

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J2828/00

In the matter between:

FOURIE'S POULTRY FARM (PTY) LIMITED
t/a CHUBBY CHICK

Applicant

and

**THE COMMISSION FOR CONCILIATION,
 MEDIATION & ARBITRATION**

First Respondent

MS RIANA BOTHA, NO

Second Respondent

FEDCRAW

Third Respondent

TIMOTHEUS TJALE

Fourth Respondent

M SENAME

Fifth Respondent

JUDGMENT

JAMMY AJ

This is an application in terms of Section 145(2) of the Labour Relations Act 66 of 1995 in which the Applicant seeks an order reviewing and setting aside the award of the Second Respondent in an arbitration between the Applicant and the Fourth and Fifth Respondents and made by her in her capacity as a Commissioner of the First Respondent.

The application is based on two grounds. The first is that in reaching her conclusion that the Applicant had failed to discharge its acknowledged onus of proving that its dismissal of its employees, the Fourth and Fifth Respondents was fair, the Second Respondent applied an incorrect test in considering the circumstantial evidence before her and secondly that there was no rational connection between her conclusion and the undisputed facts of the matter which were placed before her.

The Fourth and Fifth Respondents were dismissed, following a disciplinary enquiry, for the theft of chickens whilst in the employ of the Applicant on one of its farms where it carries on business as a chicken breeder. It is common cause that in the course of the arbitration neither the Fourth nor the Fifth Respondent gave evidence. The only witnesses to testify were called by the Applicant and in addition to their testimony, the Second Respondent had recourse to a bundle of documents of which only the record of the disciplinary enquiry and a plan of the farm were held by her, with what she stated to be the agreement of the parties (although the Applicant disputes this), to be admissible and relevant.

The evidence presented to her, in broad terms, indicated through two specific witnesses, that the Fourth and Fifth Respondents had been heard discussing the possession of chickens, that the Fifth Respondent had been seen by an off-duty night watchman with a sack containing chickens and that when confronted by him, the Fifth Respondent had only laughed. The person who had heard the initial discussions subsequently saw the Fourth Respondent carrying bags and putting them under a fence, on the other side of which the Fifth Respondent and another person had taken possession of them. No one had actually seen the contents of the bags at any time but the Fifth Respondent had been seen taking the bags to the showers on the property.

The manager of the site, having been alerted to the situation, contrived a confrontation with the Fifth Respondent in the shower block where eighty-seven chickens were discovered. It was on the strength of this accumulation of largely circumstantial evidence that disciplinary proceedings were eventually instituted and, as a consequence, the Fourth and Fifth Respondents were dismissed.

The different tests to be applied in the assessment of circumstantial evidence in criminal and civil proceedings are trite elements of the law of evidence. The proper test in arbitration proceedings is the civil one and if an Arbitrator imports to the evidence before him the test applicable to criminal proceedings, namely that the discharge of the onus borne by employers must be determined beyond a reasonable doubt rather than on a balance of probabilities, a gross irregularity in the proceedings will have been perpetrated.

OK Bazaars (a division of Shoprite Checkers) v Commission for Conciliation Mediation and Arbitration and Others (2000) 21 ILJ 1188 at 1191

In Govan v Skidmore 1952(1)SA 732

It was held that the selected inference must “**by the balancing of probabilities be the more natural, or plausible, conclusion from amongst several conceivable ones**”, a principle confirmed by the Appellate Division, in a line of subsequent decisions.

See for example: Ocean Accident & Guarantee Corporation v Koch 1963(4) SA 147 at 159

What emerges from these authorities is that clear and convincing evidence from an employer to establish a valid reason for dismissal is not required in arbitration proceedings. The determination to be made is one based solely on a balance of probabilities.

In her award in this matter, having reviewed the evidence before her, the Second Respondent concluded **“that the employer failed to discharge the onus to prove on a balance of probabilities that the Respondents had stolen the chickens”**. Reference was made by her to her perception of discrepancies, inconsistencies and contradictions in the evidence of the Applicant’s witnesses but I agree with Mr Bruinders’ submission that those criticisms do not concern the identification of the Fourth and Fifth Respondents as the perpetrators of the alleged theft but relate rather to the contents of the bags that they were seen carrying. No aspect of the evidence presented by the Applicant’s witnesses supported any valid inference that the Fourth and Fifth Respondents were not the persons guilty of the theft in question, whether or not anyone else was involved. It is apparent from the award that the Second Respondent’s approach was that, once there was reasonable doubt regarding the contents of the bags seen to be carried by the Respondents, the Applicant had failed to discharge its onus of establishing their guilt. That, as I have indicated, is the criminal test, and not one legitimately applicable in the instant circumstances. That irregularity alone, renders her award reviewable.

The evidentiary material before the Second Respondent was solely that submitted by the Applicant and there is no doubt in my mind, notwithstanding the discrepancies and inconsistencies which she seeks to emphasise, that her award is not rationally justifiable. In my view the most compelling inference to be drawn from the facts before her is that the Fourth and Fifth Respondents were guilty of the theft with which they were charged. It should be borne in mind in that context that the facts submitted by the Applicant’s witnesses, whilst in certain relatively immaterial instances inconsistent, were not disputed by any contradictory or rebutting evidence submitted by the Respondents.

I conclude therefore that the award cannot be allowed to stand. Having elected to present their case in the arbitration on the basis upon which they did so, the Respondents cannot now because of its inadequacy, expect a second opportunity to do so. The Applicant has met that case and cannot equitably be expected to do so again. This is not a matter in my view therefore which would justify the dispute being referred back to the First Respondent for arbitration anew. In the circumstances of the matter, the following order is both appropriate and proper.

The award of the Second Respondent dated 20 May 2000 in the First Respondent's Case Number NW14795 is reviewed and set aside.

The Second Respondent's determination that

“the dismissal of the Respondents was not effected for a fair reason”

substituted by the following -

“The dismissal of the Respondents was fair and justified in all respects”.

The application being unopposed, there is no order as to costs.

B M JAMMY
Acting Judge of the Labour Court

16 July 2001

Representation:

ant: Advocate T J Bruinders, instructed by Pienaar Swart & Nkiseng