REPUBLIC OF SOUTH AFRICA

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Of interest

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1051/14

In the matter between:

MARTIN & EAST (PTY) LTD **Applicant**

and

BULBRING N.O. **First Respondent**

CCMA **Second Respondent**

SOLIDARITY obo DIRK DU TOIT **Third Respondent**

Heard: 18 November 2015

Delivered: 2 February 2016

Summary: Review – misconduct – arbitrator finding that employee did not contravene a rule regarding moonlighting – employee committed fraud, was dishonest and brought company into disrepute. Arbitrator's finding that dismissal was unfair not a reasonable finding. Award reviewed and set aside. Dismissal fair.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant company, Martin & East, dismissed the third respondent, Mr Dirk du Toit (represented by his trade union, Solidarity) for misconduct. He referred an unfair dismissal dispute to the CCMA. The arbitrator (the second respondent) found that the dismissal was procedurally fair. She also found that the employee had been dishonest; that he had committed fraud; and that he had brought the company's name into disrepute. But she found that his dismissal was unfair because "there was no strict application of the rule" against moonlighting. She said that her "impression was that the company wanted him out and that in different circumstances they may have dealt with this sort of misconduct differently". She ordered the company to pay the employee compensation equivalent to three months' salary, amounting to R 63 939, 00. The company seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[1]

Background facts

[2] The employee was an operators' manager. He also trained the company's employees and had become an accredited assessor and moderator during his employment. The company alleged that he had breached the company rule against moonlighting; that he acted dishonestly and fraudulently by misrepresenting the time he had spent on training and by forging a signature and submitting false information on other documents; and that he had brought the company's name into disrepute. After a disciplinary hearing, the company dismissed the employee as it could no longer trust him.

The award

[3] The arbitrator dealt with each of the allegations of misconduct, having regard to the evidence before her. I shall do likewise.

[1] Labour Relations Act 66 of 1995.

Moonlighting

[4] It is common cause that there was a rule against moonlighting. The company alleged that the employee had contravened the rule "in that you did not declare or obtain written approval to present training to an external company for remuneration over the period 27 February 2013 to 3 March 2013."

[5] During this period the employee had presented training for his own account to another company, Benbou, in Beaufort West. He did not ask permission to do so. And he was actually on duty in Cape Town for at least some of the time.

[6] The arbitrator accepted that there was a rule and that the employee was aware of it; yet she found:

> "[M]y sense is that there was no strict application of the rule when it came to Du Toit".

[7] The arbitrator did not accept the evidence of Du Toit's plant manager, Johan van Straaten, that Du Toit did not tell him that he was going to Beaufort West. She found that they had "had a discussion" because Van Straaten had asked Du Toit what he should do if he needed him during that time. She also asked, if Du Toit had requested permission to do private work previously, "why was the rule not made clear to him on those occasions?". She concluded that the employee knew the rule but that it was not strictly enforced; and that, although he did not ask permission to go to Benbou, he had told Van Straaten, who did not object.

Fraud and dishonesty

[8] This allegation related to the employee having forged the signature of a site agent, Louis Mouton; and submitting false documentation. The company has a long standing service provider relationship with an accredited training service provider, Tjeka Training. Tjeka could issue lawful competency certificates after it had done training. The company concluded an agreement with Tjeka in terms of which one of the applicant company's employees, Christo Duister, was accredited to do the evaluation, on behalf of Tjeka, for operators employed by Martin & East.

Those employees had to be employees of Martin & East and had to be trained by Duister using Tjeka's approved training material.

[9] Du Toit, as previously explained, did training for Benbou for his own account during the period 27 February – 3 March 2013. He then submitted the documentation regarding the completion of that training to Tjeka for it to issue competency certificates to Benbou employees. Tjeka did so. Du Toit used Tjeka material for the training. He submitted attendance registers showing that the trainees attended his training on all five days. However, he was actually at work in Cape Town – more than 400 km from Beaufort West – on three of those days, from 27 February to 1 March 2013. It appeared that he had fabricated the attendance registers and falsified the signatures of the trainees on those registers. Mouton was one of the people trained by Du Toit at Benbou. (Mouton's brother is a co-owner of Benbou). Mouton testified that he did not sign the attendance register; yet his falsified signature, together with his name, surname and identity number appeared on the attendance register for each day from day one to day five. The arbitrator found that Du Toit forged the signature. She concluded:

> "He made a misrepresentation which prejudiced the training or potentially prejudiced it and put certificates at risk. The intention was to deceive the moderator. Du Toit is guilty of dishonesty and fraud."

Bringing the company's name into disrepute

[10] The arbitrator also found that the employee brought the company's name into disrepute. He leveraged his position at the company for his personal benefit. He secured an agreement with Tjeka in his private capacity for the same deal that his employer should have secured. He also leveraged his relationship with the company for his son's benefit, thus securing a benefit for the company's competitor.

Sanction

[11] Turning to the issue of sanction, the arbitrator took into account that the employee had previously been reinstated by the CCMA after a previous

incident where the company claimed that he had resigned. The arbitrator in that case found had not resigned, but that he had been dismissed.

[12] Apparently because of that fact and because of the fact that the company subsequently charged the employee with misconduct upon his being reinstated, the arbitrator reasoned:

> "My impression was that the company wanted him out and that in different circumstances they may have dealt with this sort of misconduct differently. There was no investigation into any other employee (Mouton facilitated the moonlighting; Smith drafted a quote during working hours) and it does smack of a witch-hunt/spite."

[13] The arbitrator found that there was inconsistency; and that this, together with "the company's motive" and "the fact that Du Toit's conduct had no impact on the relationship of the company with Tjeka (until the company directly confronted Tjeka about it) makes the sanction of dismissal inappropriate." She also found that the dishonesty and fraud was in relation to Tjeka and that "it was not a fraud on the company." Having found that dismissal was "inappropriate", she then found that the dismissal was substantively unfair (though procedurally fair).

[14] In considering the appropriate compensation to award, given her finding on substantive fairness, the arbitrator noted:

> "I was taken aback by the fact that Du Toit was not prepared to make even the smallest concession. He proved a difficult witness. It was clear to me that the company had certainly reimbursed Du Toit for his LOA but Du Toit would not make the concession. He would not acknowledge any wrongdoing on his part and tried to blame the moderators for not doing their job properly and the trainees for agreeing to sign documents that were false. The explanation that he took his son to Tjeka but stood outside and left them to do the talking without getting involved at all is also inadequate and untrue. I have also considered that he did not respect the company and respect its relationship with Tjeka."

[15] Despite these findings on the employee's dishonesty and lack of credibility, the arbitrator stated:

> "I believe that the company would have dealt with the matter differently had the misconduct not been uncovered off the back of the CCMA award."

[16] The arbitrator then expressed the belief "that three months' compensation is appropriate to remedy the unfairness" and ordered the company to pay that.

Review grounds

[17] There is no cross-review against the arbitrator's findings that Du Toit was guilty of dishonesty and fraud, and of bringing the company's name into disrepute.

[18] The company takes issue with the finding that, despite the fact that the employee knew the rule against moonlighting, he was "not guilty" of that charge because the arbitrator's sense was that there was no strict application of the rule when it came to him. The company also seeks to review the award of compensation. It argues that the employee should be dismissed.

[19] In short, the company argued that the decision reached by the arbitrator is one that a reasonable arbitrator could not reach on all the material that was before her.[2]

Evaluation / Analysis

[20] Mr *Snyman* argued that, based on the arbitrator's own factual findings, dismissal was a fair sanction. I agree. As set out above, the arbitrator found, amongst others:

20.1 The employee was aware of the rule against moonlighting, despite him denying it.

20.2 The employee did not ask for, and was not given permission for, the training in Beaufort West from 27 February to 3 March 2013, which was for his own personal benefit.

20.3 The employee had forged Mouton's signature on the training attendance register and had forged documents relating to the training.

[2] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) para [110]; *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) para [25].

20.4 The employee was dishonest representing that it did the training over five days when that was not the case.

20.5 The employee brought the company into disrepute.

[21] Based on these findings alone – that have not been challenged by the employee or his trade union – the arbitrator's finding that the dismissal was unfair is, in my view, so unreasonable that no reasonable arbitrator could have come to the same conclusion.

[22] The employer's witnesses testified that the company had lost trust in the employee. It is common cause that he was not only dishonest but had committed fraud. The arbitrator clearly disregarded the following principle set out by the Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v CCMA:*[3]

> "[T]his court has consistently followed an approach, laid on early in the jurisprudence of the Labour Court in *Standard Bank SA Ltd v CCMA* [1998] 6 BLLR 622 (LC) at paragraphs 38-41 where Tip AJ said:
>
> 'It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."

[23] The LAC also dealt with dishonesty in *Toyota SA Motors (Pty) Ltd v Radebe*:[4]

> "I revert now to the question whether the [arbitrator] committed a gross irregularity in setting aside the dismissal of [the employee] by the [company]. If the above-mentioned case law has required that dismissals be upheld where dishonesty has been proved, it seems relatively clear that dismissal would be warranted we gross dishonesty is present."

[24] The arbitrator accepted that the employee's fraud and dishonesty caused prejudice to the company and to Tjeka as a third-party service provider. The following *dictum* of the LAC in *ABSA Bank Ltd v Naidu*[5] is apposite:

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[3] [2008] 9 BLLR 838 (LAC) para [16].

[4] (2000) 21 *ILJ* 340 (LAC) para [51].

[5] [2015] 1 BLLR 1 (LAC) paras [53]-[54] (footnotes omitted).

> "In *De Beers Consolidated Mines Ltd* above, the court further pointed out that 'the seriousness of dishonesty – i.e. whether it can be stigmatised as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business.' In the present instance, considering the nature of the business, there can be no doubt, in my view, that Ms Naidu's dishonesty severely adversely impacted on the business… It followed that she owed a fiduciary responsibility vis-a-vis the appellant towards ensuring that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients. It seems to me, accordingly, that any false declaration or fraudulent misrepresentation that she made to any client – as she did in relation to Mr Khan – constituted a breach of her duty and a breakdown in her trust relationship with the appellant."

[25] It must also be borne in mind that the employee continued to rely on a false defence that the arbitrator rejected. The LAC held in *De Beers Ltd v CCMA*[6]:

> "Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great."

[26] To the findings of dishonesty and fraud must be added the finding that the employee brought the company's name into disrepute. He leveraged his relationship with the company for his personal benefit and assisted competitor. In other words, he breached his fiduciary duty towards his employer. The failure of an employee with faith award employer was dealt with by the LAC in *SAPPI Novoboard (Pty) Ltd v Bolleurs:*[7]

> "It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully.… The relationship between employer and employee has been described as a confidential one. The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests'…. If an employee does 'anything

[6] (2000) 21 *ILJ* 1051 (LAC) para [25].

[7] (1998) 19 *ILJ* 784 (LAC) para [7] (references omitted).

> incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him'…."

[27] The Supreme Court of Appeal confirmed in *Phillips v Fieldstone Africa (Pty) Ltd*[8] that:

> "Where one man stands to another in a position of confidence involving a duty to protect the interests of that order, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty."

[28] On the arbitrator's own findings, that is exactly what Du Toit did. That was contrary to the principles expressed by the SCA in *Ganes v Telecom Namibia Ltd*:[9]

> "As an employee of the [company] and in the absence of an agreement to the contrary the [employee] owed the [company] a duty of good faith. This duty entailed that he was obliged not to work against the [company's] interests; not to place himself in a position where his interests conflicted with those of the [company]; not to make a secret profit at the expense of the [company]; and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee of the [company]."

[29] And finally, in *Stoop & Ano v Rand Water*[10] Basson J held with reference to *Volvo SA v Yssel*[11]:

> "[The employees] not only had the express duty to maintain the highest level of ethics and transparency but, as senior employees, they had a fiduciary duty to ensure total honesty and integrity when goods and services were procured."

[30] Du Toit held a position of trust. He abused it. He acted against his fiduciary duty to his employer, acted in his own interests, and to the prejudice of his employer. That in itself destroyed the employment relationship.

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[8] (2004) 25 *ILJ* 1005 (SCA) para [22].

[9] (2004) 25 *ILJ* 995 (SCA) para [25].

[10] (2014) 35 *ILJ* 1391 para [99].

[11] (2009) 30 *ILJ* 2333 (SCA).

[31] Turning to sanction, it is difficult to fathom on what basis the arbitrator formed the "impression" that the company wanted the employee out and that it conducted a "witch-hunt" against him out of "spite". Her impression that, in different circumstances, the company "may have dealt with this sort of misconduct differently" does not amount to evidence of inconsistency. The fact is that the employee committed serious misconduct, including dishonesty, fraud and bringing the company's name into disrepute. The company led clear evidence that it had lost trust in him. For the arbitrator to find that, in those circumstances, the sanction of dismissal imposed by the company was unfair, is entirely unreasonable in my view.

[32] The arbitrator also does not set out any basis for her "belief" that the company would have dealt with the matter differently had the misconduct not been uncovered "off the back of the CCMA award". And she does not deal with the fact that neither Mouton nor Smith committed misconduct in the form of dishonesty or fraud. There is no rational basis for her finding of inconsistency.

Conclusion

[33] The employee committed gross misconduct. The arbitrator accepted that he was dishonest, that he committed fraud, that he brought the company's name into disrepute, and that he acted to the prejudice of his employer for his own benefit. He destroyed the relationship of trust between him and his employer. Her finding that his dismissal was nevertheless substantively unfair is, in my view, so unreasonable that no reasonable arbitrator could have come to the same conclusion. As the LAC held in *Toyota*[12]:

> "Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty."

[12] Above para [15].

[34] As to the appropriate relief, it would serve no purpose to remit this dispute to the CCMA for a fresh arbitration before another arbitrator. On the first respondent's own findings, the dismissal was fair.

[35] With regard to costs, I take into account that the employee had an arbitration award in his favour; and that he is represented by a trade union that has an ongoing relationship with the employer. Taking into account the law and fairness[13], I do not consider a costs award to be appropriate.

Order

The arbitration award of the first respondent, Commissioner Ursula Bulbring, under case number WECT 5862-14 dated 20 October 2014 is reviewed and set aside. It is replaced with an award that the dismissal of the employee, Dirk du Toit, was fair.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Sean Snyman (attorney).
THIRD RESPONDENT:	Gerrit Visser (trade union representative, Solidarity).

[13] LRA s 162.