

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR115/02

In the matter between:

KARAN BEEF

Applicant

and

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

First Respondent

FAIZEL MOOI N.O

Second Respondent

**NATIONAL WHOLESALE AND UNITED
WORKERS UNION obo ALBERT GUMEDE
AND CYPRIAN DIDI**

Third Respondent

—

J U D G M E N T

HUTTON A J:

1 The applicant in this matter is Karan Beef, a sole proprietorship. The applicant is a distributor of fresh meat products. Albert

Gumede (“*Gumede*”) and Cyprian Didi (“*Didi*”) were employed by the applicant. Their duties involved assisting a truck driver in the distribution of the applicant’s products to its customers. In particular their duties included the off-loading of meat at the premises of various customers of the applicant.

1 On 9 July 2001 the applicant’s warehouse manager, Joseph van Eeden (“*Van Eeden*”), received a telephone call from an irate customer complaining that two of the applicant’s employees had been under the influence of alcohol when delivering meat to the customer’s premises. It was ascertained that the crew of the truck making the delivery to that particular customer consisted of Gumede, Didi and a driver.

1 Upon their return to the applicant’s premises, Gumede, Didi and the driver were stopped by the applicant’s security guards. As a consequence of what then ensued the driver of the truck was cleared of any involvement in the alleged misconduct whilst Gumede and Didi were charged with misconduct consisting of the consumption of alcohol whilst on duty, the consumption of alcohol whilst in the applicant’s vehicle, being under the influence of alcohol when delivering to the applicant’s customer and bringing the applicant’s name into disrepute.

1 A disciplinary enquiry was convened on 13 July 2001 at which Gumedede and Didi were found guilty. They were both dismissed from the employ of the applicant.

1 Subsequently, the third respondent, the National Wholesale and United Workers Union, of which Gumedede and Didi were both members, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (“*the CCMA*”) on behalf of Gumedede and Didi, disputing both the substantive fairness and the procedural fairness of their dismissals. After an unsuccessful attempt of conciliation, the matter proceeded to arbitration before the second respondent, a duly appointed commissioner of the CCMA.

1 The first witness led by the applicant testified in relation to the procedural issues surrounding the dismissal. The remaining three witnesses for the applicant, Messrs Van Eeden, Kgogo and Slinger testified in relation to the issues of substantive fairness. A Mr Mbhele was the only witness called on behalf of Gumedede and Didi. He testified in relation to procedural issues. Neither Gumedede or Didi testified at the arbitration. Their silence had also been a feature of the earlier disciplinary enquiry.

1 The second respondent delivered an award on 6 December 2001. In his award the second respondent found that whilst the dismissal was procedurally fair, it was substantively unfair.

1 The second respondent's reasoning for coming to the latter conclusion was as follows:

“Section 192 (2) of the LRA states: ‘If the existence of the dismissal is established, the employer must prove that the dismissal is fair.’ It is not disputed that the applicants were dismissed. Even though the applicants did not testify, the respondent still has to establish the dismissal was fair. I am of the view that the dismissal was substantively unfair for a number of reasons. Firstly, in chief, Mr van Eeden was specifically asked who smelled of alcohol to which he replied that he could not say which one, because they were in a closed room. Under cross-examination he said they both smelled of alcohol. He acknowledged that he had earlier said that he was not sure if they smelled of alcohol, but insisted that when they got out of the truck he spoke to each of them close by to see if they smelled of alcohol. His later insistence that the applicants both smelled of alcohol cannot be given much weight as he was given an opportunity by his own representative to mention this in his evidence in chief. Furthermore, Mr Slinger testified they were standing outside the security office when Mr van Eeden came over to where they stood. There is therefore no corroboration for Mr van Eeden's evidence that he smelled alcohol on both applicants when they got out of the truck. Secondly, Mr Kgogo who was also with the applicants in the office as he was asked to interpret, made no

mention of either or both of the applicants smelling of alcohol. Mr Slinger testified that he smelled alcohol. However he did not indicate if both applicants smelled of alcohol or only one of them. While I accept that both Mr van Eeden and Mr Slinger smelled alcohol in the vicinity the (sic) of the applicants, this is not sufficient to render the dismissal substantively fair, as the case against both applicants must be conclusively proved on a balance of probabilities. It is clear that one or more of the people in the truck consumed alcohol as a beer bottle was found in the truck. However, the driver did not smell of alcohol and was cleared. In order for the applicants both to be found guilty, it is necessary for the witness to have clearly smelled alcohol on both of them, or to conclusively state that he smelled alcohol on one of them and clearly identify him. It is possible that only one of them consumed alcohol. Without clear evidence as to which one consumed alcohol or whether both of them consumed alcohol, they both have to be given the benefit of the doubt.”

1 The applicant seeks that the second respondent’s finding in regard to the substantive fairness of the dismissal be reviewed and set aside. In essence the applicant complains that the second respondent misdirected himself by imposing a greater burden of proof on the applicant than is required in law. It is well established that what is required of an employer is to discharge the *onus* that lies upon it in terms of section 192(2) of the Labour Relations Act, 1995 (“*the LRA*”) on a preponderance of probability.

See: **Lefu & others v Western Areas Goldmining Company Ltd**

(1985) 6 ILJ 307 (LC) at 314 B

Early Bird Farms (Pty) Ltd v Mlambo [1997] 5

BLLR 541 (LAC) at 544 A - B;

Mbhele & another v Strange Cleaning Services CC

(2001) 22 ILJ 2746 (CCMA) at 2750 E - F

1 The applicant argues that although the second respondent appears to accept that the *onus* that lies upon an employer in terms of section 192 (2) of the LRA to prove that the dismissal is fair is discharged upon a balance of probabilities, the second respondent has misconceived what this entails by requiring that the applicant should have established the misconduct complained of “*conclusively*”. The applicant argues that the second respondent’s evaluation of the evidence before him clearly demonstrates a lack of appreciation of the nature of the *onus* that rested upon the applicant.

1 In **Marapula & others v Consteen (Pty) Limited (1999) 20 ILJ 1837(LC)** Jajbhay AJ, as he then was, held as follows at **1845 F - I**:

“The onus is on the employer to prove that the dismissal was fair (s 192 of the LRA) on a preponderance of probability. In my opinion, the onus is discharged if the employer can show by credible

evidence that its version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanor and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions is assessed, or where a particular story tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety."

1 I am in respectful agreement with what is set out by the learned judge in the passage quoted above. I am furthermore of the view that the second respondent materially departed from the accepted method of assessing the evidence before him in arriving at a decision as to whether or not the probabilities favoured the applicant.

1 What the second respondent was required to do was to assess the totality of the evidence led on behalf of the applicant in order to determine whether a *prima facie* case of misconduct on the part of Gumede and Didi had been established. In view of the fact that neither Gumede nor

Didi led any evidence in their defence (apart from the evidence regarding procedure), if a *prima facie* case was established, then that would suffice to discharge the *onus* resting upon the applicant.

1 The second respondent made no finding adverse to the credibility of any of the applicant's witnesses. He merely found that it had not been established that Gumede and Didi, individually, smelt of alcohol. Without "*conclusive*" proof that each of them smelt of alcohol, the second respondent reasoned, they both had to be "*given the benefit of the doubt*".

1 This approach is, in my view, untenable. The second respondent in assessing the evidence in this manner, has narrowed the enquiry to an impermissible extent. In so doing, he has effectively ignored the other evidence that was before him. The fact that there was a smell of alcohol about Gumede and Didi, albeit not attributable directly to one or the other of them, must be taken together with the other proven facts, that is that a complaint had been received from the applicant's customer, an almost empty and freshly consumed quart bottle of beer had been found in the truck in question and that both Gumede and Didi refused to submit to breathalyser tests when requested to do so.

1 When all of these facts are taken into account, the cumulative effect thereof can lead to no other rational conclusion than that it has been *prima facie* established that Gumede and Didi had partaken of the contents of the quart bottle of beer that had been found in their truck, whilst on duty. That being so, the duty to adduce evidence in rebuttal of this *prima facie* case then lay upon Gumede and Didi. They did not take up the challenge and accordingly the misconduct with which they were charged was established before the second respondent.

1 In **Shoprite Checkers (Pty) Limited v Ramdaw N.O and Others** (2001) 22 ILJ 1603 (LAC) the Labour Appeal Court authoritatively held that a decision of an arbitrator at the CCMA may be reviewed and set aside if it is not justifiable. The court held that in order for a decision to be justifiable it must be rational.

1 I am of the view that given the erroneous approach adopted by the second respondent to the question of *onus*, the decision arrived at by the second respondent lacks rationality. As a decision that is irrational cannot be said to be justifiable, I am accordingly of the view that the decision falls to be reviewed and set aside.

1 This being the case, I am enjoined by section 145 (4) of the LRA to either determine the dispute in the manner I consider appropriate or to make any order I consider appropriate about the procedures to be followed to determine the dispute. In the arbitration proceedings the sole issue for determination, other than the procedural issue which was decided against Gumede and Didi, was whether or not they were guilty of the misconduct complained of. There was no contention that there was no rule in place that employees may not drink on duty, nor any contention that such a rule was an unreasonable one. No contention was advanced on behalf of Gumede and Didi that the sanction of dismissal was an inappropriate one if the misconduct with which they were charged was proved. In these circumstances, I am of the view that once the misconduct was proved on a balance of probabilities, and as I have already found this ought indeed to have been the case, then it is a foregone conclusion that the result in any arbitration would be that the dismissal of Gumede and Didi would have to be found to be substantively fair. In these circumstances I see no reason to burden the CCMA with a rehearing of this matter.

1 I see no reason in law or fairness why the costs of this application should not follow the result.

2 In the circumstances, I make the following order:

1 The decision of the second respondent under cases number GA 14092/01 and 12561/01 dated 6 December 2001 is hereby reviewed and set aside.

2 The decision of the second respondent is substituted with a decision that the dismissal of Albert Gumede and Cyprian Didi was substantively and procedurally fair.

3 Albert Gumede and Cyprian Didi are ordered, jointly and severally, to pay the applicant's costs of this application.

R HUTTON

Acting Judge

Labour Court of South Africa

For the applicant:

Instructed by : Bell Dewar & Hall Inc

Attorney D Masher

For the respondent:

Instructed by : Maluleka Seriti

Makume Matlala Inc

Adv G L M Bokaba