

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

Reportable

Case number: P491/08

In the matter between:

DUNCAN MANUFACTURING

Applicant

And

THE METAL AND

ENGINEERING INDUSTRIES

BARGAINING COUNCIL

1st Respondent

A GOVINDJEE NO

2nd Respondent

MFANELO ERNEST NGEMNTU

3rd Respondent

Judgment

Molahlehi J

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number MEPE1029 and dated 15th October 2008. In terms of the arbitration award the commissioner found the dismissal of the third respondent, hereinafter referred to as “the employee,” to have been substantively unfair and ordered compensation for that reason.
- [2] The brief facts in this matter are that the employee was dismissed after being found guilty of theft of an electric cable. The cable in question was found in the bag of the employee by the security guard.
- [3] The case of the applicant at the arbitration hearing was that the employee stole the cable from its store room. It was also the case of the applicant that it never threw away the cable and that the employee knew that every property on its premises belongs to the applicant and that the employee could not remove any property from the premises.
- [4] The employee’s case was that he did not steal the cable but took it when he found it in the dust bin.

The grounds of review and the arbitration award

- [5] The applicant in its founding affidavit contends that the commissioner unreasonably found that the electric cable was on the balance of probabilities thrown away. It is further the contention of the applicant

that the arbitration award was fatally flawed because the commissioner failed to appreciate that it was completely improbable that it could throw away an item of value such as the cable in question and for that matter and allow any of the employees to remove it.

- [6] The commissioner in his arbitration award summarizes the testimony of each party's witnesses and such summary does not seem to be disputed by any of them. The summary of the testimony of the witnesses is for that reason not repeated in this judgment.
- [7] In analyzing the evidence which was presented before him the commissioner start firstly by considering what constitutes theft. In this respect the commissioner relies on the definition of theft as set out by *Grogan in Employment Law*, wherein the learned author indicates that theft consists of unlawful appropriation of goods or property with the intention of permanently depriving the owner of the use and possession thereof. The onus to proof the intention to steal, says the commissioner, rests with the employer.
- [8] The applicant advanced two reasons in support of its contention that the dismissal was for a fair reason. The first reason advanced was that the cable was stolen from the store room. The second reason which seems to be in the form of an alternative reason was that if it was

found that the cable was indeed found in the dust bin, the dismissal still remained fair because the cable remained the property of the applicant and that the employee was not entitled to remove it without prior approval of the applicant.

[9] In relation to the second or alternative reason the commissioner found that there was no satisfactory evidence to establish that a rule existed which made the conduct of removing things from the dust bins an offence. The commissioner also found in this respect that the crux of the case of the applicant was that the employee was accused of having removed the cable in question from the store room. In addition the commissioner found, relying on the authority of *S v Rantsane 1973 (4) SA 380 (C)*, that property placed in a dust bin normally constitutes abandoned thereof and for which the owner would be assumed to have relinquished his or her ownership or possession rights. On the facts of the matter the commissioner found that the cable in question was abandoned.

[10] As concerning the allegation that the employee removed the cable from the store room, the commissioner firstly found that there was no direct evidence in that regard and therefore found that the applicant sought to support that allegation on the basis of circumstantial

evidence. After considering the authorities governing the approach to be adopted in dealing with circumstantial evidence the commissioner concluded that the inference that the applicant sought to have drawn was unsustainable. Because the key of the store room was left in a place known by everybody, the probability that any other person could have opened the store room, removed the cable wherever it may have been in the store room and placed it in the dust bin was found to be highly probable and that accompanied the probability that the employee once it was placed in that dust bin may have found it and taken it for himself. It was for this reasons that the commissioner found that the applicant had failed to adduce sufficient evidence to justify the dismissal of the employee.

Evaluation

[11] It seems to me that, there can be no doubt that the commissioner was correct in treating this case as one based on circumstantial evidence. The key witnesses of the applicant in this regard, being the store manager and the security guard, did not see the applicant remove the cable from the store room. The security guard only saw the cable when he enquired from the applicant as to what he had in the bag. The store manager could not say whether the cable in question was one of

those which were in the storeroom when he knocked off duty on that day, neither could he say he saw the employee remove it from the storeroom. Thus the commissioner was correct in concluding that there was no direct evidence suggesting that the employee was seen removing the cable from the storeroom.

[12] In applying the standard of review set out by *Sidumo and Others v Rustenburg Platinum Mines 2007 12 BLLR 1097 (CC)*, the approach adopted by the commissioner cannot be said to be unreasonable. The commissioner had a good understanding of the nature of the dispute and the task it brought upon him to discharge. In this respect the commissioner did not only have a good understanding of the principles of law he had to apply, but also applied his mind correctly to the evidence and the material properly before him. In applying the *Sidumo* test in this matter attention has to be given to the application of the principles applicable when dealing with a case based on circumstantial evidence.

The law relating to circumstantial evidence

[13] The approach to be adopted when faced with circumstantial evidence has received attention in a number of cases previously, including those that came before this court. The approach to be adopted when

dealing with circumstantial evidence was summarized by this court in ***Komape v Spoortnet (Pty) Ltd & Others (2008) 29 ILJ 2967*** as follows:

*“In assessing circumstantial evidence the arbitrator should always consider the cumulative effect of all the item of the evidence before him or her. In assessing the inference to be drawn from the facts the commissioner should look at the totality of the evidence and weigh it on a balance of probabilities. See **Zeffert et all (supra), Numsa v Kia Motors (207) 28 ILJ, 2283, SA Nylon Printers (Pty) Ltd V Daniels 1998 2 BLLR 135 (LAC)** at 1369. The inference must be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been committed by the employee. To this extent the court in **Smith v Arthurs 1976 (3) SA 378**, when dealing with circumstantial evidence the court held that:*

“All the relevant facts must necessary go into the melting pot and the essence must finally be extracted there from.”

[14] In cases of this nature the onus is discharged if the inference sought to be drawn is the most readily apparent and acceptable one from a number of other possible inferences. See *AA Onderlinge Assuransie-Assosiasie Bpk v De Beers 1982 (2) SA 603 (A)*.

[15] The court in *Komape (supra)* went further to say that in dealing with circumstantial evidence care should always be taken to ensure that a distinction is maintained between permissible inference and a mere conjuncture or speculation. The reason for this distinction is to avoid the inherent danger of drawing of an inference based on circumstantial evidence.

[16] In order for an employer to succeed where it seeks to prove an offence based on circumstantial evidence, it needs to put before the commissioner objective facts which will point towards the reasonable probability of the offence having been committed. In the absence of objective facts no inference can be drawn. In other words for an employer who relies on circumstantial evidence to prove commission of an offence by an employee, it has to produce positive facts from which the inference can be drawn, otherwise anything less than that would be a speculation and conjuncture.

[17] Turning to the facts of this case, I have already indicated that there was no doubt that the applicant sought to establish its case on the basis of circumstantial evidence. The testimony of the store manager during the arbitration hearing was that on the day in question he locked the storeroom at the time of his departure. He could however not say whether the cable in question was in the storeroom when he left. And of importance in relation to the commissioner's assessment of the circumstantial evidence, is the fact that the store manager testified that other employees had access to the keys of the storeroom. He also testified that he did not see the employee remove the cable from the storeroom. Thus the probability that someone could have opened the storeroom and placed the cable, for whatever reason, in the dust bin cannot be ruled out. The store manager's evidence was confirmed by the fitter who in testifying on behalf of the applicant stated that everybody had access to the storeroom keys and almost everybody knew where the keys were placed.

[18] In my view the alternative contention that the employee knew that he had to obtain permission before removing any item (including property in the dust bin) from the applicant's premises is far from making the commissioner's award reviewable. In applying his mind to

that issue the commissioner focused his attention to the question of whether or not there was a rule in place governing such a situation.

[19] Mr. Reyneke, the owner of the business testified that nothing could be moved out of his premises without his knowledge and that previously the employee had approached him when they wanted to remove used property from the premises. In this respect when it was put to him that the applicant was unaware of the policy requiring him to seek permission when removing used items, he answered as follows:

“Okay, in this case he removed it out of my store, not the dust bin.” He then went further to answer that question with another question which was; *Okay, so why did ask me in the past to remove things from my building.”*

[20] The answer and the question raised by Mr Reyneke do not deal with the critical question of whether there was at the workplace of the applicant a rule or a policy governing removal of property from his premises including in particular those which were thrown into the dust bin. It was thus correct for the commissioner to say that there was no rule governing the offence of removing the cable which was found in the premises of the applicant.

[21] I am further of the view that the case of the applicant stand to fail even if the contention that the employee needed permission before removing the cable from the dust bin. Although the arbitration proceedings are hearings *de novo* the ambit of the commissioner's inquiry is limited to determining the fairness of the dismissal on the basis of the reason given at the time of such dismissal. The employer is not entitled to introduce new charges or as the applicant sought to do in the present instance introducing an alternative charge/s at the stage of the arbitration hearing. See *Fidelity Cash management Service v Commission for Conciliation, Mediation & Arbitration & Others (2008) 29 ILJ 964 (LAC)*.

[22] It is clear in the present instance that the reason for dismissing the employee was because he had removed or stolen the cable from the storeroom and that is the reason which the commissioner had to concern himself with in order to determine the fairness of the dismissal. In any case even if he was dismissed for removing the cable from the dust bin, the dismissal would still, in all probabilities, have been unfair because it is clear that there was no rule or policy governing the removal of items found in the dust bin, be it with or without the approval of the applicant.

[23] In the light of the above analysis, I am of the view that the applicant's application to have the arbitration award issued by the commissioner reviewed and set aside for unreasonableness stand to fail. I see no reason in the circumstances of this case why costs should not follow the results.

[24] In the premises the application to review and set aside the arbitration award issued by the second respondent under case number MEPE1029 and dated 15th October 2008, is dismissed with costs.

Molahlehi J

Date of Hearing: 19th August 2010

Date of Judgment: 07th September 2010

Representation

For the applicant: Mr. C Unwin

Instructed by: Chris Unwin Attorneys

For the respondent: Mr. M van Zyl

Instructed by : Marius van Zyl