IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA96/2018

In the matter between:

AQUARIUS PLATINUM (SA) (PTY) LTD **Appellant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER DHELIWE MAVUMA N.O. **Second Respondent**

REGGIE NGORIMA **Third Respondent**

Heard: **20 February 2020**

Delivered: **18 May 2020**

Summary: dismissal misconduct – theft – concealment not an element of theft – theft is the deliberate deprivation of someone's property permanently– where having borrowed material from an employer and having an intention to return it, an employee fails to return the property, a change of intention to permanently deprive the employer of the property must be assessed on the probabilities in light of the evidence

Misappropriation of employer property – the unauthorised use of employer's labour force amounts to an abuse of managerial position and misconduct.

Coram: Davis, Musi and Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This appeal is against the refusal of the Labour Court, which having reviewed an award of a CCMA commissioner, nonetheless, endorsed a finding that the dismissal of the third respondent, Ngorima, was unfair, and left an award of reinstatement undisturbed. Ngorima had been dismissed by the appellant on charges relating to the misappropriation of company property.

[2] The judgment *a quo*, and the award, reveal some important misconceptions about the idea of theft, misappropriation, dishonesty and the appropriate accountability of an employee for such conduct. This judgment addresses these misconceptions and seeks to clarify the appropriate approach to adjudicating such alleged conduct. Further, the award invoked the idea of inconsistency of discipline to justify its conclusion that the dismissal was unfair which, as the analysis that follows in this judgment shows, was ill-considered, and in this respect, was correctly criticised by the Labour Court and was the foundation for the review of the award.

[3] The charges which Ngorima faced and upon which he was convicted in a disciplinary enquiry were these:

> 'Charge No 1: Dishonesty, in that during September 2014 you did not act honestly towards the company as a site engineer in that you committed the following:
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> 1.1: Misappropriation of company assets or resources; use labour and resources for private use without acquiring authorisation.

1.2: Abuse and misuse of management position – use mine labour to perform private tasks; and

1.3: Damage to company property – cutting of company (scaffolding) pipes for private usage.

Charge no 2: Failure to comply with company rules and procedure in that:

- You did not comply with the waybill procedure.

Charge no 3: Theft:

- Unauthorised removal of company property, took the pipes belonging to the company without authority.

The critical facts

[4] There are no material disputes of fact. What happened was this:

4.1 Ngorima was the shaft engineer, thus a senior employee.

4.2 He lived off the mine. He wished to mount a TV aerial at his home at a great height to inhibit vandalism by passers-by. For this task, the installer needed a scaffold to access the spot. The installer's scaffold was inadequate to reach the spot.

4.3 Ngorima was aware that there were metal scaffolding poles in the discard yard at the shaft. He realised that he could supplement the installer's equipment by using these poles.

4.4 He telephoned the then mine manager, Mhlambi, who, at that moment, was absent on leave. He said he wanted to borrow the poles. Mhlambi's answer was that if he did so, he should comply with the procedure, a reference to the so-called waybill procedure. The waybill procedure required any removal of any company property from its designated place to be documented and authorised. Doubtless, this procedure was to

regulate the movement of property in the possession of employees which, if adhered to, would avoid any suspicion of being in unauthorised possession thereof, an act of misconduct. Ngorima was well versed in the procedure.

4.5 Whether the exchange between Ngorima and Mhlambi indeed amounted to a "permission" to borrow the poles is not altogether obvious. For the purposes of this judgment, it is accepted that the "borrowing" was authorised. It is common cause that a practice existed in terms of which company equipment was borrowed by employees from time to time. Examples adduced in evidence showed that employees took equipment and returned it in the condition it had been taken.

4.6 Ngorima thereupon instructed an artisan, Jansen, to cut 600mm lengths from the metal poles taken from the discard yard. These lengths were then loaded onto his bakkie and removed by him. This exercise interrupted other duties that Jansen was busy on. There was some debate on the importance of the task that Jansen was engaged on – mending a security gate installation – but this is a red herring; the point of significance is the re-deployment of Jansen for private purposes.

4.7 Ngorima travelled with the load of poles to another shaft on the mine, Kroonvaal, where he was to attend a meeting. He then left the mine. He himself authorised himself to remove the material from the shaft to Kroonvaal, in an 'internal waybill'. He did not prepare an 'external waybill' to take the material off the mine. Ngorima offered as an excuse for not filling out an external waybill that he had intended to do so upon the conclusion of the meeting at Kroonvaal, to which he first had gone, but had overlooked doing so. Why he could not and did not fill out an external waybill initially, was unexplored in the evidence. The omission of the latter authorisation was an irregularity recognised by both the arbitrator and the Labour Court.

4.8 The material was never returned. It was estimated to have a value of R1000, if sold as scrap. No acceptable evidence was adduced by Ngorima to explain why at any time either before or after his suspension, seven days after the removal had occurred, the poles were not returned, or could not be returned, as was his logical obligation in terms of the borrowing of the equipment. Ngorima's sole contribution to an explanation was that his suspension inhibited him from so doing. This is hollow when he never even tendered a return at either his disciplinary hearing or at the arbitration.

The Award

[5] The arbitrator held that Ngorima was guilty of charge 2, in not complying with the waybill procedure but that this misconduct was "not grave and wilful". It must be inferred that Ngorima's claim that he inadvertently overlooked doing so was not regarded as a proper defence.

[6] In addressing the other two charges, the award effectively treated them as intertwined. The arbitrator concluded that there was no "dishonesty" by Ngorima. However, the burden of the *ratio* in the award is that there was a culpable inconsistent application of discipline by the employer. This analysis is plainly confusing. If there was no dishonesty present exactly what was Ngorima guilty of? Furthermore, what act of culpability was to be compared with culpable acts of other employees?

[7] The upshot was that, on these findings, the dismissal was held by the arbitrator to be unfair.

[8] In my view, the award is gravely misdirected.

[9] First, as to the charge of theft, the arbitrator stated at [58]:

> 'Theft has an *element of concealing whatever item intended to be stolen*. In this instance, colleagues were aware and had full knowledge of the applicant's

intentions of the usage of the scaffolding. Therefore, I do not find the applicant guilty of theft.'

[10] This understanding of theft in charge no 3, as an action which is intrinsically furtive is fundamentally wrong. It is plain that the arbitrator misconceived the enquiry he was supposed to conduct. More is said on this aspect hereafter.

[11] Second, as to inconsistency in the application of discipline in respect of charge 1, the arbitrator stated in the award that the case of Van der Merwe was comparable.[1] The facts of the Van der Merwe incident were these:

11.1 Van der Merwe borrowed a pump for personal use.

11.2 He obtained permission to do so.

11.3 He complied with the waybill procedure.

11.4 He returned the pump.

11.5 Van der Merwe had a car washed by company employees.

11.6 The arbitrator, in the award, said this was for private use, but apparently the vehicle was itself company property.

11.7 Van der Merwe was not disciplined.

[12] These incidents about Van der Merwe and the conduct of Ngorima have merely to be described to demonstrate the material misdirection in perceiving them as a proper foundation for a comparator to conclude that inconsistent application of discipline took place; the view also taken by the Labour Court.

[13] Therefore, this appreciation of the award compels the conclusion that the arbitrator did not render an award that a reasonable arbitrator could have rendered. It fell, rightly, to be reviewed and set aside.

[1] There were also other incidents alluded to in evidence but ostensibly, the arbitrator did not rely on them. The Labour court mentions these other incidents and concluded they were not comparable.

The judgment

[14] The Labour Court disapproved, correctly, of the reliance on the inconsistency of application of discipline on the grounds that the other incidents put forward were not comparable.

[15] The Labour Court approved the finding of guilt on charge no 1.2 – abuse of managerial authority, and on charge no 2 – failure to follow waybill procedure. On the other charges, the Labour Court was unpersuaded any "dishonesty" was evident.

[16] In two distinct passages the issue of theft as set out in charge no 3 are dealt with by the Labour court. This is what is said:

> '[35] There are different conclusions one can arrive at there, but I do not think [Ngorima] was charged merely for the use. When one looks at the charge sheet it seems to suggest that there was an appropriation, disposing of company property, that is now the third charge in this matter.
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> [36] I begin with that because I think it is proper to conduct that enquiry first. It cannot be said on the evidential material before Court that the evidence that is common cause revealed that the third respondent stole the pipes. I would not agree that what he did amounted to theft.
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> [37] I would agree that he was not authorised to remove it permanently. He was authorised to remove it subject to him bringing it back.
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> [38] I do not know what one would call that, but it cannot be theft. One has to bear in mind that he had already approached a senior person. In his mind one would not say he was secretive in what he was doing. He was doing it openly. He was not hiding what he was doing. In fact, the fact that he took the trouble of telephoning Mr Mhlambi shows that he was executing his conduct in an open manner.
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> [39] I would therefore find it difficult to agree that on the evidence that was before the commissioner the third respondent ought to have been found guilty of

theft. *He could have been found guilty of retaining property of the company, which he was authorised to take*. But I do not know what that kind of misconduct would be. It cannot be a misconduct of theft, knowing what that amounts to. As I have already alluded to it.

[40] On the evidence therefore, [Ngorima] could not be found guilty of theft as described there, but he could be guilty of some misconduct, of taking company property and not returning it. In fact, of disposing of it, because he passed it on to a third party.[2]

[41] The problem I have is that without knowing what this kind of misconduct is, it then becomes difficult to say what kind of sanction one imposes. Because one has to go to the company policy and find where this kind of misconduct fits in, and then find the sanction that is appropriate in those circumstances. That is the first problem with the third count.

. . .

[47] The evidence was essentially that once he was done with the pipes he would return them and Mr Jansen would put them back into the length of 1.6 metres, which never happened.

[48] Therefore in relation to the first count, the evidence was overwhelming that the third respondent did use company resources for private usage, firstly, when he cut the steel pipes.

[49] It is not clear what the purpose was for which these pipes were still kept at the time. It may well be that these pipes would be given away and sold out at a price of about R1 000. However, on this count I have a problem.

[50] The applicant decided to call this an act of dishonesty. There is no evidence that suggests to me that this was an act of dishonesty. He was not acting secretly nor was he acting to the prejudice of the company.

[2] This finding that the poles were disposed of is not altogether clear on the evidence although such an inference was certainly plausible and consistent with the fact that a tender to return them was never made.

> [51] Dishonesty suggests some kind of conniving wrongful conduct. However, the conduct that is proved by the evidence seems to suggest otherwise. Again, I would say it merely amounts to misappropriation of company assets, abuse and misuse of a management position. Those two can be sustained and should be sustained.
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> [52] Mr Mhlambi had been told that the pipes would be privately used. Once you describe these counts as they appear in the charge sheet without dishonesty, it then impacts on the issue of the fairness of the sanction.
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> . . .
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> [61] I do accept that the third respondent was a senior personnel in the sense that he was an engineer and he was hierarchically senior at the place where he was employed at the time. However, when one really looks at what he did objectively, it lacked the seriousness that should attract a severe sanction such as one for dishonesty, or theft."
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> (*emphasis supplied*)

[17] I disagree with this perspective of the conduct of Ngorima as articulated by the Labour Court and it cannot be endorsed. The idea that theft or dishonesty requires furtiveness or concealment is misplaced. It is true that, often, to either conceal the fact of the theft or to conceal the identity of the thief, the deed is done clandestinely. However, that is not an element of the crime. The crime of theft is based on the common sense of the ages: all that is required is that a person deliberately deprives another person of the latter's property permanently. 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.

[18] To articulate the notion of a misappropriation of property that is free of dishonesty is a contradiction in terms. In my view, to describe the deliberate retaining of property which the employee is not entitled to retain is not distinguishable, conceptually, from theft. Naturally, a proper appreciation of the dimension of the requisite intention in regard to misappropriation is not wholly free from difficulty. It is conceivable that a person, *bona fide*, intends to return an item at the time of borrowing but later changes that intention. If circumstances, where the probabilities are equally poised that at the outset, the "borrower" had an intention to return the item, how is the existence of the fact of a change of intention to be determined? Self-evidently, except in rare cases, that change of intention would have to inferred from the evidence. In such a case, the explanation proffered by the borrower would be of central importance. Where a borrower gives no explanation, can the inference indeed be drawn that the intention not to return the goods be made? In my view, such an inference can be drawn if, in the absence of other evidence, the probabilities lend weight to such an inference. This does not result from any onus on an employee to prove the absence of guilt; rather, it is a straightforward example of inferential reasoning to determine the probabilities on the available evidence.

[19] Moreover, to return to the idea that furtiveness is a necessary attribute of theft or dishonesty, such a perspective overlooks that sometimes theft takes place quite brazenly. One example where this is common is where senior employees, often managers, abuse their standing and authority to take possession of company property for private use. The workforce looks on impotent to intervene. The facts of this case illustrate exactly that scenario.

[20] Moreover, even were I to be wrong about the establishment of guilt of theft by Ngorima on this body of evidence, and, thus, a finding of theft *per se*, on these facts, were to be unsafe, there is another significant dimension to the conduct of Ngorima to be weighed which renders him culpable of serious misconduct. That conduct is, as alluded to above, the brazen abuse of his status and seniority to appropriate the labour of Jansen for private purposes, something for which there

is no hint that he had the authorisation to do, and the causing of the cutting up of company property. This is an example of an abuse of his managerial position for which the disciplinary code provides dismissal as an appropriate sanction. In the context of large businesses, such as a Mine, where vast quantities of company property are continually in the possession of a large number of employees, a strict standard of conduct is usually and appropriately applied to everyone. Ngorima as a senior employee was obliged to set a good example: he did not. Ngorima was, in the circumstances, indeed guilty of serious misconduct in this regard and dismissal is appropriate.

The Order

(1) The appeal is upheld.

(2) The Award is reviewed and set aside.

(3) The judgment of the Court a quo is set aside.

(4) The sanction of dismissal is declared not to be unfair.

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Sutherland JA

Davis and Musi JJA concur

APPEARANCES:

FOR THE APPELLANT: Adv G Fourie SC,

Instructed by Werksmans.

FOR THE THIRD RESPONDENT: Adv E Liebenberg,

Instructed by Ismail and Dhaya.