IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT **BRAAMFONTEIN** Case No.: **JA 37/08**

In the matter between:

JEAN DESIRE GAETAN BESTEL Appellant

and

ASTRAL OPERATIONS LIMITED First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

ROBERT JAMES SEGGIE N.O. Third Respondent

JUDGMENT

DAVIS JA

Introduction

1) Appellant had been the managing director of first respondent's KwaZulu-Natal business known as 'Meadow Feeds'. In November 2004 he was charged with the offence of dishonesty,

in that he had instructed "Mr. M. **Bradford** (a subordinate) to procure a false report that a sample of the product of **D H Brothers (Pty) Ltd** tested positive for salmonella." He was found guilty, after an internal disciplinary enquiry, and dismissed.

2) He challenged the dismissal before second respondent in terms of section 191 of the Labour Relations Act 66 of 1995 'LRA'. Third respondent, who conducted the hearing, concluded that the dismissal had been substantively unfair and reinstated appellant.

3) First respondent then applied to the Labour Court to review the award in terms of section 145 of the LRA. **Pillay J** set aside the award and replaced it with an award setting aside the appellant's determination, which had the effect of reinstating appellant's dismissal. Appellant now comes before this Court on appeal against the judgment of the court *a quo*.

Factual Background

4) Meadow Feeds manufactures and sells chicken feed. A major customer was Rainbow Chickens, a breeder of large numbers of battery chickens. A supplier of one of the ingredients to the feed,

sunflower cake meal, was D H Brothers Industries (Pty) Ltd which trades as Willowton Oil and Cake Meals (Willowton).

5) In October 2004 Rainbow reported to Meadow that its chickens, which were fed with the latter's feed, were underperforming. It further reported that there had been an outbreak of Newcastle Disease.

6) After receiving this report from Rainbow, appellant telephoned **Bradford,** who was his subordinate and who was employed by Meadow as a senior nutritionist. Bradford understood the appellant to have told him in this conversation to 'find' a laboratory report which implicated Willowton in the delivery of 'off-specification sunflower cake meal'. By contrast, appellant testified that he told **Bradford** to 'check the lab data to find out if we have missed anything, . . . if he could find anything to explain the drop in performance'.

7) It is common cause that an existing laboratory report from Avimune, an independent laboratory used by Meadow, was altered by changing a result of 'negative' for the presence of salmonella in a sample of cake meal from Willowton to 'positive'.

8) On the basis of this altered report, appellant suspended the delivery of cake meal from Willowton and certain new bio-security measures were then required of Willowton before it was allowed to resume deliveries. In the meanwhile, both Willowton and Meadow sent a sample of the cake meal to other independent laboratories for re-testing. Willowton also checked the authenticity of the falsified report. It found that the false test report, with which it had been furnished by Meadow, was indeed incorrect. This ultimately led Willowton to report the matter to appellant's superiors. In turn, this report led to the disciplinary enquiry and ultimately to the appellant's dismissal.

The Arbitration Award

9) Third respondent engaged in a careful analysis of the testimony which was presented to him. The key evidence, in his view, was given by **Bradford** and by appellant. In evaluating the competing versions of the two witnesses, third respondent concluded: 'it will also be readily apparent that this whole episode might have been precipitated by **Bradford's** having mistaken what **Bestel** was implying. However, **Bradford** testified that when **Bestel** had

asked him for a copy of the report, so that he could send it to Moosa, he had told **Bestel** not to send it because it was a false report. To me, this aspect of **Bradford's** evidence just does not have the ring of truth about it. I am also troubled by the fact that when **Bradford** testified at the disciplinary hearing, he was uncertain of his own future with the company'.

10) Third respondent then went on to conclude: 'there is no evidence that **Bestel** was told in express terms about the falsification before 9 November and there appears to be nothing in his behaviour between 25 October and this date (other than the above snippet of Moosa's evidence) which points to a conclusion of wrongdoing. Had **Bestel** known that the report had been falsified, it is unlikely that he would have sent a copy to Moosa. Further, when Moosa told him that he had been sent the wrong report, **Bestel** had given **Bradford** instructions to send the correct one'.

The court *a quo*

11) **Pillay J** concluded that **Bradford's** evidence, namely that he had inferred from what he had been told by appellant, that he should 'find' a positive result, was a reasonable inference which Bradford

had drawn. Furthermore, the learned judge found that **Moosa,** a technical director of Willowton, had testified that, on 1st November 2004, he had told appellant that the report had been 'altered' and that this evidence had been conceded by appellant. Accordingly, third respondent was not justified in rejecting both the evidence of **Moosa** and **Bradford,** to include that appellant did not know about the falsification until 9 November. Furthermore, the learned judge found that there was evidence to suggest that Meadow would have benefited significantly from a suspension of deliveries for a few weeks, as there was evidence that Meadow was over supplied by about three months and that this was a probable explanation for the generation of the false report.

The appropriate test for a review based upon the assessment and evaluation of evidence by a Commissioner

12) The applicable test for a review of a decision in terms of section 145 of the LRA has been definitively settled by the Constitutional Court in Sidumo and Another v The Rustenburg Platinum Mines Ltd 2008(2) SA 24(CC) at para 110:

'To summarise, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

13) Conscious of the limited scope possessed by the court *a quo* to review third respondent's award, Mr. **Pretorius,** who appeared on behalf of first respondent, referred to an article by **Anton Myburgh** dealing with the scope of the Sidumo test. See **A Myburgh** 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 ILJ 1.

14) **Myburgh** contends that a commissioner's finding, on the facts, will be considered to be unreasonable if the finding is:

i unsupported by any evidence;

ii based on speculation by the commissioner;

iii entirely disconnected from the evidence;

iv supported by evidence that is insufficiently reasonable to justify the decision; or

v made in ignorance of evidence that was not contradicted.

15) In coming to this conclusion, **Myburgh** cites a *dictum* of **Van Niekerk** AJ in Sil Farming CC t/a Wigwam v CCMA (unreported LC Judgment cited by **Myburgh** at 13): 'A commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justify the decision arrived at or where the decision maker ignores uncontradicted evidence.

16) **Schwartz** Lions over the Throne (1987) at 133 explains that, in the context of a review, a court deals with a test of 'reasonableness, not the rightness of agency findings of fact. The question under it is whether the evidence is such that the reasonable person acting reasonably could have reached the decision from the evidence and the inferences'.

17) Although the judgment in **Sidumo** *supra* superceded the test for review as contained in the decision of this Court in *Carephone (Pty) Ltd v Marcus* 1999 (3) SA 384 (LAC) at para 37 , the following *dictum* in the latter judgment is helpful in order to illustrate the nature of the test: 'Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at'.

18) It is important to emphasise, as is exemplified from Carephone, and in **Schwartz,** *supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.

19) In the present dispute, Mr. **Pretorius** submitted that the finding of third respondent was not supported by evidence that could reasonably justify the decision or, alternatively, that the finding was made in ignorance of evidence that remained uncontradicted.

In particular, Mr. **Pretorius** submitted that in his plea and statement the appellant had stated as follows:

> *'On Monday, the 1st November 2004 I received a telephone call from Moosa who advised me that there appeared to be a problem with the positive report that we had sent him and that it appeared to have been altered and that I was to confirm that what I sent him was the correct report. I approached Bradford and advised him that Moosa had indicated that we had the wrong report. He confirmed that he had provided me with the wrong report and I advised him to send the correct report to Moosa immediately.'*

20) Accordingly, as at 1st November 2004, appellant knew that the report had been altered. Notwithstanding appellant's testimony about when he became aware of the false report, he was forced to concede that his plea statement accurately reflected the time when he gained knowledge of the altered report.

21) In Mr. **Pretorius** view, third respondent had ignored this fact in his decision when he accepted the incorrect evidence of appellant. In particular, in his evidence in chief, appellant claimed that

Moosa had never told him what was wrong with the report, whereas under cross-examination Mr. Moosa was asked whether he had indicated to appellant that there was a wrong report and he said 'I said it is strange a plus has turned to a minus same dates etc'.

22) Mr. **Pretorius** then referred to the evidence of **Bradford** and in particular the following key passage from his testimony:

"Question : *How come date and results are wrong?*

Answer : *Based on a phone call I had from Bestel over weekend. I'd been requested to find a positive for salmonella in sunflower oil cake. There was concern about price and length of contract still outstanding and concern over Rainbow. It took place on Saturday.*

Question : *Was it Bestel that requested you?*

Answer : *Yes*

Question : *Regard as a normal request?*

Answer : *No, but (...)I wouldn't say it was a normal request.*

Question : Was he aware of how many positive received in past?

Answer : Yes I mentioned it in discussion.

Question : P 30 (Record p160) do you recognise it?

Answer : I recognise it as a fax from Meadow Feeds to Willowton.

Question : How come report on p 31 and 32 (Record: p 161 and 162) was faxed?

Answer : Bestel came to me and asked for a copy of Report. Said he wanted to fax it to Willowton. I said he must know it is false. I didn't think he should send it. He'd asked me to find a positive. On Monday when he came in I told him I had found a positive. It was done because supply terminated.

23) On the basis of **Bradford's** testimony, together with that of **Moosa,** Mr **Pretorius** submitted that it was clear at least by 1 November 2004, that appellant knew that a 'negative' had been turned into a 'positive' to the detriment of Willowton. Appellant, on his own version, did not appear to question the nature of the report. Given testimony that he was a micro manager, this was

particularly surprising. Mr **Pretorius** submitted that this omission was not surprising when Bradford's evidence was taken into account. In his view, it was clear that appellant had told Bradford to find a 'positive', after having been told there was no such evidence. Appellant must have known that Bradford had falsified a 'positive', from the 'negative' because he had informed appellant accordingly.

Evaluation

24) As Mr **Stewar**t, who appeared on behalf of appellant, noted the record before this court constituted only the notes of the evidence as prepared by third respondent. Somehow, the transcript of evidence has been mislaid. Accordingly, this court is in an even more disadvantaged position than normally is the case with an appellate court, in that it does not even have access to the exact words employed by the witnesses in order to evaluate their testimony. What is clear however, as Mr **Stewart** contended, is that **Bradford's** evidence is not as unequivocal as was urged upon us by Mr **Pretorius**. For example, the following passage of cross-examination represents an important qualification of his evidence as cited above:

"KOEN: I put it to you it was an error of judgment by assigning a certain meaning to words used by Bestel

-No, in falsifying documents.

KOEN: In not saying – "is this what you mean"?

-Yes it may have been".

25) While even this passage of testimony is not entirely clear, it does appear to support Mr **Stewart's** argument that **Bradford** was prepared to make a concession that he may have misinterpreted that which appellant had told him.

26) There is the further issue as to the nature of appellant's reaction after his conversation with **Moosa** on 1 November. On 27th October **Moosa** received a faxed copy of a report in which one line item had been changed from a 'negative' to a 'positive'. On 1 November **Moosa** received the correct report. The evidence indicates that appellant informed **Bradford** that if the incorrect report had been sent, he should then send the correct report to **Moosa.**

In **Bradford's** words: *"After meeting with Moosa Bestel asked me to send corrected documents to Moosa to show a negative and I did".*

27) There does not appear to be any adverse explanation as to appellant's immediate instruction to send the correct report. Were appellant to have been guilty of a fraudulent act, in persuading **Bradford** to produce an incorrect report, then the evidence shows that, five days later, without more, including any attempt at a justification or explanation, he instructed **Bradford** to send the correct report to **Moosa.** Mr **Pretorius** suggested that the purpose of the incorrect report was to allow Meadow to resile from an unfavourable contractual arrangement. The evidence, on any basis of probability, does not support this conclusion. It rather supports the conclusion of third respondent that "had **Bestel** known that the report had been falsified it is unlikely that he would have sent a copy to **Moosa,** when the latter told him he had been sent the wrong report **Bestel** had given Bradford instructions to sent the correct one".

28) Mr **Pretorius** was unable to explain plausibly as to why appellant would instruct **Bradford** to send the correct report, without any

attempt to cover 'his tracks', if he had acted fraudulently in the first place in instructing the preparation of the incorrect report.

29) In short, third respondent was confronted with two conflicting versions of events as given by **Bradford** and appellant. True, there was evidence of **Moosa** which indicated that appellant knew about the incorrect report as at 1 November 2004. It does not appear that any inquiry was generated by appellant as to the cause of the incorrect report. But there is no single reason which can be derived from the record as to why appellant had not immediately questioned the basis of the incorrect report. Further, there was no compelling evidence as to the commercial justification for generating an incorrect report : in particular in order to resile from a contract with Willowton. Yet, that was the only additional evidence which could be produced by Mr **Pretorius** in order to assail the justification for third respondent's determination.

30) This speculation is insufficient to justify a conclusion that third respondent's findings, on facts supported by the evidence was insufficiently reasonable to justify his decision or made in ignorance of uncontradicted evidence. On the **Sidumo** test for

review as I have outlined it, there was no basis by which third respondent's award should have been set aside.

ORDER

31) The appeal is upheld with costs. The order of the Labour Court is substituted with the following order: 'The application is dismissed with costs'.

TLALETSI JA:)

VAN ZYL AJA:) Agreed

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DAVIS JA

APPEARANCES:

For the appellant: A.M. Stewart SC

Instructed by: Tomlinson Mnguni James

For the Respondent: G.C. Pretorius SC

Instructed by: Cliffe Dekker Hofmeyr

Date of Hearing: 24 August 2010

Date of Judgement: 16 September 2010