

SOUTH AFRICA / JUDGMENT

NUMSA obo Ngqulu and Another v Eskom SOC Ltd and Others (C411/2020) [2023] ZALCCT 51 (22 August 2023) [2023] ZALCCT 51

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C411/2020

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**THE LABOUR COURT OF
SOUTH AFRICA,
HELD AT CAPE TOWN
Case No: C411/2020
Not reportable
In**

the matter between: NUMSA
obo S NGQULU and M PEFILE
Applicant
And
ESKOM
SOC LTD.
First
Respondent
COMMISSION
FOR CONCILIATION,
Second
Respondent
MEDIATION
& ARBITRATION
L
MARTIN (N.O.)
Third
Respondent
Date
of Set Down: 3 August 2022
Date
of Judgment: This judgment was

handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 22 August 2023.

Summary: (Review – dismissal – unauthorised possession of scrap cable – errors in arbitrator's reasoning not fatal to reasonableness of outcome – award not one no reasonable arbitrator could have arrived at irrespective of flaws – award upheld)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review and set aside an award in which the arbitrator found that the dismissal of the two applicants for unauthorised possession, or removal or attempted removal of copper cabling from the respondent, by colluding with each other in the removal of copper cable from the employer's premises without the authority of the senior supervisor, was substantively and procedurally fair.
- [2] The respondent's answering affidavit was filed some six weeks' late, but no notice of objection was filed by the applicant under clause 11.4.2 of the Labour Court Practice Manual so no objection to the late filing could be raised.

Background

- [3] The copper cabling in question had been collected from a police station in Khayelitsha. The cabling was brought to the store by Mr A Goyi ('Goyi') on the instruction of Mr T Lehopa ('Lehopa') to the Spine Customer Network Centre ('Spine CNC'), where the two applicants, Mesrs S Ngqulu, a technical official ('Ngqulu'), and M Pefile, a storeperson ('Pefile'), worked. Lehopa was a senior supervisor at Spine CNC. Initially Lehopa wanted Goyi to put the bag in Lehopa's office, but because it was locked and he was not at the premises he told Goyi to take it to the store. The cabling was taken in a bag with a SAPS tag to the store where Pefile worked as a storeman. Ngqulu had assisted Goyi to take the bag to the store, but Ngqulu testified he did not go inside the store with Goyi. Lehopa testified that he was authorised to determine what could

be kept in the store and the store was the safest place for keeping the cabling, apart from his office.

- [4] All cabling to be scrapped had to be taken to the firm's depot in Brakenfell. However, smaller quantities were not taken directly to Brakenfell but were put in a bin for scrap at CNC. Lehopa testified that the amount of cabling in question ought to have been place in the bin and not taken to Brakenfell directly. When the bin was full it would be taken to the Brakenfell. This saved transport costs. Lehopa said because it came from the police he need to inspect it before it could be scrapped.
- [5] He claimed his authority was required to remove the cabling from the store as he had to check it before it could be scrapped. He agreed though that he was not the only person who authorised the removal of scrap to Brackenfell. Lehopa could not point to a particular company document confirming his authority, but he insisted that since the cabling had been placed in the store on his instruction, it should not have been removed without consulting with him first. The sector manager, Mr A Martin ('Martin'),
- also testified that Pefile should have consulted Lehopa before deciding to dispose of the scrap.
- [6] Pefile testified that he asked Ngqulu to put the scrap material in the bin at the CNC, but Ngqulu told him that if it had been collected from the police it should be taken to the Brackenfell depot and he accepted Ngqulu's advice because he had no experience of handling scrap received from the police. When Ngqulu testified he said he advised Pefile it should go to Brackenfell in case Lehopa asked Pefile about the cable. If he had placed it in the bin Pefile would have no proof of what he did with it.
- [7] During cross-examination, Ngqulu actually stated that he had told Pefile that the cable had been placed in the store on Lehopa's instruction, but nonetheless he inexplicably tried to maintain that Pefile was not aware of this.
- [8] The applicants maintained that Pefile had given permission to Ngqulu to remove the cabling from the store in order to take it to a depot in Brackenfell where such cabling was scrapped. There was uncontested video footage of Pefile and Ngqulu entering the store and then speaking to each other for 30 seconds, at which point a third person entered the store and Pefile when to speak to that individual. While Pefile was with the other person, Ngqulu walked over to the bag containing the cabling and looked inside. Pefile joined him at the bag. Ngqulu then left the storeroom with the bag containing the cabling and placed it in double cab pickup on the seat behind the driver's seat. Pefile left the store together with Ngqulu. Goyi was present with Ngqulu and Pefile when they exited the store before Ngqulu put the cabling in his vehicle.
- [9] There was a procedure for booking materials in and out of the store, which was not followed when the cabling was stored there. However, the relevance of this procedure to the receipt of scrap material was doubtful.
- [10] Pefile allowed Ngqulu to remove the cabling without having completed a form known as the 'store return form' ('SRF form'), which was required by the person receiving scrap at the Brackenfell. Pefile claimed he trusted Ngqulu to come back with the form. The form had to

be signed by the person taking scrap to Brackenfell and by the person authorising the removal. When the scrap was delivered at the depot, the form is countersigned by the person receiving it at Brackenfell. This procedure was common cause. It was common cause that, without the signed form, the scrap would not be accepted at Brackenfell. Ngqulu claimed that when he took scrap material to Brackenfell he would always fill in the form later. Ordinarily, scrap cable would be put in the bin at the Spine CNC depot and then taken by truck to Brackenfell.

- [11] On 13 December 2021, the day he put the cabling in the pickup, Ngqulu's version was that he was intending to go to Brackenfell to collect his Low Voltage authorisation, but someone else picked it up for him, so he no longer had to go. In the end the pickup with the bag remained at Spine CNC premises and he went out in the field in another truck. On 14 December, it was a half day so he could not go to Brackenfell and he was on leave from 18 December, so he put the cabling in the loading bay of the pickup under the canopy and locked the canopy, intending to take the cabling to Brackenfell when he returned from his leave at the end of December. Lehopa testified that he should have returned it to the store if he could not take it to Brackenfell.
- [12] Pefile's version was that he was unaware that Goyi had even placed the burnt cabling in his store until Ngqulu pointed out the red bag containing it. He also claimed he was unaware that Lehopa had instructed Goyi to place the bag in the store.. The store was not meant for keeping scrap and when Ngqulu showed it to him, he said Ngqulu should put it in the scrap bin at the CNC depot, but Ngqulu told him it had to go to Brackenfell because it had been received from the SAPS. Pefile told Ngqulu to fill out the SRF form and let him take the cabling in the belief he would bring the form back, but he did not. However, he was confident Ngqulu would return with the form. Ngqulu claimed he did not complete the form at the time as it was the practice to do so on returning from Brackenfell. Nonetheless he claimed to have completed one of the SRF forms, which were in his vehicle, but on his return to

the depot after going out in the field there was nobody there to sign the form and he left it in a Pefile's in-tray on his desk.

- [13] However, when Ngqulu left with the bag in a double cab truck, he never went to Brackenfell but went into the field. Thereafter, he had driven around in the vehicle visiting a number of places in Khayelitsha, with the cabling in it. According to the evidence, he went to 25 different trips on 13 and 14 December in the vehicle. On 14 December he was leaving work early to go on leave and could not return the cabling to the store as Pefile was not there and nobody else was going to Brackenfell. However, before he left he put the cabling in the loading bay of the vehicle and removed the key to open the canopy from the ignition key, which he left with a clerk to drive whilst he was on leave. He reasoned that the cabling would be safer in the truck than in the store.

- [14] He claimed he had put the incomplete SRF form in Pefile's in tray but at that stage Pefile was not there. When Ngqulu was pressed under cross-examination about why he and Pefile had not simply filled in the form before he went to load the bag in the pickup, Ngqulu was insistent that he had always loaded the scrap material first then completed the form and obtained the authorisation, even though that was contrary to procedure. His rationale for loading material first, then obtaining authorisation was that once the material was loaded he knew exactly what he was taking to Brackenfell.

The arbitrator's reasoning

- [15] The arbitrator's reasoning is summarised briefly below.
- [16] Even though the storing of scrap materials is not something set out in the employer's policies for placing and removing stock in the store, both Ngqulu and Pefile acknowledged there was a procedure for taking scrap material to Brackenfell involving the use of the SRF form, which they both acknowledged.
- [17] Ngqulu knew that the supervisor had to deal with the handling of such scrap material and that it should not be taken directly to Brackenfell.
- [18] The arbitrator rejected the applicants' version that it was only when Ngqulu came to the store regarding materials for another project and alerted Pefile to the bag, that Pefile became aware of it and then instructed him to take it to Brackenfell. He found there was no evidence supporting Ngqulu's other project. If he had come to the store for that purpose, it was improbable he would have sorted out what was needed with Pefile in a period of 30 seconds as video footage revealed was how long he spoke to Pefile at the time he said he was speaking with Pefile about the materials. The arbitrator believed this was an attempt by Ngqulu and Pefile to create a reason for Ngqulu to have been at the store. Similarly, it was unlikely that as soon as Pefile was alerted to the bag that he instructed him immediately to take the scrap to Brackenfell.
- [19] Even if Ngqulu had previously taken scrap from SAPS directly to Brackenfell as he claimed, he knew that Lehopa had instructed that the cabling should be brought to CNC and later that it had to be placed in the store, so Lehopa should have been involved if it was to be removed.
- [20] Pefile ought to have known, at the very least, that the RSF form should have been completed before Ngqulu removed the cabling from the store. It was logical that when Ngqulu placed the cabling in the pickup if he was going to Brackenfell that he would have the form completed beforehand. There was no reason why he would come back later to complete the form. It was more likely that he had no intention of returning to the store to complete the form and that it was not his intention to take the cabling to Brackenfell for scrapping. Pefile's explanation for the form not being completed because he trusted Ngqulu, did not make sense because the form was necessary for the cabling to be accepted at the Brackenfell depot for scrapping. It also made no sense why Pefile would tell Ngqulu to take such a small amount of cabling to Brackenfell. For this reason, the arbitrator concluded that Pefile had

colluded with Ngqulu to remove the cabling from the premises without authorisation.

- [21] There was also no evidence to corroborate Ngqulu's claim that he left the completed form in an in tray or desk in Pefile's office. Moreover, Pefile would have been expecting the form to be returned.
- [22] The arbitrator disbelieved Ngqulus version that, after he left the premises with his vehicle containing the cabling, he gone out in the field because the tracker record did not support that version.
- [23] Ngqulu's conduct of returning with the cabling and placing it in the locked storage bin of the pickup, where it remained out of sight, showed that he had no intention of delivering the cabling to Brackenfell.
- [24] The normal procedure for scrapping such a small quantity of waste material material would be that it was placed in a bin at the CNC premises and not separately dispatched for special delivery to Brackenfell.
- [25] In circumstances where the canopy section of the pickup was inaccessible, it was up to the applicants to explain that the bag found there was the same as the bag which Ngqulu claimed he had put on the back seat of the truck.
- [26] The fact that Ngqulu brought the truck back with the cabling still inside did not detract from the fact that it was improperly removed from the premises in the first place. In any event, Ngqulu should not have left the cabling in the back of the pickup while he was on leave instead of storing it in the store or even Lehopa's office.
- [27] Had Lehopa not been alerted to the missing cabling by other staff, Ngqulu would have been in a position to dispose of the cabling as he pleased. This was what the rules of the respondent were designed to prevent.
- [28] The absence of Pefile from his store at crucial points in the applicants' narrative was noteworthy, and clearly the arbitrator believed it was suspicious especially because his actual whereabouts when he was supposedly not there was not corroborated by any other evidence about where he was.
- [29] The arbitrator concluded on a balance of probabilities that the applicants were guilty of the charges.
- [30] In respect of procedural fairness, the arbitrator was satisfied that Pefile had sufficient time to ensure that his representative was present at the disciplinary enquiry.
- [31] Since the cabling was found missing, the nature of the misconduct was one that carried a sanction of dismissal and there was no need for the employer to conduct an enquiry in terms of clause 3.2 of the disciplinary code.

[32] On the question of alleged inconsistency, the arbitrator found that in fact the employer had acted similarly in other cases and that the explanation for the apparent anomaly of a Mr Bethanie's, the transgression essentially concerned misrepresentation related to timekeeping and the firm's explanation why he was not dismissed was acceptable. Insofar as the applicants allege. Insofar as other employees were not dismissed for other offences, the arbitrator found that there was no explanation for lesser sanctions imposed in other cases, so it was not possible to understand what the reasons for those sanctions were, though the charges were different. There also had been no reason to discipline Lehopa or Goyi because they had allegedly breached protocols for placing the cabling in the store, but that was different from Ngqulu and Pefile whose misconduct concerned dishonesty. Accordingly, the arbitrator dismissed the argument that the employer had acted contemporaneously inconsistently.

[33] Accordingly the arbitrator concluded that the dismissal was both procedurally and substantive fair.

The review

Grounds of review

[34] Having regard to the pleaded grounds of review, the applicants argue the arbitrator could never have concluded that they were guilty of the charges because:

34.1 There was no evidence that the bag of cabling was removed from the store with the intention of taking it. The only evidence of any intention regarding the cabling was that it was removed to take it to Brackenfell. The fact that the bag was still in the vehicle two weeks later was indicative of that.

34.2 There was no evidence of dishonesty and the employer suffered no loss.

34.3 There was no basis for placing the onus on the applicants to show that the bag in the truck was the same bag which had been removed from the store.

34.4 The evidence that it was not the same bag was mere speculation and in any event the onus is on the employer to prove the misconduct.

34.5 The arbitrator could not have concluded that the scrap did not form part of material included in audits and that the incorrect process was followed.

34.6 Mr Jantjies, from the Brackenfell Depot, and Pefile both testified that if scrap was found in the store it would attract a negative audit finding. In deciding that even though there was no policy regulating the removal of items, the arbitrator ignored Lehopa's testimony that Pefile did not require his authority to move things from the store as long as the necessary forms were completed.

34.7 The arbitrator also ignored the evidence of Jantjie that the scrap would have been accepted that Brackenfell if the necessary forms were completed.

[35] In elaborating on their case when the review was argued, the following points were emphasised by the applicants:

35.1 The charge was very specific and the evidence does not support the existence of a rule that Lehopa's authority was needed for the cable to be removed from the store. At best there was evidence that it would have been preferable 146 and 153.

35.2 The arbitrator could not have reasonably concluded that there was any intention to unlawfully remove the cable, especially when he travelled around with the cable in the pickup for two days taking 25 trips in all

35.3 Procedurally there ought to have been an investigation and it was acknowledged that Lehopa could have spoken to them first.

35.4 The argument that there was no evidence that the form was filled in ignores the fact that there was Ngqulu's oral evidence to the contrary.

Respondent

[36] In reply, the respondent argued inter alia that:

36.1 the applicants did not put their case to the respondent's witnesses. The applicants did not put their defence to the respondents' witnesses and Lehopa and Martin's explanations were largely unchallenged. The applicants submit that, even on the respondent's case, they should succeed.

36.2 It was common cause that scrap should have been deposited in the bin at the CNC premises which is another indication that they did not do what they were supposed to have. The applicants retort that there was no evidence that the bin was reserved for material coming from SAPS or that it was properly packaged and labelled before it was scrapped.

36.3 Pefile had a duty to monitor material coming in and out of the store and it is clear he neglected his duty in this respect in allowing the cable to be removed for two weeks.

36.4 Pefile must have known about the material in the store and Martin was not challenged when he testified to this effect.

36.5 It is common cause that Ngqulu ought to have completed the return to store form but did not.

36.6 Even if Lehopa had confirmed that his authority was required to remove the material from the store, in response to a leading question, his evidence that he needed to verify the cable was not disputed. The applicants accepted, in any event, that the SRF form still had to be completed.

36.7 The mere fact that the procedure was not complied with was sufficient in circumstances where the procedure was designed to prevent theft.

[37] The applicants ought to have discussed the removal of the cabline with Lehopa, in circumstances where they knew he had instructed Goyi to deliver it to the store.

Evaluation

[38] It is well established that in order to set aside an arbitrator's award on the basis that no reasonable arbitrator could have reached the same outcome, the following approach applies to evaluating the arbitrator's assessment, whether it be related to factual findings or otherwise:

"[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide

a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

Moreover, even if the arbitrator's reasoning in arriving at their findings is flawed, "(t)he court must nonetheless still consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence". [2]

(emphasis added)

The standards set by these criteria alone pose high hurdles for applicants on review.

[39] Undoubtedly, there are valid criticisms that can be made of the arbitrator's reasoning. Thus, there was no basis for burdening the applicants with the onus of proving that the cables retrieved from the loading bay of pickup when the canopy was opened were the very same ones that had been retrieved from the police. This was not really an issue in the case and it was never alleged they had substituted the original bag of cables with another, so there was no need for them establish it was the same

bag for the purposes of their defence. Similarly, the arbitrator was plainly incorrect in holding that there was no evidence that Ngqulu completed his portion of the SRF form because Ngqulu testified to that effect. However, if the arbitrator was in fact referring to the lack of documentary evidence of the partially complete authorisation, that would still be correct. The arbitrator also appeared to have clearly erred in his understanding of the import of the tracker report evidence which might have led him to suspect that Ngqulu was not as busy as he claimed to be on his last two days at work.

[40] Though not an error of the same order, it could be argued that the fact that Ngqulu had not removed the cables from the vehicle when he out in the field and on one trip near to his home, should be construed as evidence that in taking possession of the cable, albeit without completing the necessary authorisation form, Ngqulu had no intention of disposing of it. The arbitrator might have viewed this evidence in that light and inferred that it supported a contention that it was just a matter of not concluding the formalities in time before Ngqulu went on leave that led to the cables remaining so long in the pickup. However, none of these errors

leads ineluctably to a necessary inference that the arbitrator could not have arrived at the same outcome if it had not been for these lines of reasoning.

[41] In relation to the complaint that the charge of lack of authority stipulated that the alleged collusive act concerned a failure to obtain Lehopa's authority to remove the cable from the premises, Eskom argued that this argument was premised on a criminal

law approach to the formulation of charges, which has long ceased to be the standard of precision required in the formulation of

disciplinary charges. In support of this argument, the applicant referred to the Labour Court decision in *LA Crushers v Commission for Conciliation, Mediation and Arbitration and Others*[3], in which the court cited the authority of the LAC decision in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[4] the LAC stated:

"[32] Unlike in criminal proceedings where it is said that 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient', the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be

borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux & Van Niekerk where the learned authors offer a suitable example, with which I agree:

'Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.' "

- [42] In this instance, the complaint is that the issue of the cable being removed without the necessary forms evidencing authority being completed, was not stipulated as the factual basis of the charge. In passing, I note this was not specifically raised as a ground of review in the founding papers. It is true the charge related to Lehopa's authorisation to remove the cabling. However, it was already clear in the course of the disciplinary enquiry that an additional lack of authorisation was evidenced by the failure to follow the protocol of completing the RSF form before taking the cabling off the premises and the applicants were well aware of the need to defend themselves against the allegation they had not complied with this procedure either, whether or not they needed to obtain Lehopa's consent for the removal.
- [43] It must also be mentioned that, given Ngqulu's admission that he told Pefile that it was Lehopa who had instructed Goyi to place the cable in the store, it is difficult to escape the conclusion that, by deciding between themselves to remove the material from the store without getting Lehopa's say-so, their actions were at odds with his instruction that the bag should be placed in the store and they must have realised that.
- [44] The applicants argued that there was no loss suffered because the cable was found and had been secured in the Ngqulu's company pickup. Eskom counters that the reason for the procedure for removing scrap material from the premises was designed to limit the prospect of theft and it was entitled to take an infraction of the rule seriously. It referred to the LAC decision in *Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* [5], in which the court stated:

"In industrial relations parlance, theft is frequently described as misappropriation of the employer's property. Conceptually there is no useful distinction. The frequent resort to the lesser offence of being in 'unauthorised possession' of the employer's property, an act of misconduct listed in many disciplinary codes, caters for cases where a thieving intention is suspected and requires of employees to ensure that they do not place themselves under suspicion, relieving an employer from having to prove a specific intent. To articulate the notion of a misappropriation of property that is free of dishonesty is a contradiction in terms. In the court's view, to describe the deliberate retaining of property which the employee is not entitled to retain is not distinguishable, conceptually, from theft."[6]

[45] The case is certainly not on all fours with the facts in this matter, but the principle enunciated above is nonetheless applicable here too, even if dishonesty was not an express part of the charge. The purpose of having a procedure is to prevent retention of company property without authority, and to relieve the employer of having to prove all the elements of theft when goods are found in possession of an employee who should not have them.

[46] On the question of the undesirable presence of scrap material in the store it is obvious that procedures applicable to handling of stock-in-trade in the warehouse is subject to a detailed set of procedures, which are not applicable to recovered stolen scrap which is stored there. I am not persuaded that it was unreasonable of the arbitrator to have ignored the suggestion that scrap material of this nature would be handled like other conventional stock in the store. It was not a failure to comply with stock handling procedures which was relevant to the case. It is true that the presence of scrap material might attract a negative audit

finding, but that argument is not material to the central question, which is why Ngqulu and Pefile decided to remove the

cabling despite knowing that their superior had decided to store it there and without consulting him, and also then removed it without complying with the necessary protocol for a period of three weeks after the cabling had been removed from the place Lehopa had instructed it be stored.

[47] The indisputable fact remains that on Ngqulu's own account, despite his attempts to shield Pefile from the implication of his version, both of them knew that Lehopa had instructed the bag to be placed in the store and therefore also knew that removing it without his knowledge would have been at odds with Lehopa's intention. Pefile had claimed he had no knowledge of how the cabling came to be in his storeroom. Even before Ngqulu's own admission that he told Pefile how it came to be there, it was

inherently implausible that Ngqulu would not have related to him how he and Goyi came to bring it there on Lehopa's

instruction.

[48] In the circumstances, the failure of either of them to even try to contact Lehopa before taking action on their own initiative, which would have been the obvious and easiest step, called for a proper explanation to dispel the appearance of deceptive conduct. Secondly, even if that was irrelevant, the authorisation process for removing the cabling, from where it had been stored for safekeeping, was not complied with before the item was removed from the warehouse. Transporting such a small item to Brakenkloof was also at odds with the policy of normally disposing of such items in the CNC bin. What he did know is that the cabling had been stored in his vehicle for three weeks during which time he had no signed authority showing why it was there. During that time another person would be driving the vehicle unaware of the cabling in it. Rather than contriving to keep it in his vehicle all that time, he could simply have returned it to the store.

[49] Ngqulu's justification for allegedly being in the habit of not filing in the SRF form until everything was loaded on the vehicle might be plausible when a variety of scrap items were to be loaded, but it is still hard to understand why on the day in question, when it was only one item, he did not get the authorisation then and there from Pefile, which would have been the more natural and easiest thing to do. His explanation, which amounted to saying the habit was so ingrained in him, rings somewhat contrived.

[50] The purported discussion about errors in materials supplied to Ngqulu, during the 30 seconds he and Pefile were seen conversing on the video footage after they entered the store early, does seem very brief and the arbitrator noted this. The details of the incorrect construction material supplied to Ngqulu were described by him in rather vague terms, and Pefile's explanation what materials they were talking about was even more so. Leaving aside whether it is plausible they had disposed of Ngqulu's

reason for going to the store within 30 seconds, Ngqulu claimed he just noticed the bag he and Goyi had collected and went to look

inside it to see if it was the same bag. Why there was any reason it would not have been the same bag, which it appeared to be, is unclear. He then claims he asked Pefile if he knew about the cable and Pefile denied any knowledge of it and then asked him to take it to the scrap bin, on the basis it should not be in his store. Why Ngqulu would ask Pefile if he was had any knowledge of the bag, when Ngqulu knew full well how the cable got there is difficult to fathom. His later evidence that he told Pefile how it got there is far more likely. In any event, the joint version that Ngqulu and Pefile had presented, which excluded any disclosure by Ngqulu to Pefile of how the bag came to be in the store and the decision to remove it, and that the decision to remove it arose by sheer chance when Ngqulu drew Pefile's attention to it, causing Pefile to act promptly in getting it out of his store room, has an air of artificiality about it

[51] Ngqulu's explanation, for proposing that he take it to Brakenfell, which was only mentioned for the first time when he gave evidence, was that he believed it was preferable for Pefile's sake for him to take the material to Brakenfell so that Pefile would have proof of what he did with it, is at odds with their insistence that Pefile was free to decide what to do with scrap in his store, without regard to anyone else. The easiest and most obvious step they did not take if they wanted to be

sure they were doing the right thing, was to speak to Lehopa first. Yet, without even attempting to obtain clarity, Pefile assents to scrapping the cable at Brakenfell within a matter of minutes and it is immediately removed from the store by Ngqulu.

[52] Also, even if Pefile trusted Ngqulu to obtain the authorisation before going to Brackenfell, no explanation was offered why he was unconcerned about not receiving the form back by the time Ngqulu went on leave, and he never made a single enquiry to follow up. The applicants contended it was improbable the cable would still be in the vehicle if they had intended to remove it and suggested Ngqulu could easily have dropped the bag at his home by 14 December. However, that fact is not dispositive as there is no reason

to assume that it would necessarily have been feasible for Ngqulu simply to store the cables at home. Be that as it may, because he did not return it to the store and kept it the vehicle, the cabling was neither in the store nor handed in Brackefell with the necessary authorisation, and he was the only person who knew where it was.

[53] Aside from the parts of the arbitrator's reasoning that were not flawed, and on a broad consideration of the factors discussed above, I cannot confidently say that no reasonable arbitrator could have arrived at the same conclusion, on the evidence before him. That is not to say another arbitrator might still have reasonably come to a different conclusion and decide that, despite the obvious flaws in the applicants' case that their conduct was not unauthorised, their explanation why their actions should be treated as non-collusive and less blameworthy should be accepted.

[54] Accordingly, the review application must fail.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives For the Applicant G Doble of Cheadle Thompson & Haysom Inc. For the First Respondent V G Mkwibiso of Majang Inc.

[1] Head of Department of Education v Mofokeng & Others (2015) 36 ILJ 2802 (LAC) , reaffirmed more recently in Makuleni v Standard Bank of South Africa Ltd and others

[2023] 4 BLLR 283 (LAC) at paragraph [3].

[2] Mofokeng at paragraph 30, also reaffirmed in paragraph [3] of Makuleni

[3] (JR342/11)

[2017] ZALCJHB 476 (18 December 2017)

[4] (2011) 32 ILJ 2455 (LAC)

[5] (2020) 41 ILJ 2059 (LAC)

[6] At paras [17] and [18].

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