

SOUTH AFRICA / JUDGMENT

Famous Brands Management Company (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration (PR270/22)

[2024] ZALCPE 37 (27 August 2024)

[2024] ZALCPE 37**COURT**

Labour Court Port Elizabeth

BEFORE

D A Smith

CASE / FILE NUMBER

PR270/22

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Source record**FLYNOTES:****LABOUR**

– Dismissal – Misappropriation of stock –
Bag
of sugar loaded on van which returned after deliveries without bag
– Commissioner found that employer not discharging
onus of
proof – Finding dismissal unfair and awarding reinstatement
– Evidence that employee would have noticed
bag of sugar as
bags of dough-mix were offloaded – Commissioner's
reasoning fails to take into account clear
evidence regarding
position of bag of sugar in van – Inferential reasoning not
consistent with proven facts –
Award reviewed and set aside.
THE LABOUR COURT OF
SOUTH AFRICA, GQEBERHA
Not Reportable
Case No: PR270 / 2022
In the application

between: FAMOUS
BRANDS MANAGEMENT COMPANY (PTY) LTD
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION ('CCMA')
First
Respondent
COMMISSIONER
NOLITHA MDLEDLE N.O.
Second
Respondent
NUPSAW
obo SEBENZILE MABENGU
Third
Respondent

Heard: 4 July 2024

Delivered: 27 August
2024

JUDGMENT

SMITH, AJ

Introduction

- [1] This matter was enrolled and heard by me on 4 July 2024. Thereafter, judgment was reserved. The application is an opposed review, in which the Applicant seeks to set aside an arbitral award which was made by the Second Respondent (the "Commissioner") under the auspices of the First Respondent (the "CCMA").
- [2] The impugned award relates to an unfair dismissal dispute which was referred by the Third Respondent (the "employee"). In place of the award, the Applicant urges me to either substitute it with a decision of substantive fairness or to remit the dispute back to the CCMA for consideration afresh before a different commissioner.
- [3] Only the employee, through the assistance of his union, NUPSAW, has opposed the relief sought. No opposition was received by each of the First and Second Respondents.
- [4] The employee delivered an answering affidavit, but later than what the Rules of this Court[1] allow. The Applicant objected to this in terms of the Practice Manual[2] and in consequence, the employee brought an application to condone such non-compliance to this Court. This application was opposed and argued before Thys AJ.

- [5] Thys AJ dismissed the application and provided his written reasons for doing so on 1 July 2024. This judgment was delivered to me by the Registrar of this Court before the main review application. In the opposed review before me, Mr Lennox appeared for the Applicant, and Mr Dwayi appeared for the employee. It was urged on me by both Counsel that the employee's argument to this Court would be made without the benefit of his answering affidavit. In my preparation of this judgment, I have not had regard to the answering affidavit.

Litigation history

- [6] The employee was employed as a "van assistant" by the Applicant employer.
- [7] After the Applicant experienced the loss of a 12,5 kg bag of sugar, it investigated the incident which caused such loss. It interviewed employees. The culmination of the investigation revealed prima facie misconduct by the employee and other employees. The employee was charged on a sole count for the misappropriation of the sugar and ultimately summarily dismissed.
- [8] As already mentioned, the employee referred an unfair dismissal dispute to the First Respondent. After the non-resolution of the dispute through conciliation, it was arbitrated by the commissioner.
- [9] The commissioner's published award concludes that the Applicant, which she found bore an onus of proof, never discharged it. Crucially, she determines that the Applicant couldn't prove that the employee was responsible for the sugar's loss. She therefore concludes in her award that the employee's dismissal was substantially unfair. As relief, she awards the employee's reinstatement, but that this is not retrospectively operative.
- [10] It is this finding, and the consequential relief awarded, that forms the backdrop of this review application.

Material facts

- [11] Both in the arbitral proceedings and before this Court, it was not the subject of serious dispute that the bag of sugar, as an objective fact, was loaded onto the Applicant's delivery van – which was then parked at its depot. Similarly, not in dispute are the following material facts:

11.1. the delivery van returned to its depot without the sugar; and

11.2. no bag, or indeed any other bag which closely resembled the sugar, was delivered accidentally to one of the Applicant's other customers on its delivery route.

- [12] What made this incident so striking for the Applicant was that on the day of the delivery, its van was loaded with bags of dough mix only. The sugar was, therefore, an unusual item to be loaded, and then delivered, along with the dough mix. The bag of sugar was distinctive because it was branded with the company name and logo of “Hulett’s”. The dough mix was in plain, white bags.
- [13] The dough mix was assembled on a wooden pallet and arranged in a square shape. Each bag of dough mix was assembled one on top of the other and resembled almost a wall of bags of dough mix on each of the pallet’s four sides. This arrangement created a void in the middle of the cube and it is into this void that the bag of sugar was placed. Because of the height of the walls of dough mix, the sugar would not have been noticed on ordinary, sidelong, inspection as the dough mix wall would’ve blocked it from view.
- [14] The employee had been so employed with the Applicant since 1990. He was also a shop steward. He has an unblemished record of employment.
- [15] Much evidence was led by the Applicant’s witness before the arbitrator on its delivery van’s loading-bay - relative to the size and dimensions of the bag of sugar and its immediate surroundings. The reason for this was to press the point that it would be difficult for a bystander to fail to notice the bag of sugar once the piles of dough mix were reduced after various deliveries on that day.
- [16] The Applicant’s other employee, Mr Masinga, the Warehouse Controller, while on the telephone, noticed the forklift driver, Mr van Niesson, place a bag on the dough-mix pallet. He thought this odd, made a note of it; the delivery van’s licence plate letters and numbers and took a photograph of the sugar in the central void between the walls of dough mix. This photograph was tendered into evidence in the arbitral record. Mr Lennox commenced his argument with reference to that photograph.
- [17] The employee’s duties were to push a trolley between the delivery van and the Applicant’s customer’s goods-receiving area or kitchen. His evidence throughout was that he didn’t notice the sugar, which was, as I have stated already, hidden from view by the wall of dough mix, albeit at its loading stage of the journey.
- [18] Mr van Niesson, the forklift driver, during the Applicant’s investigation, implicated the employee along with the rest of his delivery crew in the loss of the sugar. He too was dismissed for his admitted participation in the loss of the sugar.
- [19] It was submitted in argument – both in the arbitral proceedings and before me, that as the delivery van progressed along its delivery route, and bags of dough mix were delivered to each of the Applicant’s customers on that route, so the wall of dough mix would drop down in height and would eventually reveal the sugar in the central void.

[20] It was then that the employee would have been expected to notice the bag of sugar; and, that the employee (along with the other members of the delivery crew) bore a responsibility to the Applicant to ensure that undelivered stock be returned to the depot.

Grounds of review

[21] The Applicant pleads that the arbitrator has committed material errors; misconceived the nature of the issues that arose for determination; incorrectly determined the issues that she had been called upon to determine; and committed material errors of law.

[22] These defects in her reasoning in her award were such that the outcome of her award was one that no reasonable commissioner could have reached on the evidentiary material properly before her.

Reasoning of the commissioner's award

[23] The commissioner finds as facts proven that:

23.1. the sugar left the Applicant's depot on the loading bay of the delivery van;

23.2. a stock-take of sugar in the depot, which was done after the delivery van left the depot, reflected x1 bag of 12,5kg sugar which was unaccounted for, and

23.3. the truck returned to the depot absent the bag of sugar.

[24] She comes to the outcome that the employee may have been inside the Applicant's customer's kitchen or goods-receiving area when the sugar disappeared from the delivery van.

[25] This inferential finding of fact informs the basis of the arbitrator's conclusion on a matter of law that the Applicant has failed to discharge the onus cast upon it, viz. that the employee was responsible for the sugar's disappearance.

Applicant's grounds of attack of the arbitral award

[26] The Applicant delivered its supplementary founding affidavit after the record of the proceedings was filed by the CCMA. In this, the deponent alleged that the commissioner failed to consider material and relevant evidence; failed to consider properly, or at all; the poor veracity of the employee's version, in light of the probabilities of the referral; and that she misconceived the true nature of the enquiry before her.

Applicant's argument on the evidence which served before the commissioner

[27] The employee's representative from his union never challenged the Applicant's evidence that goods would be off-loaded from the van's loading bay one-by-one and in delivery episodes i.e. the bags of dough-mix would be off-loaded at various sites along the delivery route.

[28] Therefore, the Applicant asserted that the employee, who would push the trolley with the items just off-loaded from the van to the customer's goods-receiving area, would have come to notice the bag of sugar once the wall of dough mix had lowered sufficiently.

[29] This inference is consistent with the proven facts and is the only reasonable inference which is capable of being drawn.

[30] It was also never challenged by the employee's representative that:

30.1. the bag of sugar was heavy and unwieldy to carry. It needed at least two sets of hands to manoeuvre it;

30.2. none of the Applicant's customers on the delivery route ordered or were delivered sugar on that day. The delivery notes confirmed this; and

30.3 the delivery crew are responsible for the safety of stock in transit and that any undeliverable stock is to be returned to the depot and noted accordingly.

[31] Instead, the Applicant complains that the commissioner's conclusion on the employee's culpability is informed more by speculation than it is by a reasoned analysis of the competing versions before her.[3]

[32] Despite the commissioner's finding that it was possible that the sugar could have been off-loaded from the delivery van whilst the employee was with his trolley elsewhere, this proposition was put to the employee by his own representative (as a leading question when he was being led on his evidence-in-chief) and the employee flatly denied that this would have been possible in the circumstances.

[33] It was submitted in the affidavits before me that it was unusual in the extreme that the commissioner had preferred this scenario to reason the outcome of her award when it was specifically disregarded by the employee as being impossible.

[34] The employee's representative never put this proposition to any of the Applicant's witnesses for their comment.[4]

[35] The Applicant also pleaded that a prima facie case of misappropriation of the sugar had been made against the employee. This therefore called out for some sort of explanation from him.[5] The argument was developed that the employee's bare denial of not noticing the sugar was palpably inadequate.

Employee's argument on the evidence which served before the Commissioner

[36] It was argued that the employer essentially was charged with a common-purpose offence. This was because all members of the delivery crew, and particularly the fork lift driver, who placed the bag of sugar inside the central void, were joint participants in the offence. This is, of course, on the assumption that misconduct has been proven by the Applicant.

[37] As a follow-on argument, it was submitted that the employee never actively associated himself with the misconduct of the forklift

driver. Reliance for this argument was placed on Madlanga J's unanimous judgment in NUMSA obo Dhludhlu & Others v Marley Pipe Systems (SA) (Pty) Ltd.[6]

[38] Much criticism was also made about the fact that the forklift driver and the employee were charged with misconduct offences in separate, internal disciplinary hearings.

[39] In summary, it was argued that the commissioner's finding on the outcome was reasonable.

[40] Counsel for the employee urged me to dismiss the application and to make an award for costs in the union's favour. Reliance on the dictum of Mhlantla J in Zungu v Premier of the Province of KwaZulu-Natal & Others[7] was placed on the 'fairness' of a costs award in the employee's favour.

Analysis of the competing arguments

[41] In *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*[8], the test has been more clearly defined as follows:

- a) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the commissioner employed give the parties a full opportunity to have their say in respect of the dispute?
- b) Did the commissioner identify the dispute that he or she is required to arbitrate?
- c) Did the commissioner understand the nature of the dispute he or she is required to arbitrate?
- d) Did he or she deal with the substantial merits of the dispute?
- e) Is the commissioner's decision one that another decision-maker could reasonably have arrived at based on the evidence?

'The failure by a [commissioner] to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.'[9]

[42] One of the disconnects in the commissioner's award – having just found that the employee bore no culpability for the loss of the sugar – decides to deviate from the primary remedy, viz. retrospective reinstatement. She awards instead that the employee is not entitled to any back-pay. Implicit in this award is the gaping question of the employee's complicity in the loss of the sugar or the honesty and reliability of his version of events.

[43] It remains for me to decide whether the commissioner seriously applied her mind to the material evidence which was placed before her; and whether, should she be found by me to have committed an irregularity in her failure to do so, that this irregularity produced an unreasonable outcome by her.

[44] Her most impugned finding was her finding at her paragraph 19 of her award. I reproduce it here in full:

‘It is also a fact that the [employee] was not the only crew member in that truck. It is also a fact that the said [bag of sugar] might have been offloaded whilst the [employee] was busy in the store as he was the one who was pushing the trolley that took [the] goods into the client (sic) premises but not the one who was taking the goods off the truck. The point I am trying to make is that there are probabilities that the [employee] did not misappropriate the item as alleged. My considered view is that the probabilities do not necessarily put the scales in favour of the employee. For this reason, I believe that the [employer] has failed to discharge the onus.’

[45] This paragraph demonstrates gaps in reasoning and logic. It fails to take into account the clear evidence of the Applicant’s witness as regards the shape, size and position of the bag of sugar – relative to the delivery van’s load-bay and the sugar’s immediate surroundings, viz. the walls of assembled dough mix along the four sides of the pallet. Inference[10] may fairly be drawn that once the bags of dough mix were delivered in episodes to various customers on the delivery route, the Hulett’s bag of sugar would be able to be seen. This is what I understood the reason for the Applicant’s evidence and what was submitted to me in argument by the Applicant’s Counsel.

[46] The commissioner’s inferential reasoning is revealed when she commences her second sentence in paragraph 19 of her award in which she states as “fact” that the employee may not have noticed the sugar being off-loaded as he “might” have been occupied elsewhere. There was no evidence before her to buttress that finding. This inferential reasoning by her was not a reasonable one which was consistent with the proven facts. The commissioner’s reasoning was, at best for her, speculative.[11]

[47] Her finding is made all the more peculiar by the employee’s own disavowal of the proposition put to him by his own representative i.e. that it would’ve been possible for him to notice the bag of sugar when some of the bags of dough mix had been delivered to customers on the delivery route.

[48] The evidence which was overlooked by her had a material bearing on the outcome of her decision. For this reason, I hold that this irregularity results in an unreasonable outcome or that this causes her to misconceive the true nature of the enquiry. In the result, her award must be set aside.

- [49] Something needs to be said about the employee's argument. When this application was called on for hearing, I understood the issue in dispute was the substantive fairness of the award. I did not understand there to be any objection in any manner of the procedural fairness of the unfair dismissal dispute.
- [50] In my view, Counsel for the employee's argument strayed onto the path of procedural fairness. He stressed the fact that the forklift driver didn't offer any evidence for the Applicant in the disciplinary process (no evidence was led that this witness was available in any event to testify, and therefore that a negative inference may be drawn for such failure to call an available and competent witness). This served to promote the argument on common-purpose liability because of the lack of active association by the employee with the deviant conduct of the forklift driver.
- [51] I was referred in argument to page 199 of the Record, which relates to a completed pro forma witness statement (signed but not commissioned) taken by the forklift driver. When asked of Counsel for the employee whether this statement was either admitted into the evidence of the proceedings or was proved during the live evidence, I was told that this was "neither here nor there".
- [52] From my own preparation, I can find no indication that this witness statement was ever referred to during live evidence before the commissioner. In response to my clarifying question posed earlier to Counsel for the employee, the Applicant's Counsel answered me during his rebuttal argument and stated that this witness statement was never referred to in evidence before the Commissioner.
- [53] A criticism was made of the charge preferred against the employee at the internal disciplinary stage. It was argued that the employee ought to have been charged with negligence and not misappropriation because misappropriation suggests an element of mens rea (this obviously assumes a prior finding by me that the employee bears some responsibility for the loss of the sugar). A short argument on competent verdicts was delivered by both Counsel and Counsel for the Applicant referred me to the case of *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[12].

Appropriate remedy

- [54] I come now to the remedy sought by the Applicant: Do I remit the matter back to the Commission to be heard before a different commissioner, or do I substitute a finding of substantive fairness?
- [55] The Applicant was at pains to point out to me that the long period of service by the employee was an aggravating factor. It viewed the employee's conduct as even more of a betrayal because of his long service and because of the leadership position he held within the union.

- [56] The Applicant led evidence on the breakdown of the trust relationship between it and its employee. It emphasised its evidence that the Applicant sustains huge losses because of stock shrinkage. It also emphasised that honesty is a virtue which cannot be learned by an errant employee from teachings by a frustrated employer.
- [57] The evidence has been led by both parties before the commissioner. There was no argument before me that a different commissioner would be better placed than me to deliver an award, with particular reference to the credibility and demeanour of the individual witnesses. There is also no indication to me that the outcome of a remitted referral to the Commission would turn favourably on a credibility and demeanour assessment of the individual witnesses.
- [58] To remit this matter back to the Commission would only heap further cost on both parties and may unnecessarily cause further delay and prejudice to each of the parties.[13] I am satisfied, on the gravity of the conduct for this single offence, that dismissal would be the most appropriate response.
- [59] The incident is the subject of the dismissal dispute occurred in February 2022. The employee was summarily dismissed on 6 May 2022. The referral was arbitrated on 19 September 2022 and the award published on 10 October 2022. A primacy is placed on the expeditious resolution of labour disputes. Were I to remit this matter back to the Commission, it might be arbitrated again during the course of 2025. This is to nobody's advantage and definitely wouldn't be in the public interest.
- [60] I therefore grant an order in terms of the notice of motion at prayers (a) and (b) thereto. I make no order as to costs.

[61] In the premises, the following order is made:

Order

1. The award in ECPE2520-22, dated 10 October 2022, is reviewed and set aside and substituted with the following order:

‘The dismissal of Sebenzile Mabengu is found to be substantively fair.’

2. There is no order as to costs.

D. A Smith

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Lennox Instructed by Harrington Johnson Wands Attorneys, Johannesburg
c/o Van Heerden Attorneys, Gqeberha For the Respondent: Mr Dwayi, Instructed by YBI
Attorneys, Gqeberha

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- [1] GN 1665 of 1996: Rules for the Conduct of Proceedings before the Labour Court effective 17 July 2024).
- [2] Practice Manual of the Labour Court of South Africa, effective 1 April 2013 (effective 17 July 2024).
- [3] Sasol Mining (Pty) Ltd v Nggeleni NO & Others
(2011) 32 ILJ 723 (LC) at para 7.
- [4] President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 11; 2000 (1) SA 1 CC at para 59 .
- [5] Osman and another v Attorney- General, Transvaal [1998] ZACC 14; 1998
(4) SA 1224 (CC) at para 22.
- [6] 2023
(1) SA 338 (CC) at para 17.
- [7] (2018) 39 ILJ 523 (CC) at paras 23 – 25.
- [8] [2013] ZASCA 97; 2013 (6) SA 224 (SCA) at para 25.
- [9] Head of the Department of Education v Mofokeng and Others [2014] ZALAC 50;
[2015] 1 BLLR 50 (LAC) at para 30.
- [10] AA Onderlinge Assuransie-Assosiasie BPK v De Beer 1982
(2) SA 603 (A).
- [11] Bates & Llyod Aviation (Pty) Ltd and another v Aviation Assurance Co; Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co 1985
(3) SA 916 (A) at 939I – 940A.
- [12] [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC).
- [13] See: Waglay J (as he was then known) in Consol Ltd t/a Consol Glass v Ker N O & Others [2002] 4 BLLR 367 (LC) at 369 – 371.

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