

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA52/2015

In the matter between:

**AUTOZONE**

**Appellant**

and

**DISPUTE RESOLUTION CENTRE OF**

**MOTOR INDUSTRY**

**First Respondent**

**LUVUYO QINA N.O.**

**Second Respondent**

**ALLEN SIKHAKHANE**

**Third Respondent**

**Heard: 05 May 2016**

**Delivered: 13 February 2019**

**Summary: Review of arbitration award – breakdown in the trust relationship – employee dismissed for dishonesty – commissioner upholding dismissal but Labour Court setting aside award and reinstated employee – court finding that the evidence as a whole establishes on the probabilities that employee deliberately and falsely misrepresented the amount to be paid to the casual workers -**

**Held that where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.**

**Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The**

employer thereafter will be hard pressed to place trust in such an employee. The finding to by the arbitrator is one that a reasonable decision-maker could reach. Labour Court to set aside and review application dismissed.

**Coram: Tlaetsi DJP and Murphy AJA**

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## JUDGMENT

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MURPHY AJA

- [1] This is an appeal against the judgment of the Labour Court (Molahlehi J) handed down on 16 February 2014 in which it reviewed and set aside the award of the second respondent (“the arbitrator”), reinstated the third respondent (“Sikhakhane”) and granted ancillary relief. The appeal was heard in 2016 and judgment was reserved; with Ndhlovu JA appointed as scribe to write the unanimous judgment of the court. The unfortunate passing of Ndhlovu JA regrettably has delayed completion of the judgment.
- [2] The appellant (“Autozone”) is an auto spares company. Sikhakhane commenced employment with Autozone on 25 October 2004 and at the time of his dismissal was employed as a driver at the Midway branch in Johannesburg. On 30 August 2010, Sikhakhane was dismissed on grounds of dishonesty (theft, misappropriation of company funds or attempted theft or misappropriation).<sup>1</sup>
- [3] The facts are straightforward and can be summarised as follows. On 5 August 2010, the Regional Operations Manager, Mr. Alvin Govender, instructed Sikhakhane to employ casual labour to clean up waste and rubble at the back of the store. Sikhakhane then recruited three casual labourers (“casuals”). In the presence of Sikhakhane, Govender informed the three casuals that they

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<sup>1</sup> The record does not disclose the precise offence with which Sikhakhane was charged. However, the evidence discloses that he was dismissed for some form of dishonesty in relation to the misappropriation of petty cash.

would each be paid R50 for the task. When the task was completed, Govender, in the presence of the branch manager, Mr. Paul Thakalani, instructed Sikhakhane to obtain R150 from the cashier. Sikhakhane approached the cashier (Ms Thandi Mashego) and requested R180. After Govender had left the branch, the three casuals approached Thakalani and complained that the payment to them of R50 was too little for the work done. Thakalani was informed by Mashego that she had in fact handed R180 to Sikhakhane. Thakalani confronted Sikhakhane and asked why he had requested R180 and only paid over R150. Sikhakhane responded by taking the R30 out of his pocket, but did not provide an explanation at that point. Later he explained that he had acted on his own initiative to pay the casuals more and had withheld the R30 balance until the work was complete. This version of events was confirmed at the arbitration proceedings by Govender, Thakalani and Mashego.

- [4] Sikhakhane testified at the arbitration that towards the end of the day when the casuals were about to complete the work, he asked them for their identity documents. Without any reference to management, he decided on the amount to be paid. He then went and requisitioned R180. When he came out to pay the casuals, he noticed that the work was not completed (two “things” had not been emptied). He then gave each casual R50 and held back the balance until the last task was completed. The casuals were unhappy at receiving only R60. According to Sikhakhane they knew they were going to be paid R60, and saw him hold back the R30. He told them to speak to Thakalani. Later he gave each casual the additional R10. Under cross-examination, he could not explain why he referred the casuals to Thakalani if he had the authority to decide the amount of payment. Nor was he able to account for why the casuals complained about only being paid R50.<sup>2</sup>

- [5] In a brief award, the arbitrator concluded that Autozone had discharged its *onus* of proving on a balance of probabilities that the dismissal was for a fair reason and on that basis held that the dismissal was substantively fair.

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<sup>2</sup> Thakalani after confronting Sikhakhane paid the casuals an additional R50 each.

- [6] In his application for review, Sikhakhane denied that he had been dishonest and reiterated his version. Autozone defended the reasonableness of the award. The Labour Court (without explicitly finding as much) accepted that the misconduct had been proven. It made no attempt to analyse the evidence to determine the nature of the transgression. Rather, it merely assumed that it had occurred and concluded:

'In the present case the applicant was at the time of the incident employed as a driver. He was, as stated earlier, required to supervise the casual workers and ensure that they are, on completion of their task, paid for their services. There is no evidence that shows how the conduct for which the employee was found guilty of impacted on the relationship of trust relationship (sic) between the parties. In the absence of such evidence the proper approach which the arbitrator ought to have adopted was that the dismissal of the employee was in the circumstances unfair because there was no proof that the trust relationship between the parties had broken down.'

- [7] The Labour Court accordingly set aside the award, reinstated Sikhakhane to the date of his dismissal, and ordered that Sikhakhane should be issued with a written warning for the misconduct (thus indicating that it accepted that the offence had been proven).
- [8] In making its finding, the Labour Court relied on relevant authority stating that the test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable, which is a question of fact to be established by appropriate evidence.<sup>3</sup>
- [9] In its notice of appeal, Autozone confined its grounds of appeal to the issue of whether the trust relationship had in fact broken down. It alleged, *inter alia*, that the Labour Court erred in failing to assess the facts and circumstances of the particular case and in finding that on account of the fact that no specific evidence was led relating to the trust relationship it followed that the dismissal was substantively unfair.

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<sup>3</sup> *Edcon Limited v Pillemer N.O.* [2010] 1 BLLR 1 (SCA)

- [10] Although Sikhakhane did not file a cross-appeal regarding the implicit finding of the Labour Court that the misconduct had occurred, he persisted before us with his denial of dishonesty. His submissions in that regard are unconvincing. The idea that he was holding back the R30 until the job was completed is inherently improbable. If the job was indeed incomplete, it was more likely that he would have held back the entire amount until the job was finished. But, in any event, Govender and Thakalani both testified that Sikhakhane had been authorised to requisition R150. That evidence was not seriously challenged. As a driver he had no authority to determine the amount of payment. Additionally, the complaint made by the casuals to Thakalani was that a payment of R50 was insufficient. They were aggrieved at being paid R50, not R60, for the job. The evidence as a whole establishes on the probabilities that Sikhakhane deliberately and falsely represented to Mashego that the amount to be paid to the casuals was R180 instead of R150 and that he intended to pocket the difference for his own benefit. This was corroborated by Thakalani's evidence that Sikhakhane could not come up with a plausible explanation at the moment he was confronted.
- [11] Consequently, the only issue on appeal is whether Sikhakhane's conduct breached the trust relationship so as to render the continuation of the employment relationship intolerable.
- [12] Undeniably, the evidence on the issue is somewhat thin. An employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal.<sup>4</sup> Where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.

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<sup>4</sup> Grogan; *Dismissal* 164-165.

[13] Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The employer thereafter will be hard pressed to place trust in such an employee. It will be difficult going forward for any task involving a measure of discretion or reliance to be entrusted to the deceitful employee. The operational requirements of the employer alone, therefore, may very well justify the dismissal. An employer is entitled to have a driver it can rely on to act in good faith to advance and protect its interests. Sikhakhane's conduct shows that he is not such a driver. It was not necessary for Autozone in such circumstances to have produced evidence to show that the employment relationship had been irreparably destroyed.<sup>5</sup> The nature of the offence and the manner of its commission support a conclusion that the continuation of the relationship had become intolerable. The employer cannot reasonably be expected to retain Sikhakhane in its employ. Hence, the finding to that effect by the arbitrator is one that a reasonable decision-maker could reach. There was accordingly no basis for the Labour Court to set aside the award.

[14] In the premises, the appeal is well founded. This is not a case where costs should be awarded.

[15] The following orders are made:

15.1 The appeal is upheld.

15.2 The order of the Labour Court is set aside and substituted with an order dismissing the application for review.

15.3 The dismissal of the third respondent is declared to have been substantively fair.

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JR Murphy

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<sup>5</sup> See *Department of Home Affairs v Ndlovu* [2014] 9 BLLR 851 (LAC); *Quest Flexible Staffing Solutions (Pty) Ltd v Legobate* [2015] 2 BLLR 105 (LAC); and Grogan: *Doctored CVs: Getting jobs by false pretences* Employment Law vol 30 part 5 October 2014.

Acting Judge of Appeal

I agree

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Tlaletsi

Deputy Judge President

APPEARANCES:

FOR THE APPELLANT:

Adv W J Hutchinson

Instructed by Fluxmans Incorporated

FOR THE THIRD RESPONDENT:

Adv SS Green

Instructed by Mangena & Associates