbitration I was satisfied that on a balance of probabilities the applicants were not guilty of misconduct and did not knowingly breach the rules of the employer. Contrary to the applicant's statement that there were no (admissions), there were several (admissions) to taking the items from the bags which they found in the compact room from all the witness (as per my notes). However,

they did not remove it from the company premises without the necessary pass out as the charge read. The goods were never removed from the premises and (they) had been compacted. I disagree with paragraph 5.22 ... of the founding affidavit ... The company witness, Mr Ramuthla did indeed concede under cross-questioning and did testify that he had compacted the items which had been removed from the bags. This weighed heavily in my mind and was noted by me in my notes at the arbitration. The employees testified that they did not obtain a pass out because the goods had been compacted and they did not remove (them)." (emphasis added)

[17] Central to the charges preferred against the employees is that they "removed" the goods in question. In this regard the Commissioner has made a clear finding which she has amplified in her affidavit. Mr van As, who appeared on behalf of the company, conceded that if there was evidence to support these findings, the arbitration award would be unassailable.

[18] The test for review has been authoritatively laid down by the Labour Appeal Court in Carephone (Pty) Ltd v Marcus NO and Others (1998) 19 ILJ 1425 (LAC). The question that must be

posed is whether there is "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" (at 1435E). The Labour Appeal Court also pointed out (at 1439A-B) that where there is a dispute of fact "the commissioner's version must be accepted as there was no application in the court below for oral evidence to be heard on the disputed issue".

[19] Although the primary relief that Mr Van As seeks is the review and setting aside of the arbitration award, in the alternative, he asks for a limited reference to evidence concerning the evidence of Mr Ramuthla. The passage from the Carephone case (supra) dealing with the possibility of referring the disputed issues to evidence should not be misunderstood. Although the Labour Appeal Court did not elaborate on this issue, I do not understand this passage as signifying a departure from long established precedent that persons exercising statutory adjudicative functions, such as magistrates and members of licensing boards, should not ordinarily be subjected to cross-examination concerning the performance of their functions, save in special cases (see Swart v Van der Merwe 1943 AD 629 at 647; Daitsh and Another v Osrin and Another (2) 1950 (2) SA 343 (c);

Clairwood Motor Transport Co Ltd v Pillay and Others 1958 (1) SA 245 (N); Johannesburg City Council v The Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T); Cape Town Municipality and Another v Bethnal Investments (Pty) Ltd and Another 1972 (4) SA 153 (C)).

[20] I do not suggest that a reference to evidence will never be competent nor do the authorities state as much. Nevertheless a reference to evidence entailing the examination and cross-examination of a Commissioner on the performance of his or her function ought to be strictly confined to cases where such is necessary to serve the ends of justice.

[21] It is not necessary for purposes of the present case to attempt to delineate the circumstances in which such a possibility might arise.

[22] The Labour Appeal Court in the Carephone case (supra) was also at pains to insist that the distinction between review and appeal must be maintained. The mere fact that I may have come to a conclusion different to that of the Commissioner does not justify interference on review. The fact that a Commissioner may have misconstrued a particular piece of evidence which has

no material bearing on the outcome of the arbitration award, also does not justify interference on review. Where a Commissioner makes findings of credibility and this is relevant to the conclusion reached, it is more difficult to sustain the review.

[23] In the present case the attacks on the arbitration award are summarised by Mr van As in his heads of argument as follows:

- (a) The commissioner failed to take account of the admissions to Mchunu by the employees immediately after the incident;
- (b) She failed to take account of the evidence of Ramuthla who testified that the employees had in fact removed the clothing from the compacting area;
- (c) She failed to take account of the admissions of the employees during the arbitration proceedings that they had in fact removed the items of clothing;
- (d) She failed to have regard to the failure by the employees to secure a pass out in order to remove the items of clothing from the premises.
- (e) She misconstrued the evidence of Ramuthla in concluding that he in fact compacted the items of clothing.

[24] I have already indicated that the Commissioner has furnished an affidavit in which she emphasises that it was not

proved that the employees removed the items in question from the company premises and moreover, she reiterates the finding that Mr Ramuthla did concede under cross-examination and did testify to the effect that he had compacted the items in question.

[25] Mr van As has drawn specific attention to the notes of the arbitration proceedings which have been furnished by the Commissioner. The proceedings before the Commissioner were not mechanically recorded and the sole record of what transpired consists of the handwritten notes of the Commissioner. Without in any way being critical of the Commissioner, it should be pointed out that these notes do not purport to be a verbatim transcript of what transpired and in certain instances are not easy to follow. This is perfectly understandable given the absence of any means for recording the proceedings mechanically.

[26] From the Commissioner's notes it emerges in relation to the evidence of Eunice Mathe, that she admitted to taking certain items. The notes also reflect, however, that Eunice Mathe testified that she would have obtained a pass out for those goods. It is also reflected in the notes that Eunice Mathe was questioned about alleged discrepancies between her oral

evidence before the Commissioner and the evidence that appears in the transcript of the disciplinary enquiry.

[27] With regard to Emily Kathide, Mr van As places reliance on the following passage from the notes, I shall reproduce that passage as it is recorded in the Commissioner's notes:

"I had knocked off already, dressed in my own clothes, to get drink from kitchen. On my way back at the compacting area I saw Maggie and security at the compacting room. I then asked them what they were doing there. They then said it was items that was thrown away. I then asked them - if this was for (indistinct). I then asked security - if I take it won't you say I need a pass out. I am in a hurry, I won't see Dorothy - I have taken ... I took serviettes and an apron. I put them aside at laundry to fetch my bag. When came back security searched my bag. Used them at home to clean."

Mr van As argues that this is indicative of an admission of guilt. The very next sentence, however, in the Commissioner's notes reads as follows:

"Did you take them home? (No)."

It is not clear to me why the answer to this latter question is in brackets. Nevertheless the difficulty remains that on this

passage it is not possible for me to reach a conclusion adverse to the Commissioner's finding that the employee did not remove the item from the company's premises.

[28] With regard to Gladys Mkwana, the Commissioner's notes reflect that she "chose one apron and one doek". Seemingly in response to the question as to whether she took these items home, the answer is recorded "no I did not take it home, I was going to look for a pass out". The Commissioner's notes also reflect that Gladys Mkwana was questioned on apparent discrepancies between her evidence before the Commissioner and the transcript of the proceedings of the disciplinary enquiry.

[29] With regard to the evidence of Simon Ramuthla, Mr van As has drawn my attention to the arbitrator's notes in which this witness deals with the issue of compacting the items in question. At one point in the notes it appears to be reflected that Mr Ramuthla was told not to compact these goods by presumably Dorothy Mchunu. It is also reflected in the notes that he was told not to touch these goods. On the same page of the notes, however, there appears the statement "I compact everything where I am working" and "everything I see must be compacted".

Again, without intending any criticism of the Commissioner, it is not clear from these notes whether or not the witness in fact testified that everything had been compacted or whether he had been told not to compact these goods and gave effect to that instruction.

[30] From the perspective of the company seeking to review these findings, it faces the difficulty that the record at least discloses evidence which seems to support the conclusions reached.

[31] Mr van As also argued that the Commissioner ignored the minutes of the disciplinary enquiry. There was a suggestion by Mr Zibi, who appeared for the employees, that the status of these minutes was uncertain. For purposes of the review proceedings, however, it is quite clear that the transcript of the disciplinary enquiry is stated to be a fair reflection of what transpired and this is not disputed. It is not entirely clear what status was accorded to the transcript of the disciplinary enquiry at the arbitration proceedings. What is clear, however, is that these minutes were placed before the arbitrator. It not infrequently occurs that an arbitrator will be confronted with a conflict between the oral evidence presented at an arbitration hearing and matter

contained in documents which are placed before the arbitrator. In such cases the Commissioner may frequently be at a disadvantage due to lack of opportunity to study the documentary evidence. It is perfectly permissible for a Commissioner to test discrepancies that emerge between the oral evidence and the documentary evidence. Indeed this occurred to a limited extent in the present matter. Both Eunice Mathe and Gladys Mkwana were questioned about apparent discrepancies between the oral evidence and the record of the disciplinary enquiry. In my view, therefore, it is not open to the company to assert that the Commissioner failed to have regard to the minutes of the disciplinary enquiry.

[32] On this issue, however, it should be emphasised that where the issues in dispute are not dependent on matters of evaluation and judgment it will be easier to test the result arrived at against the constitutional standard of justifiability. However, much of the work of Commissioners in arbitration proceedings is precisely concerned with matters of judgment and evaluation.

[33] At common law, while it is clear that an official vested with a statutory discretion is obliged to take into account all relevant considerations and to ignore irrelevant considerations, it is

frequently no easy task to determine what is relevant or irrelevant, as the case may be. Milne AJ in Estate Geekie v Union Government and Another 1948 (2) SA 494 (N) at 511 postulated this test:

"Allowing that if some consideration were taken into account which was so manifestly alien and irrelevant that no reasonable man could regard it as relevant, that might vitiate the decision arrived at as a result of it (depending upon the degree to which the intruding factor influenced the decision) .."

The corollary of the rule requiring an official to ignore irrelevant considerations is that such official must take into account relevant considerations. Even here, however, a court will be slow to prescribe the weight to be accorded to such considerations. The position in English law has been summarised thus:

"When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate

weight has been accorded to a relevant consideration."

(De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th ed) at 557 para 13-015).

[34] I do not wish to be understood as suggesting that the common law tests are the same as the constitutional standard of justifiability. I cite the common law authorities as illustrative of the difficulties in interfering on review with decision-making functions involving matters of judgment and evaluation. Each case would however, have to be considered on its own merits. Even in matters involving judgment and evaluation, the Court is not relieved of its duty to scrutinise the reasons furnished against the standard of justifiability.

[35] The present case, however, poses considerable difficulties. They are exacerbated by the fact that there is no verbatim transcript of the arbitration proceedings and all that is before the court is the handwritten notes of the Commissioner. Mr van As has sought to extract various aspects of the evidence reflected in these notes. It is not permissible to consider these aspects of the evidence in isolation and draw the conclusion that there has been a clear failure by the Commissioner to consider the issues in dispute. In my view, and notwithstanding factors pointing to a

suspicion of misconduct on the part of the employees, it is simply not competent to interfere with the arbitration award on review.

[36] In the result the application is dismissed with costs.

G J MARCUS

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 11 JUNE 1999

DATE OF JUDGMENT: 11 JUNE 1999

For the applicant: Adv M Van As

Instructed by Hofmeyr Herbstein

For the Respondent: Mr V Zibi

SACCAWU