REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN PORT ELIZABETH

CASE NO **P758/2000**

In the matter between:

NUMSA o.b.o. NGELE	Applicant
and	
DELTA MOTOR CORPORATION	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
JOHANNES NIEHAUS	Third Respondent

ON BEHALF OF APPLICANT	MR T FAKU
ON BEHALF OF RESPONDENT	ADV R B WADE

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

GERING AJ

[1] This is an application brought by NUMSA [the applicant] on behalf of Mr K Ngele [the employee] to review and set aside an award made by a commissioner of the CCMA [third respondent] upholding the dismissal by the first respondent [the employer or the company] of the employee on 22 September 1999 pursuant to a disciplinary inquiry into an incident that occurred on 1 September 1999.

[2] There is a paginated bundle of documents and references to the paginated bundle will be denoted by the capital letter B followed by the page reference.

[3] The award of the commissioner dated 25 August 2000 is in the paginated bundle B14 to B22. On B22 the award of the commissioner is as follows:

"The sanction of dismissal [although harsh] is not unfair or unreasonable, given the totality of circumstances."

[4] As stated in the award [B15]:

"The employee was accused of misappropriation of company goods in that half a roll of toilet paper was found on his person by a security guard when he left the workplace."

[5] In terms of section 192(1) of the Labour Relations Act No 66 of 1995 [the "Act"]:

"In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal."

In the present case the existence of the dismissal was clearly established. In terms of section 192(2):

"If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

[6] This involves also proof by the employer that the imposition of the sanction of dismissal is fair. As stated by NICHOLSON JA in *Toyota S A Motors (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC); [2000] 3 BLLR 243,

"A statutory arbitrator is also required to find if a sanction is

fair." [Para.50]

And in *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857(LAC) at para.15 it was stated:

"Where the conduct for which the employees are dismissed is unacceptable but the sanction is, in all the circumstances not a fair sanction, the dismissal cannot be said to be substantively fair."

[7] In the award [B17] the following is stated:

"From the outset it has to be stated that the taking of a toilet roll appears at first glance not to be that serious a transgression and is most certainly not serious enough to dismiss an employee."

[8] I may mention here that it was not the taking of a toilet roll but the taking of part of a toilet roll.

[9] It is clear from the documents in the bundle relating to the disciplinary inquiry that the company's case against the employee was based on its written policy in regard to the misappropriation of company property. Under the heading "Penalty" the following is stated: [B216]

"The chairman made it clear that the company has on numerous occasions notified employees of this type of offence and its consequences and referred to company document dated 22 June 1999. [This appears in the bundle at B223.] Mr Ngele was found in possession of a toilet roll, hidden in his underwear, therefore the intention was clear."

[10] Indeed, in the heads of argument filed by the respondent's representative and appearing on B200, the following is stated:

"The allegation raised against the applicant by respondent is that the applicant was guilty of being in unauthorised possession of company property, being one toilet roll, which the respondent contends was hidden on his person when he attempted to leave the respondent's premises."

And on B204 in the same heads, paragraph 6.1:

"The respondent imposed the sanction of dismissal on the applicant as a result of his being found guilty of being in unauthorised possession." (Emphasis added)

[11] Different versions of the company's written policy relating to the misappropriation of company property were published from time to time by the company.

[12] Thus in B222 dated 26 November 1998 entitled "Policy on Misappropriation", the Company "has revised its policy on the issue." On B225 it is stated that it is intended "to eliminate any confusion about this policy".

[13] In B223 re-issued on 22 June 1999 this is worded differently. I quote the terms of the company policy under the heading "Misappropriation of company property":

"All employees are hereby advised of the company policy.

(a) The misappropriation of money or property belonging to the company or fellow employees is a dismissable offence.

(b) If any employee misappropriates - or is found in unauthorised possession of any production part or any other component or item - inclusive of scrap material - regardless of whether it can be fitted to a vehicle or not, he or she may be summarily dismissed. (Emphasis added)

(c) All other instances of misappropriation may result in the application of disciplinary sanctions ranging from a written reprimand to dismissal, depending on the circumstances as judged by an independent inquiry chairman. (Emphasis added)

(d) Employees are reminded that it is the responsibility of each individual to check his or her own belongings or vehicle before leaving the premises. Each individual will be held responsible for any items in their possession.

(e) Those employees who wish to purchase scrap or any other material must follow the correct procedure. No deviation from this policy will be allowed."

[14] I may point out that it is clear from the evidence that there was no specific memorandum issued in connection with toilet paper. (See B48)

[15] A later policy dated 27 October 1999 (See B224/226) headed "Misappropriation - Unauthorised Possession of Property" specifically states that it is intended to

"eliminate any confusion about this policy. (Emphasis added)" This policy supersedes all previous publications with regard to this policy. Therefore, all employees are reminded of the company policy with regards to this issue.

(a) Any employee found guilty of misappropriation/ unauthorised possession of money or property belonging to the company, fellow-employees, contractors or any other party associated in

any way with the company (business or individual) will result in dismissal. (Emphasis added)

(b) The abovementioned property includes, amongst other things and not limited to any company property or production part or any other component or item, inclusive of scrap material, regardless of whether it can be fitted to a vehicle or not and regardless of the value of the item. (Emphasis added)

(c) Employees are reminded that if any company property is found on their person or in their possession (whether in their clothing, vehicle, or any other receptacle or container under their control when leaving the company premises without having a valid pass for such property, this will constitute unauthorised possession/ misappropriation. The penalty referred to above will apply." (Emphasis added)

[16] Even in regard to this latest policy, which was intended "to eliminate confusion" and which made it clear that the penalty will result in dismissal, it is stated [See B226] that:

"The company reserves the right, with due regard to consistency, only in exceptional circumstances, to apply discretion in the application of this policy in cases of insignificant or trivial nature and consequence (for example paper clip or pin)."

[17] After referring to these different versions of the company policy on misappropriation and unauthorised possession, the arbitration award states, correctly in my view [See B19]:

"As a result I am not convinced that as far as the written company policies were concerned, the employees knew, or ought to have known, that in terms of these policies the taking of half a roll of toilet paper would be met with disciplinary action. Most certainly it was not known that in the event of disciplinary action that dismissal was necessarily the sanction to be imposed. On the contrary, the policy clearly contemplated disciplinary sanctions such as a written reprimand in less serious instances of misappropriation. I find it difficult to find a better example of such a less serious instance of misappropriation than the taking of half a roll of toilet paper. Surely dismissal appears to be inappropriate given the content of the disciplinary inquiry."

[18] At B20 the award states:

"The company's mere reliance on its disciplinary code will result in a failure to meet the criteria laid down in item 7 of Schedule 8 to the Labour Relations Act, given my comments

above in respect of the employee's knowledge of the rules at the time, or the knowledge he ought to have had. As stated, given the nature and value of toilet paper, I am not willing to assume that the employee should necessarily have known that taking toilet paper is a transgression or at least a transgression that will be met with dismissal."

[19] As I stated above, there is no specific memorandum issued in connection with toilet paper, and on B20, in reference to items such as toilet paper, the Commissioner says:

"... the possession of which was not dealt with specifically by the company rules at the time, nor was it intended to be included." (My emphasis).

[20] In my view, once the Commissioner had come to the conclusion that the company's reliance on the contravention of the company rules relating to misappropriation of company property could not have justified the dismissal of the applicant, it seems to me that that should really have been the end of the inquiry. On this basis the Commissioner should have held that the sanction of dismissal was unfair.

[21] However, the arbitrator went on to state that:

"Even if one should go as far as to accept that toilet paper was not covered by the disciplinary policy, it does not necessarily follow that it is the end of the matter. For example, all employees ought to know, for instance, that theft is not to be tolerated. There is no need to put that in a policy."

[22] While it is true that employees should know that theft is not to be tolerated, theft was never the basis of the case against the employee and, as pointed out in the heads of argument filed on behalf of the respondent, it is clear that it was really unauthorised possession that was the real charge against the employee.

[23] In my view Professor Grogan is correct when he states in *Workplace Law* 6th Ed. [2001] at p.164:

"The employer should advise the employee of the precise charge or charges that he or she is required to answer in advance of the hearing. This requirement flows from the need for adequate preparation. The employee cannot prepare his defence if he does not know what charges he has to answer. The charge should be formulated in precise and simple terms

and clearly spell out that the consequence of a finding of guilty could be dismissal. The employer cannot change the charge or add new charges after the commencement of the hearing."

[24] This is in conformity with the statement in *S A Chemical Workers Union v Afrox Limited* [1999] 20 ILJ 1718 para.22:

"Fairness has become the hallmark or essence of labour law and practice."

[25] In my view considerations of fairness make it imperative that the employee should have been charged with theft, if theft was to be relied on by the company. There are significant differences between the common law offence of theft and the written policy of the company as published from time to time dealing with misappropriation of property both in regard to the essential elements and what is an appropriate sanction. Whereas theft is regarded as a very serious offence which will normally result in dismissal, the provisions of the company policy which were applicable at the time, namely that appearing on B223, dated 22 June 1999, make it clear that dismissal is not a necessary result of contravention of the policy, unlike the later policy dated 27 October 1999 appearing

on B225/6.

[26] Although the Commissioner correctly held that the company's policy dated 27 October 1999 was not applicable at the time of the incident, namely 1 September 1999, he was incorrect in stating that the policy applicable was the one included on page 11 of *Exhibit B* (corresponding to B222). The policy that was applicable is the one that was "re-issued" on 22 June 1999 and appears on B223. There are material differences in the wording of the policy that appears on B223 as compared with that which appears on B222, in particular in regard to the question of sanctions. The incident with which the applicant was charged was on 1 September 1999 and accordingly the policy of 27 October 1999 appearing on B224 to B226 would not have been applicable, as correctly stated by the arbitrator.

[27] Furthermore, whereas in theft the *animus furandi* or "theftuous intent" is a necessary element, in the case of contravention of the company rules such intent is not a necessary ingredient and ought to be specifically brought to the employee's attention if the company intends to rely thereon. And whereas employees would know that a charge of theft would normally

give rise to dismissal, it is clear from the wording of B223 that there is a discretion as to what sanction should result. And, as the arbitrator correctly stated, the policy clearly contemplated disciplinary sanctions such as a written reprimand in the less serious cases of misappropriation.

[28] On B17 the Commissioner stated:

"The employer's case relied primarily on company policy in regard to the misappropriation of company property."

In my view, the inclusion of the word "primarily" is not justified, and there is no rational, objective basis to justify it, having regard to the material properly available to the Commissioner. The basis on which the employee was charged was clearly and exclusively the company's policy as contained in the published documents.

[29] Having held - correctly in my judgment - that the company's reliance on its disciplinary code would result in a failure to meet the criteria laid down in item 7 of Schedule 8 of the Act, the Commissioner should have held that the imposition of the sanction of dismissal was unfair and that, as stated in the *Mzeku* case "the dismissal cannot be said to be substantively

fair".

[30] I would accordingly rest my judgment to set aside the arbitrator's award on the basis:

(a) that the company's reliance on its disciplinary code resulted in a failure to meet the criteria laid down in item 7 of Schedule 8 of the Act, and

(b) that it was not competent to find the employee guilty of theft when he had not been charged with theft but was charged only with a contravention of the disciplinary code.

[31] But in case I am held to be wrong on this, I proceed now to consider whether the Commissioner's decision to reject the employee's version is justifiable in relation to the reasons given by him, having regard

(a) to the material properly available to him, and

(b) to the *onus* of proof which rested on the company in terms of section 192(2) of the Act.

See *Carephone (Pty) Ltd v Marcus N.O.* [1998] 11 BLLR 1093 [LAC] at para. 37 and *Shoprite Checkers v Ramdaw N.O.* [2001] 9 BLLR 1011 at para.33.

[32] In considering the probabilities one should have regard to the following facts which were either common cause or clearly established on the evidence at the arbitration.

(a) It was common cause that the employee had had an operation some four or five weeks prior to the incident which entailed an incision having been made in his groin area. (See B15 and B19)

(b) The company's medical records were of no assistance save for indicating that the employee visited the medical section on 10, 27 and 30 August 1999. (See B17)

(c) According to the medical records he was complaining of painful incision wounds. (See B91, lines 14-27) Indeed, as summarised by the Commissioner on B114,

"The employer's own witness confirms that the employee visited the medical department and in terms of their records it was because of pain." (B114, lines 15-17)

(d) Mr Erasmus, a professional nurse employed by the company, never personally saw the employee after the operation. (See B94, lines 18-20; B95, lines 21-22) He conceded that the nursing staff should have examined the employee. (B96, lines 1-3; B96, lines 9-13)

"And on all these days he was not examined? --- No.

Can you then rule out the wounds that he had were oozing on that day? --- No, I cannot. I cannot say that the wounds were not oozing because he was not examined."

And on page 96, lines 23-24,

"As I said, I cannot say that the wounds were not oozing because I did not see the wounds."

(e) There is clearly no evidence to contradict the employee's evidence that on the specific day when he visited the medical department of the company, the wounds were swollen and they were paining and oozing as it was a rainy day. (See B78, lines 22-25)

(f) According to the company's witness Michaels, the toilet paper that was found on 1 September was not properly labelled and put into a clearly marked container. As summarised by the Commissioner (See B123),

"It was only much later tagged when the auditors came to make an investigation of all exhibits available."

He correctly stated that Michaels,

"slipped up on the procedure". (line 21)

No explanation was given by Michaels for the non-compliance with the proper procedure or the system laid down by the

company. (See B85-B86). The Commissioner went on to say:

"I still have to decide whether or not I accept that version as challenged under cross-examination." (lines 21-23)

[33] The version given by Williams was that the employee stated that he took the toilet paper because he wanted to use it

"to clean a chair and table at the shebeen he was going to". (See B17, last para.)

This was consistently denied by the employee. It is important to note that no statement was taken from the employee on the day in question. (See B82, lines 13 to 14).

[34] These are two conflicting versions that are mutually destructive. The company's basis for accepting the version of Williams where it conflicted with that of the employee appears on B18. Whilst stating his evidence had "shortcomings" which he did not specify - he went on to say in relation to both Williams and Michaels (whose evidence on this point is not relevant):

"No indication was given for what basis they would have lied about their observations. In the circumstances there was no basis to regard their evidence as having been fabricated."

(B18)

[35] The Commissioner did not specify what he meant by "shortcomings", nor what was meant by "the core of their evidence". It was of course common cause that the toilet paper was found on the employee on 1 September and that may properly be regarded as "the core of their evidence" which the Commissioner was correct to accept, but on the points on which there was a clear conflict between the version of either of them on the one hand and that of the employee on the other, supported by the probabilities, the Commissioner should not have rejected the employee's version in the way he did.

[36] In my judgment the Commissioner's approach in deciding not to reject the evidence of Williams and Michaels, notwithstanding their unspecified "shortcomings" was a wrong and unsatisfactory approach and indeed a misdirection. (See *National Employers General Insurance v Jagers* 1984(4) SA 437 at 440 (a decision of the Eastern Cape Full Bench).

"It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the

trial Judge did in the present case and then, having concluded that inquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of inquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities failed to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

In *Marapula v Consteen (Pty) Ltd* [1999] 20 ILJ 1837 at 1845 the following is stated:

"The *onus* is on the employer to prove that the dismissal was fair on a preponderance of probability. In my opinion the *onus* is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate inquiries to be considered piece-meal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts which cannot be

disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted and that therefore the other version is false and may be rejected with safety."

See also *Mabona v Minister of Law and Order* 1988(2) SA 654 (SC) at 662. These authorities emphasise the importance of looking at the probabilities, inherent and otherwise.

[37] There was similarly a case of two conflicting versions that were mutually destructive in regard to the evidence of Michaels that the toilet roll exhibit was the one that was found on the employee and the employee's denial that it was the same toilet roll. The admitted and unexplained failure by Michaels to follow the company's laid down procedure and system in regard to the labelling of exhibits at the time they are taken could be a powerful reason for his persisting in giving false evidence on this question.

[38] Furthermore, in considering the employee's version, the Commissioner referred to the disciplinary record and stated that it was

"accepted into evidence as a true and correct reflection as to

what transpired during the disciplinary hearing".

(See B18, second paragraph). This, however, was not correct. (See B118 line 25 to B119 line 1; and B120 line 22 to B121 line 4). In this regard see B120 at the bottom of the page:

"The minutes here, we have not agreed whether they were correct or not, so the representative of the company cannot say for sure that Mr Ngele should (indistinct) because we have not agreed that this is a correct version of what happened.

Commissioner (indistinct). it was never agreed that this is in fact correct, so if you want to cross-examine the witness what you can do is to say is it correct that Mr so-and-so testified at the hearing as follows and if he then says yes, it is correct, then you can ask him the question. You cannot assume that what stands here is in fact correct because that was not agreed to by the parties."

[39] On B21 the Commissioner again refers to the disciplinary inquiry. He states:

"As observed earlier his version at this arbitration was also not in all respects in accordance with the version given at the disciplinary inquiry."

He then goes on to say:

"The last-mentioned factor proved to have been conclusive" (My emphasis). Having regard to the fact that the record of the disciplinary inquiry had not been accepted into the evidence as a true and correct reflection of what transpired at the disciplinary hearing, this factor, which the Commissioner regarded as conclusive, was in my view a clear misdirection on a material matter.

[40] There is a further error by the Commissioner when he stated:

"From his medical file it clearly appeared that he in fact visited the medical section the previous day."

(See B21, last two lines) The day of the incident was 1 September. The last of the three dates on the medical file was 30 August. The month of August of course has 31 days. There was similarly confusing and misleading cross-examination based on the same error (See B111 lines 14-16 and B113 lines 18-26) and the Commissioner made the same error:

"So in terms of the records he visited the medical department on two days consecutively." (B21 last line)

This is also a misdirection on his part.

[41] In mentioning the factors relevant in deciding whether "the employee's defence was not sustainable" (See B21) the first factor he relied on was:

"If the employee really used the toilet paper to cover his wound, why was it necessary to take the complete roll?"

There is no rational objective basis for his reference to "the complete roll". Although it was common cause that toilet paper, constituting part of a roll was found on 1 September, even on the evidence of the company witnesses it was not a "complete roll".

[42] In answer to the Commissioner's question: (See B154 para.6 and B122-B123).

"Can we get an indication? Was it less than a half? Was it more than a half? Was it less than a quarter? More than a quarter?"

The employee stated:

"It was about a quarter."

(See B101 lines 24-26). The employee also stated:

"It was not a roll, it was not round, it was flattened."

(See B75 lines 2-3; B76 lines 3-4; B101 lines 13-14; B126 line 17; B125 line 4) and the evidence of Williams. (See B79,

lines 5-14).

[43] It is to be noted in this connection that the Commissioner, in putting a couple of questions to the employee (on B125) also asked:

"The next question is, I want to understand why was it necessary to take the complete roll?"

The answer by the employee was:

"I was using it like that because I wanted to create a space between the thighs because it was oozing and then the underpants were also pinching me."

[44] Although the Commissioner correctly stated "The employee bears the *onus* to prove that the dismissal was fair" (See B17) in his analysis of the evidence he appeared to be paying only lip-service to this. Thus he states: (B21)

"The employee maintains that he went to see his doctor after he left the premises. This would have corroborated his version of events that he experienced problems with his wound. However, no proof is provided that such a visit did in fact take place."

In this regard it may be pointed out that on B122 the

Commissioner stated:

"Well, if he went to the doctor it will be very favourable to his case. If he did not go to the doctor it is a matter of argument whether I should infer from that in the negative."

In my view there was no *onus* on the employee to provide such proof of a visit to a doctor.

[45] A further factor relied on by the Commissioner in finding that the employee's defence was not sustainable was, (B21)

"the absence of medical records confirming that the employee had experienced some problems with the wound".

This is in conflict with the Commissioner's own statement on B114 lines 15-17 that:

"The employer's own witness confirms that the employee visited the medical department and in terms of their records it was because of pain."

[46] In my judgment the Commissioner misdirected himself in a number of respects as I have set out above. Having regard to the abovementioned misdirections and errors, as well as the *onus* of proof, in my judgment there was not a rational, objective basis for rejecting the employee's version and for

finding that the employer was able to show that in taking and using a part of a toilet roll on 1 September 1999, the employee acted "with dishonest intent". (See B21)

[47] For the above reasons, in my judgment the dismissal of the employee cannot be said to be substantively fair, and accordingly the award of the Commissioner should be set aside. Having regard to the wide powers conferred on the Court under section 158(1)(a) to make "any appropriate order" and to the provisions of section 193(1)(a) and section 193(2), my judgment is that the employee should be reinstated as from the date of dismissal. Section 193(2) expressly states that the Court "must require the employer to reinstate" unless one of the grounds under paragraphs (a) to (e) of section 193(2) would make reinstatement inapplicable. In my view none of the grounds under paragraphs (a) to (d) of section 193(2) make reinstatement inapplicable. In the circumstances I see no need to remit the matter to the CCMA.

[48] Accordingly, my judgment is that the dismissal of the employee was not substantively fair and that the award of the Commissioner should be set aside and that the employee

should be reinstated as from the date of dismissal. In my judgment the company should pay the costs.

[***Sgd**] GERING AJ

ACTING JUDGE LABOUR COURT

31/7/02