

CASE NO : D1009/2000

Revised/Reportable

DATE : 26 February 2001

RAINBOW FARMS (PTY) LTD versus CCMA & R NGIDI

JUDGMENT

PILLAY J

[1] The employee was charged for unauthorised removal of company property and dismissed on 11 February 2000. He referred the dispute to arbitration. The arbitrator found his dismissal to be substantively unfair. One of the arbitrator's reasons for doing so was based on the fact that the employee had made a confidential report to the management before the incident that there was theft taking place in his department. The arbitrator found it strange that an employee who was allegedly involved in theft would alert his employer to it. The arbitrator was also cautious about the evidence of the accomplice who testified for the employer in return for indemnity from criminal prosecution. He criticised the chairman of the inquiry for not exercising similar caution.

[2] If the arbitrator had stopped at this point, his award way well have withstood the tests in *Carephone (Pty) Ltd v Marcus and Others (1998) 11 BLLR 1093*, *Toyota South Africa Motors (Pty) Ltd v CCMA and Others (2000) 21 ILJ 340 (LAC)* and *Shoprite Checkers (Pty) Ltd v Ramdau NO & Others 2000 21 ILJ 1232 (LC)*. However, the arbitrator advanced two further reasons which emerge from

the following paragraph in his award:

"I consider also the evidence of Mkhize. Mkhize testified that he was not present when the theft was planned between the applicant, Sidwell and Raphael. He only heard a report from

others. Those who were involved in the conspiracy, that is, Sidwell and Raphael, were not called by the company as witnesses. In addition Mkhize testified that the main link between the applicant and the theft was the fact that the applicant received money but he, Mkhize, was not present when the applicant received the money."

The arbitrator was obviously unaware that the employee and Raphael were one and the same person. His failure to realise that the employee and Raphael were one and the same person is a mistake of fact which vitiates the entire proceedings. Whenever Raphael's name was mentioned in the evidence, he did not relate it to the employee. He appeared to accept Mkhize's evidence that Raphael was involved in the conspiracy. On that basis the proper finding should have been that the employee was involved in the conspiracy. The materiality of this defect is also evident from the next finding.

[3] The arbitrator found that the accomplice Mkhize was not present when the employee received money. However, recorded in his own handwriting, the evidence of the arbitration reads as follows:

"Statement of Mkhize: Was present when Sidwell gave R150 to Raphael."

As he believed that Raphael and the employee were not the same person, he did not deal with the evidence that the employee had allegedly received money in connection with the theft. The paragraph of the award quoted above demonstrates that the arbitrator failed to apply his mind to the material properly before him.

[4] Further examples of the arbitrator not having applied his mind have been pointed out to the Court. Other grounds have also been advanced for the setting aside of the award. However, as the above two reasons are decisive for the purposes of setting aside this award, the other

grounds have not been canvassed in this judgment.

[5] In the circumstances the Court grants an order in the following terms:

The arbitration award under case No 44024 is reviewed and set aside. The matter is referred to the CCMA to be reheard as a matter of urgency before another commissioner. There is no order as to costs.

IN THE LABOUR COURT OF SOUTH AFRICA

Revised/Reportable

HELD AT DURBAN

Case No D1009/2000

In the matter between:

RAINBOW FARMS (PTY) LIMITED

Applicant

and

RAPHAEL NGIDI

First Respondent

COMMISSIONER AUBREY B NGCOBO

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

PRESIDING OFFICER

JUDGE PILLAY

FOR APPLICANT

MR M MHLONGO

FOR RESPONDENT

MR P J BLOMKAMP

**JUDGMENT
26 FEBRUARY 2001**

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