

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

LAC CASE No.: JA 51 / 09

In the matter between:

GEORGE MIYAMBO Appellant

and

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION First Respondent

COMMISSIONER TIMOTHY BOYCE N.O. Second
Respondent

PRETORIA PORTLAND CEMENT
COMPANY LIMITED Third Respondent

JUDGMENT

PATEL JA

Introduction

[1] The appellant, Mr George Miyambo ('Miyambo'), with the leave of the court *a quo*, appeals against the judgment and order handed down by the Labour Court. Jammy AJ reviewed and set aside the award made by the Second Respondent ('the Commissioner') and substituted the award with an order that the dismissal of Miyambo by the Third Respondent, Pretoria Portland Cement Company Limited ('the Company') was procedurally and substantively justified and fair and ordered Miyambo to pay the Company's costs. The Commissioner had found that the dismissal of Miyambo was unfair because a fair reason for dismissal had not been proved by the Company. Accordingly, Miyambo was reinstated to his former position with the Company.

The Facts

[2] Miyambo was employed by the Company on 30 April 1982 and had at the time of his dismissal a clean record. On 12 October 2007, whilst Miyambo was on the night shift duty, he found scrap metal which had been thrown into a skip. He was at all material times aware that the scrap metal was not going to be thrown away but rather that it would be sold by the Company. Miyambo decided to help himself to the scrap metal with the aim of fixing his stove. After he had finished his duty a security guard, who was on duty at the Company's pedestrian gate, found a few pieces of scrap metal in Miyambo's bag during a routine search. According to Company policy, a clearance permit or 'pass-out' is required for the removal of company property. This fact was well known to Miyambo because he had on previous occasions obtained the permission of the Company when he removed property belonging to the company.

[3] Miyambo could not produce the necessary pass-out allowing him to remove the scrap metal. On 16 October he was suspended from his duties and handed a notice to attend a disciplinary enquiry. Miyambo was at a subsequent disciplinary enquiry charged with theft of scrap metal and found guilty. A recommendation of dismissal was made by the chairperson of the disciplinary enquiry and the Company adopted the recommendation and dismissed Miyambo. His subsequent appeal was unsuccessful.

The Arbitration

[4] Miyambo referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA'). Conciliation was unsuccessful and the dispute was arbitrated before the Commissioner. The Commissioner found that Miyambo was guilty of theft of scrap from the waste bin. The Commissioner, however found that the sanction of dismissal was unduly harsh and unfair. The Commissioner ordered the Company to reinstate Miyambo with retrospective effect to the date of his dismissal, without forfeiture of any benefits that accrued to him had he not been dismissed, save that he was not to receive any back pay. The Commissioner substituted the dismissal with a sanction of a final written warning valid for one (1) year.

The Labour Court

[5] Subsequent to the award, the Company approached the court *a quo* to have the award reviewed and set aside in terms of s145 of the Labour Relations Act 66 of 1995 ('the Act'). The Labour Court found that the conclusions drawn by the Commissioner were not rational because they were irreconcilable with his factual findings. The Court did not refer to *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC), which is authority for the proposition that a commissioner exceeds his or her powers if the arbitration award is not justifiable in relation to the reasons given for it.

[6] The court *a quo* noted that the Commissioner made two important factual findings. The first is extracted from the Commissioner's award:

4.2.1 In the present matter the employee gave 3 contradictory explanations regarding his failure to obtain the pass-out for the scrap metal in question, viz:

4.2.1.1 on the day of the incident (12 October 2007) he told the security guard (Ngcobo) that he had forgotten to get a pass-out;

4.2.1.2 at his disciplinary hearing, the employee claimed that he did not get a pass-out since his supervisor was not present;

4.2.1.3 during the Arbitration he argued that he never believed that he even required the pass-out for the scrap metal in question.'

The other finding was that Miyambo knew he had to obtain a 'pass-out' before he could remove the scrap metal. Consequently, the Commissioner was 'satisfied' that Miyambo was guilty of theft.

[7] The court *a quo* also noted that despite this finding the Commissioner concluded that dismissal was inappropriate and that a continued employment relationship would not be intolerable. Jammy AJ held that this decision was not one that a reasonable decision-maker could have reached.

The Appeal

[8] Before us it was conceded that Miyambo was properly convicted of theft by the Commissioner and that procedural fairness was not an issue. However counsel for Miyambo submitted that although the Company's Disciplinary Code provided for dismissal for theft, it also provided for a final warning. He further contended that the Company failed to prove that it always imposed the sanction of dismissal for theft. It should have imposed a final warning instead of dismissal in light of his long service and clean record.

[9] It was also submitted that on previous occasions Miyambo had been allowed to remove the Company's scrap metal and it was likely that he would have been permitted to remove the scrap metal had he requested permission. Counsel proceeded to draw a distinction between theft in the 'technical sense', which he defines as the absence of prior permission or unauthorised possession, and theft in the 'strict sense'. According to counsel, Miyambo was guilty of the former. Counsel also submitted that the present matter was distinguishable from cases dealing with 'outright theft'.

[10] Counsel acting on behalf of the Company, submitted that Miyambo's dishonesty destroyed the trust relationship. In this regard it was submitted that Miyambo provided contradictory explanations for unauthorised removal of the scrap metal and made no attempt to comply with the Company's rule despite

knowing about it. A reasonable commissioner could not have arrived at the same result as the Commissioner.

[11] It was also argued on behalf of the Company that it applied a consistent zero tolerance policy. In the present matter, corrective discipline would have achieved nothing in light of Miyambo's persistent denial of any wrong doing. Miyambo was adamant that he did not need a pass-out despite knowing the rule, which further militated against a reinstatement. It was argued further that the Company was under an obligation to apply the disciplinary rules consistently.

[12] The leading authority on the standard of review of arbitration awards is *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). At para 79, Navsa AJ explained the duties of a commissioner as follows:

'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

Navsa AJ proceeded to frame the question for determination as follows:

'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[13] It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust. In *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC) para 22, the court, per Conradie JA, held the following regarding risk management:

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral

opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[14] In *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 9 BLLR 838 (LAC) para 21 the court quoted this dictum with approval. In *Shoprite*, the employee consumed company property without paying for it. The court held that the employee's dismissal was fair as the company's rules had been implemented for justifiable operational reasons.

[15] In *Toyota SA Motors (Pty) Ltd v Radebe and others* [2000] 3 BLLR 243 (LAC) para 15 Zondo AJP (as he then was) stated;

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

[16] In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others* [2008] 3 BLLR 241 (LC) the company had a policy allowing its employees to purchase scrap products from it. The employee did not comply with the specific procedure and dispatched a sealed box containing company property. At para 42 Molahlehi J held:

'.. the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

[17] It is clear from the above authority that our courts place a high premium on honesty in the workplace. Miyambo gave three different versions as to why he was not in possession of a pass-out. He showed no remorse despite having made an earlier statement saying he was sorry and admitting guilt. Before the arbitrator he did a complete *volte face* and stated that he did not need a pass out

for the scrap metal. This was inconsistent with not only what he had said previously but also with what he had done previously when taking out the Company's property which had no commercial value to the Company. He was aware that the scrap metal was being sold by the Company and to that extent it had a commercial value to the Company.

[18] It was also argued on behalf of Miyambo that he did not really intend to steal the scrap metal since he was carrying it in a bag. The guard at the pedestrian gate would have easily discovered the scrap metal if he had searched Miyambo. In my view this is a makeweight argument. The discovery *vel non* was dependant on the vigilance of the guard. In any event if Miyambo did not intend to steal, he *mero motu*, could have gone up to the guard and informed him that he had scrap metal without the necessary pass-out and that he would furnish one later. Instead he informed the guard that he had forgotten to get a pass-out.

[19] It is appropriate to return to the submission made by counsel on behalf of Miyambo that the above case law, which, in his opinion, involves 'outright theft and/or dishonesty', is distinguishable from the present matter which involves theft in the 'technical sense' in that there was absence of prior permission or unauthorised possession. I do not agree with this argument. It is an artificial distinction and undermines conceptual clarity. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM & Others* [2001] 3 BLLR 305 (LAC) the employee was charged with theft or unauthorised possession of company property, namely cooked meatballs, and was dismissed. The commissioner in his award held that the dismissal was fair. The Labour Appeal Court held that it was clear that the commissioner had failed to appreciate the difference between theft and attempted theft in that the latter was "mildly" less heinous than theft and set the award aside. On appeal this court paid short shrift to this distinction and held that it was clear that the commissioner had found the employee guilty of misconduct and dismissal was therefore justifiable.

[20] I must add that counsel for Miyambo also equated theft in the 'technical sense' with negligence, which adds yet another dimension to an already complex minefield of distinctions. To my mind, a disciplinary procedure that draws subtle distinctions between degrees of theft, and likens the lesser or 'technical' sort of theft to negligence, is impractical.

[21] Miyambo undoubtedly breached the relationship of trust built up over many years of honest service. The Company had a consistent policy of zero tolerance for theft and this had been clearly conveyed to all the employees including Miyambo. I agree with the Labour Court's ruling that the Commissioner's award was not justifiable in relation to the reasons given for it. On the basis of the factual findings made by the Commissioner, the dismissal of the Appellant was justified for operational reasons and was fair.

[22] I now turn to the question of costs. Miyambo was armed with an award in his favour from the Commissioner. In light of the judgment in *Sidumo* (supra) it was not unreasonable for Miyambo to consider that he had prospects of success on appeal. In my view justice would be best served if each party was ordered to pay its own costs on appeal.

Order

[23] I accordingly make the following order:

- (i) The appeal is dismissed.
- (ii) Each party is ordered to pay its own costs occasioned by the appeal

PATEL JA

I agree

McCALL AJA

I agree

HENDRICKS AJA

Appearances:

For the Appellant/s:	ADV L M MALAN
Instructed by:	Finger Phukubje Incorporated

For the Respondent/s:	ADV. W HUTCHINSON
Instructed by :	Fluxmans Incorporated

Date of judgment:	2 June 2010
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