REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D1366/02**
D1367/02

DATE 2003/08/06

In the matter between:

CAMBRIDGE MEAT Applicant

and

D M Mhlongo First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

SACCAWU Third Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE GERING
ON 6 AUGUST 2003

ON BEHALF OF APPLICANT:
MR B MacGREGOR
Deneys Reitz Inc.

ON BEHALF OF 2ND

RESPONDENT:
MR P O JAFTA
Jafta & Co.

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT 6 AUGUST 2003

GERING AJ

[1] This is a review of an award given by a commissioner of the CCMA. The award appears in the papers and is six pages long.

[2] The issue before the commissioner was whether the dismissal of the employee was substantively fair. The question of procedural fairness did not arise for decision.

[3] I will refer to the fourth respondent in the review proceedings as "the employee", and I will refer to the applicant in the review proceedings, Cambridge Meat, whose name, I believe, may have changed since then, as simply "the company" or "the employer".

[4] The proceedings at the arbitration were given through an interpreter and the evidence has been typed and the record of the arbitration proceedings is in the bundle consisting of about 72 pages.

[5] Unfortunately, in this case, there was no record of the disciplinary inquiry and we do not even have any documentation showing the employer's code of conduct or what exactly was the charge on which at the disciplinary inquiry he was found guilty and was dismissed. But it appears from page 5 of the record of the proceedings as being "unauthorised removal of company property". I point out it does not state "unauthorised possession of company property", nor does it say "theft", although at times parties do tend to treat these provisions of company codes as being theft. It is actually wrong to do so. The common law crime of theft is quite separate and distinct from the words "unauthorised removal of company property" or even "unauthorised possession of company property", and it is confusing and wrong to try to equate the one with the other.

See Grogan *Workplace Law*, 6th Ed. page 141, footnote 28.

[6] After surveying all the evidence, the commissioner states on page 5 of the award:

> "It is clear from the evidence above that the company has failed to discharge the *onus* that the dismissal of the applicant was substantively fair."

She uses the term "applicant", but it is, in fact, "the employee".

[7] There are some difficulties in regard to her reasons in coming to this conclusion but, in dealing with the matter, I prefer to adopt the approach set out in a judgment of mine where I quoted from a judgment of the Labour Appeal Court. The judgment that I refer to is *Rustenburg Platinum v CCMA and Others* (2002) 4 BLLR 387 at 392, where I quoted the following from *Shoprite Checkers (Pty) Limited v Ramdaw N.O. and Others* (2001) 9 BLLR 1011 (LAC) at 1043, paragraph 101:

> "In my view, it is within the contemplation of the

dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view, the first respondent's award cannot be said to be unjustifiable when regard

> is had to all the circumstances of this case and the material that was before him."

[8] My judgment was upheld on appeal in an unreported judgment of the Labour Appeal Court, case No JA17/02. The judgment of the Labour Appeal Court was given on the 23rd May of this year and the appeal against my own judgment was dismissed.
See now (2003) 7 BLLR 676 (LAC).

[9] In the course of that judgment, the Labour Appeal Court said:

> "Counsel on both sides argued the matter on the basis that if we found that the reasons given by the second respondent (the second respondent was the commissioner or arbitrator) were unsustainable, but we

> were of the view that the result is correct or justifiable, we should not interfere with the award. I found that the result of the arbitration is justifiable. Accordingly, there is no basis to interfere with the award and the appeal must fail."

See now (2003) 7 BLLR 676 at 687, paragraph [36].

[10] In my view, these considerations apply to this award also. The arbitrator states in the award, summarising the evidence of the applicant:

> "He stated that he was dismissed for consuming company property. In essence, the evidence of the employee was that during the course of the

> day, the 20th October 2001, when he had come to work at about 11.00 in the morning and come back after various rounds as a driver in the afternoon, he had on two occasions eaten a quarter loaf of bread, and his evidence was they were given to him with the authority or permission of his superior, one Cobus, and he consumed them on the premises. He did not remove them from the premises."

[11] I may say in parenthesis that this alone is a basis for saying there was no unauthorised "removal" of company property. Unauthorised removal of company property

normally postulates removal from the company premises.

[12] The employee further explained that he was informed by Mr James of the company that one could consume two quarter loaves per shift but as soon as one consumed the third one, one would have to obtain a slip. The employee further stated that Wayne (i.e. the person who gave evidence for the company) was present at work on the day in question. However, Wayne had not seen him with the quarter loaf.

[13] Having regard to the following facts, it seems to be that on a balance of probabilities the evidence clearly shows that the company, on whom the *onus* rested of showing that the dismissal was substantively fair, did not discharge the *onus*.

[14] There was no record of the proceedings at the disciplinary hearing.

[15] There was no record of the code of conduct, other than the

short statement on page 5 which I have already quoted.

[16] The only witness for the company was one Wayne Barker, bakery manager of the company. His evidence on all material points was hearsay, and on some questions his evidence was simply in response to leading questions put by the company representative.

[17] Cobus, the person whom the employee said had given him permission to have the bread, was not called as a witness. He had, in fact, left the company under a cloud of suspicion and the evidence of the employee was that he had been guilty of stealing R400 money from the company.

[18] The witness James, referred to on page 40 of the transcript, was not called.

[19] The only evidence that might have tended towards showing that the employee was guilty was that at the disciplinary inquiry he had said that he was guilty but

it is clear from the transcript that what he meant by saying he was guilty did not mean that he was guilty of breach of the rules or that he was guilty of theft. It meant that he had consumed the two quarters of bread which, on his evidence, he had the permission of Cobus, his superior, to have, and he says this on page 53 in answers to questions by the commissioner,

> "Just ask him does he understand what guilty means."

And he replied,

> "It may be because I do not understand English well. Maybe I pleaded to something that I do not understand."

And then he says further,

> "The only thing that I have done is I accepted or I pleaded - I plead guilty on the grounds that I took the quarter

> but I understood that I took it, I was allowed to do so and then they dismissed me on those grounds."

[20] It is clear that he admitted that he had had two quarter loaves of bread but his evidence, as put to Mr Barker, on page 18 of the record was as follows:

> "See when Mr Mhlongo gets an opportunity to testify, he will say he got permission to consume the second quarter of bread from his immediate superior, namely one Mr Cobus. Do you have any comment on that?"

[21] And on page 40 his evidence was, and he said this several times in the transcript,

"Mr James told us that we had to consume two quarters, not more than two quarters, because if we take the third one that means that now that will be the stolen one. You have got a limit of two quarters per shift."

[22] It seems to me that there is no admissible evidence to contradict the version of the employee, given on oath at the arbitration, that he had eaten the two quarters; that he had done this because he understood he was entitled to have two quarters and that he had in each case got the permission of Cobus. Cobus was not called as a witness and in the hearsay evidence which was led by the commissioner and should not have been led, according to this, Cobus had not given permission. Page 20 of the record:

"What did Cobus say to you?"

[23] I do not think it was proper for the commissioner to put to the company witness this question:

> "What did Cobus say to you?"

"Must I just explain what happened? Okay, Cobus called me up from the bakery and it's that time of the afternoon where we are about to start our stock-take. He then explained to me that Moses earlier in the day had taken his first quarter and in the second in that time of the day he had then seen him with another quarter and approached Moses and said to him, 'Listen, where is your slip for the quarter?', and Moses said, 'No, I was hungry'. Then he said to me, 'What do we do?', so I said, 'Well, Cobus, we've got to follow the company procedure. It's known as theft.'"

[24] It seems to me that this evidence, which is hearsay evidence, cannot stand against the clear evidence of the employee, given on oath at the arbitration, that he had an understanding from James, from the company, that he is entitled to two quarters and that he had, in any case, got permission from Cobus to have these two quarters.

[25] Although the commissioner does not explicitly state that she accepts the version put by the employee, it seems clear, on a proper reading of the arbitration award, that what she said was that the company had failed to discharge the *onus* that the dismissal of the applicant

was substantively fair, and that she must have, in effect, accepted the version of the employee because she then goes on to say, lower down,

> "Even if the applicant ..."

(She always refers in this award to the employee as the applicant.);

> "Even if the applicant had consumed the second quarter loaf without permission, the company had not acted consistently in applying its codes and its policies over its employees."

[26] That statement on page 5 postulates that she is saying, "Even if I were to find that the employee had consumed the second quarter without permission", but she had not found that. What she had found, implicit in that, was that the employee had consumed the second quarter loaf with permission and not unlawfully and not unauthorisedly. But she, in effect, said,

> "Even if the applicant had consumed the second quarter loaf without permission then on another basis the dismissal would not be fair."

[27] And the other basis she gives is that the employees were not all treated on the same basis. In the one case where the employee apparently had stolen R400, he had been given an option to resign and, secondly, had been given the opportunity of undergoing a lie-detector test. In the case of the employee, he was not given an opportunity to resign and he was not given a lie-detector test. So there is a differential between the way in regard to possession of company property, which is loosely described as theft, that the company treated the matter as between employees.

[28] I may say in the same decision of the Labour Appeal Court which I referred to above, the Labour Appeal Court

referred to what is known as the parity principle. I quote now from what the Labour Appeal Court said:

> "Possibly this was because differentiation would have to contend with the principle on which we were not addressed - the parity principle - which comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment. I refrain from deciding whether it may have been fair to differentiate between the third respondent and the other two employees, given the particular circumstances

of the case."

(See now (2003) 7 BLLR 676 at 686 paragraph [35].)

[29] The Court referred to an earlier case, *National Union of Metalworkers v Henred Fruehauf Trailers* 1995 (4) SA 456 (A) at 463. In that case the following is stated in the majority judgment of the Appellate Division:

> "Equity requires that the Courts should have regard to the so-called "parity principle". This has been described as a basic tenet of fairness which requires that like cases should be treated alike. So it has been held by the English Court of Appeal that the word 'equity' as used in the United Kingdom statute dealing with the fairness of dismissals,

> comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment. The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held, for example, that an unjustified selective dismissal constitutes an unfair labour practice. The application of the principle is not limited to labour disputes."

[30] In my view on a proper reading of the award, the commissioner was deciding a second ground on the

basis that even if the employee had consumed the second quarter loaf without permission, then on the basis of the parity principle the dismissal would not be fair.

[31] My own judgment rests entirely on the basis that, on the evidence as a whole, the company has failed to discharge the *onus* which rested on it of proving that the dismissal of the applicant was substantively fair.

[32] The evidence in the transcript as a whole did not justify coming to the conclusion that the employee's version should be rejected and, in my view, on the basis that the employee's version should be accepted and not rejected, and that the company's version, based on hearsay evidence and evidence resulting from leading questions, is not sufficient to discharge the *onus* of proof.

[33] In my view, therefore, the review application against the judgment of the commissioner should be dismissed with costs.

[34] There is also an application under section 158 that the arbitrator's award should be made an order of court, and in the circumstances I grant that order also, together with an order for costs.

[35] I trust that the employee, who should tender his services, that he will be reinstated by the company and that we will not have further proceedings resulting from this.

[36] Wherever the award uses the term "applicant", that refers to the employee.

[37] My judgment is that the application for the review of the award given by the commissioner dated 16th May 2002 should be dismissed with costs and that in terms of section 158 the award of the commissioner should be made an order of court with costs.

[38] I would like to thank both parties for their helpful heads and for their patient dealing with the questions raised by the Court. -

(SIGNED) GERING AJ

2003/09/01