IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN **NOT REPORTABLE**

Case no: C 573/08

In the matter between:

HOLDENSTEDT AGRICULTURAL PRODUCTION (PTY) LTD	**APPLICANT**
and	
COMMISSIONER I DE VLIEGER-SEYNAEVE	**1ST RESPONDENT**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**2ND RESPONDENT**
PIETER DU TOIT	**3RD RESPONDENT**

JUDGEMENT

CHEADLE AJ

Introduction

[1] The applicant farms fruit. It employed the 3rd respondent as its estate manager. He was dismissed for breach of trust in that he allowed another employee to sell reject plums (also referred to as prunes) at a secret profit; that he participated in the sale of the plums and the profit from that sale; and that he destroyed evidence implicating him.

[2] He referred a dispute over his dismissal to the CCMA on grounds of both procedural and substantive fairness. After conciliation failed, the 1st respondent arbitrated the dispute and found the dismissal to be both procedurally and substantively unfair. Because the applicant did not want to be reinstated, the 3rd respondent was awarded compensation equal to 9 months wages.

[3] The applicant seeks to review and set aside the award on grounds that the 1st respondent: failed to apply her mind to the facts proved; made findings without any factual basis or any rational relation to the facts; and was biased.

[4] Two bundles were indexed and paginated. The first bundle consisted of the pleadings and is referred to in the judgement as PB. The second bundle is the record comprising the transcript of the arbitration hearing and documents supplied by the second respondent. It will be referred to as RB. The page number in each bundle will follow immediately and after that the number of the paragraph or line. Accordingly the grounds of review referred to above are at PB7.8.

[5] The applicant was represented by Mr Loots and Mr Nel represented the 3rd respondent.

Outline of the facts

[6] It is necessary to describe the individuals involved and their roles. The executive director of the applicant was a Mr Reenen Potgieter, who is the son-in-law of another director, a Mr Erlo Ringelman. The senior managers were the 3rd respondent who was the estate manager and Mr Lotter who was the production manager. There were two assistant managers: a Mr Van Westerhuizen who reported to the 3rd respondent and a Mr Galant who reported to Mr Lotter. A Ms Zeeman was an administrative clerk with one of her tasks being responsibility for the delivery book. Ms Van Rooy, who was the common law wife of Mr Van der Westerhuizen, was employed on the farm. All, except Mr Lotter, testified in the arbitration hearing.

[7] Because the different names used in the documentation in respect of these individuals, it is necessary for understanding the transcript and the documents that the various aliases are identified. They have been usefully set out in full by the parties in Exhibit A. For the purpose of understanding this judgement in relation to the documentation, I list the following names and aliases:

Mr Potgieter, the executive director of the applicant (Rhyno, Rheeder, Rheenen)

Mr Ringelman, a director of the applicant (Engelman, Skoonpa, Avril, Rihaan, Arlo, Erlo, Immelman, Hogerman, Oubaas, Argo and Erna)

Mr Du Toit, the 3rd respondent and estate manager (Dieter, Pieter, and Piet)

Mr Lotter, the production manager (Jannie, Luttig, Jan)

Mr Galant, an assistant manager (Arrie, Allie, Alli)

Mr Van der Westhuizen, an assistant manager (Dawid, Dawid Rooi, Rooi)

Mrs van Rooy, wife of Mr Van der Westhuizen (Martha, Mrs Rooi)

[8] In early 2008, Mr Van der Westhuizen noticed that reject prunes were being thrown to the baboons. He saw an opportunity to make extra money and raised the possibility of buying the plums from the applicant and selling them for a profit to hawkers at a meeting at which Mr Ringelman, Mr Lotter, the 3rd respondent, and Mr Galant were present. According to Mr Van der Westerhuizen, the 3rd respondent and Mr Galant, who all gave evidence at the arbitration, it was agreed that he could buy the reject prunes at a price to be fixed by Mr Lotter for the purpose of selling on to hawkers.

[9] On the basis of this agreement, Mr Van der Westerhuizen commenced selling the reject prunes for a profit and paying the applicant the fixed price and the staff for doing overtime work. The 3rd respondent assisted in the negotiations and the logistics and as a result shared in the profits.

[10] After learning from Mr Ringelman late in late February or early March that Mr Van der Westerhuizen was earning a profit from the sale of the reject prunes, Mr Potgieter asked for reports from the 3rd respondent, his wife (who also works on the farm) Mr Lotter, and Mr Van der Westerhuizen. A report prepared by the 3rd respondent, Mr Lotter and Mr Van der Westhuizen states that it was common knowledge that Mr Van der Westhuizen had been given permission to sell the reject prunes for profit. It was common cause that Mr Lotter's view was that he knew that Van der

Westhuizen was allowed to sell a batch of the reject prunes for a profit but did not know whether that was the case in respect of future batches.

[11] A comparison between the moneys paid to Ms Zeeman and the amounts reflected at the back of the delivery book in the 3rd respondent's office revealed that the Mr Van der Westerhuizen was selling the prunes for a profit. The pages of the delivery book were subsequently removed but only after they had been copied.

[12] The reports and the removal of the pages of the delivery book led to the 3rd respondent's suspension. He was then charged with breach of trust in respect of: the unlawful confiscation of moneys belonging to the farm; allowing an employee to sell prunes for a secret profit; failing to give a full disclosure and the hiding or removal of relevant evidence; and undermining the applicant by encouraging employees to leave its employ.

[13] On 27 March, the disciplinary hearing was held. Mr Potgieter conducted the hearing despite the 3rd respondent's objections as to his bias. The 3rd respondent was found guilty of the first three charges and dismissed.

[14] An important cluster of facts that weighed with the 1st respondent in her reasons for the award is as follows:

14.1 Mr Lotter had resigned at the end of February. As a result Mr Potgieter asked whether the 3rd respondent was interested in taking on the functions of production manager in a new position, which combined this function with his current functions as estate manager. Although there is a divergence between Mr Pogieter's testimony and that of the 3rd respondent as to what was said in response to the offer, it was common cause that Mr Potgieter said that he had to discuss the offer with Mr Ringelman and that there had to be agreement on a salary package. (PB 41.10 and 46.42)

14.2 When Mr Potgieter told Mr Ringelman of his offer to the 3rd respondent of the combined position of estate and production manager, Mr Ringelman objected. (PB 41.11)

14.3 Soon thereafter a new production manager was appointed. (PB 48.54)

14.4 Ms van Rooi testified that Mr Ringelman had asked her and her husband to help him to get rid of the 3rd respondent. (PB 50)

The award

[15] The 1st respondent in her award carefully recorded the relevant evidence and analysed it applying the guidelines for misconduct disputes in the Code of Good Practice on Dismissal.

Unlawful appropriation of money due to the farm

[16] She finds that Van der Westhuizen was given permission to sell the prunes for profit. She bases this conclusion on the following:

16.1 Mr Ringelman's testimony that he agreed to allow Mr Van der Westhuizen to buy the reject plums and sell then instead of throwing them away and offered him cardboard boxes to pack them (PB 51.72). Although Mr Ringelman said this agreement was on a once off basis, the applicant accepted that Mr Van der Westhuizen legitimately thought that he had agreed on a continuing basis.

16.2 The testimony of Mr Van der Westhuizen, Mr Galant and the 3rd respondent to the effect that they were, together with Mr Ringelman, present at the meeting at which Mr Van der Westhuizen was given permission to sell prunes at a profit but bought from the farm at a price to be fixed by Mr Lotter. (PB 51.72 to 53.75)

16.3 Mr Ringleman's testimony was that, although he did not hear the discussion on the sale at the meeting with the other managers, he could not contest that it had occurred because he was hard of hearing and wore a hearing aid. (PB 51.72)

16.4 Mr Ringelman's testimony that he asked Mr Van der Westhuizen on 14 January if he was still making a commission. (PB 52.73)

16.5 The fact that despite knowing that Mr Van der Westhuizen was making a profit on the sale of the prunes, he only raised it with Mr Potgieter in early March. (PB 52.73)

16.6 Mr Van der Westhuizen conducted the loading, transporting and sale of the plums in an open manner. (PB 52.73)

16.7 There was no policy in respect of the sale of reject prunes. Although the 3rd respondent had been involved in the sale of reject prunes on behalf of the farm the year before, it was no longer his responsibility but that of the production manager, Mr Lotter (P52.74) and Mr Ringelman had given permission to sell the reject prunes.

[17] She also finds that the difference between the fixed price and the amount paid for the prunes was the profit earned on the sale (PB 52.75). She comes to this conclusion on the following facts:

17.1 Mr Potgieter testified that the only loss suffered was the loss in the commission earned by Van der Westerhuizen.

17.2 The schedule provided by the 3rd respondent shows that all crates were returned, that all money in accordance with the fixed price arising from the sale was paid to the applicant and that all who were involved were reimbursed.

[18] Because of her findings that Van der Westhuizen was entitled the profits of the sale by virtue of this agreement with the applicant represented by Mr Ringelman and its senior management, the 1st respondent found that the 3rd respondent did not unlawfully appropriate money due to the farm.

Allowing a junior manager to sell prunes for a profit

[19] The applicant claimed that as a senior manager he should have known that Mr Van der Westhuizen's conduct was unacceptable for being in conflict of interest (PB 53.76). The 1st respondent concluded that the 3rd respondent was not guilty of this charge for the following reasons:

19.1 The sale of the prunes was the responsibility of Mr Lotter, who fixed the price.

19.2 The 3rd respondent was also at the meeting with Mr Ringelman when it was agreed to permit Van der Westhuizen to sell the reject prunes and accordingly, like Mr Van der Westhuizen, under the impression that it was permissible to sell the prunes for profit.

19.3 There was no conflict of interest because the applicant suffered no loss. The applicant could not claim the profit made by Mr Van der Westerhuizen was at the detriment of the applicant because that was the way in which the agreement was structured. Employees would not go to such trouble after hours if there was no reward for doing so.

19.4 Van der Westerhuizen and the 3rd respondent were found to be honest and credible witnesses, both had submitted a full report on being asked to do so and any secretiveness between the 3rd respondent and the directors of the applicant was because they had already made up their minds to have him dismissed and replaced.

Failing to make a public disclosure and removing evidence

[20] The 1st respondent concluded (PB 53.77) that the 3rd respondent was not guilty of this charge for the following reasons:

20.1 The 3rd respondent sent a report to Mr Potgieter within a day of being asked to do so;

20.2 the 3rd respondent assumed that the decision to dismiss and replace him had already been taken for the following reasons:

20.2.1 Both Mr Van der Westhuizen and his wife (who remained working on the farm) confirmed having advised the 3rd respondent that Mr Ringelman had asked them to assist him in getting rid of the 3rd respondent.

20.2.2 The 3rd respondent knew that the Mr Ringelman was opposed to the 3rd respondent being appointed to the new position of estate/production manager.

20.2.3 Although a new manager was to start on 1 April, it was likely that he was recruited and appointed before the 3rd respondent's disciplinary enquiry on 27 March.

20.3 There was insufficient evidence to find that the 3rd respondent was the person responsible for the removal of the pages recording the deliveries at the back of the delivery book kept in the 3rd respondent's office. There were others involved who had an interest in the removal of the pages.

Inconsistent treatment

[21] The 1st respondent concluded that there was inconsistent treatment (PB 54.78) – Mr Lotter was not disciplined and Mr Van der Westhuizen, while disciplined, was not dismissed while the 3rd respondent was. She rejected the applicant's argument that the trust relationship between it and Mr Van der Westhuizen had not been breached because he had confessed everything immediately, he was under the impression that he had done nothing wrong; and that he did not hide evidence for the following reasons:

21.1 The 3rd respondent was also under the impression that there was nothing wrong with the arrangement. Mr Ringelman, a director, was aware of it and had done nothing to stop it.

21.2 The 3rd respondent promptly gave a report on being requested to do so.

21.3 There was no proof that the 3rd respondent hid evidence or removed the pages from the delivery book...

Procedural fairness

[22] The 1st respondent rejects various procedural challenges based on compliance with the applicant's disciplinary code (PB 55.82). But she finds that there was bias on the part of the chairperson of the disciplinary enquiry (PB 55.83) for the following reasons:

22.1 Because Ringelman threatened to pay out his shares if Mr Potgieter appointed the 3rd respondent to the new position – a statement that

Mr Potgieter did not contest – he had an interest to dismiss the 3rd respondent.

22.2 The evidence of Mr Van der Westhuizen and his wife was that Mr Ringelman wanted to get rid of the 3rd respondent.

22.3 The uncontested evidence that a new manager had been appointed and introduced to the staff as the new manager before the disciplinary hearing.

22.4 He accepted Mr Van der Westhuizen's evidence that he did not remove the pages from the delivery book but did not accept the 3rd respondent's denial.

22.5 Mr Potgieter after being asked to recuse himself on grounds of bias failed to do so when he could have simply postponed the hearing and appointed another chairperson to ensure that the hearing was conducted in a fair manner.

The Applicant's grounds of review

[23] As is often the case in reviews of this nature the applicant refers to general grounds of review without ever specifically addressing them . In paragraph 8 of his founding affidavit (PB 7-8), Mr Potgieter states that the grounds for reviewing the award 'include' namely that the 1st respondent:

23.1 failed to apply her mind to the facts proved;

23.2 made findings without any factual basis for those findings;

23.3 displayed significant and unwarranted bias towards the applicant;

23.4 made findings and an award not rationally connected to the proved facts.

[24] This non-exhaustive list of abstract grounds is tenuously linked to the specific grounds pleaded in the founding affidavit. Those grounds are identified in paragraphs 14 to 18 of that affidavit (PB 9-13) and then intermittently raised in a paragraph by paragraph attack on the 1st respondent's reasons, making it very difficult to discern precisely what the

applicant's case on review is, particularly since so many of the attacks are those that would fit better with an appeal rather than a review. It is a shotgun approach to review, which unnecessarily calls upon the other parties and the court to engage with issues that may not be relevant to review. Rather than address each and every attack, I deal only with the grounds specifically raised in the applicant's heads of argument and any necessary ancillary issues.

[25] Each of these grounds are summarised and dealt with below.

Substantive fairness (conflict of interest)

[26] In paragraph 14 of the founding affidavit (PB 9-11) and paragraphs 14 to 17 of the applicant's heads of argument, the applicant contends that the 1st respondent misdirected herself in failing to recognise-

26.1 the common law principle that an employee may not advance his personal financial affairs at the expense of his employer;

26.2 that the 3rd respondent made a personal and undisclosed profit from the sale of his employer's produce;

26.3 that there was a policy dealing with the sale of produce as a matter of fact (the practice of the year before) and of law (the common law duty of an employee not to misappropriate the employer's profit from the sale of produce).

26.4 that there was no harm in an employee exercising entrepreneurial skills to the prejudice of the employer.

[27] But the 1st respondent did not need to consider the common law principles relating to conflict of interest because she found as a matter of fact that the applicant's management had agreed (or had given the impression that it had agreed) to allow the sale of the prunes for profit. Although the applicant makes heavy weather of her finding that there was no policy in place, that finding is only one among several that led the 1st respondent to her conclusion that there was such an agreement. But even if there was such a policy, it could be overridden by agreement, which is what

happened on the applicant's own version when Mr Ringelman permitted a once-off sale for profit. The 1st respondent's finding that there was an agreement dispenses with the other alleged misdirection's.

[28] In an unrelated attack in paragraph 17 of the affidavit (PB 12-13) and paragraph 22.1 of the applicant's heads of argument, the 1st respondent is charged with making a 'glaring error' in failing to apply her mind to the facts by equating Mr Ringelman's presence at the meeting at which the sale of the prunes was discussed with his and Mr Potgieter's consent to the making of a secret profit – 'a completely irrational jump in logic'. In paragraph 18 she is accused of paying 'scant attention' to whether as a matter of fact the required consent of the directors had been obtained. Because these challenges are related to the sustainability of her finding that there was an agreement to allow the sale of the plums I deal with the attacks here.

[29] *Firstly*, it is quite unfair to label her analysis of the implications of Mr Ringelman's presence as *equating* to consent. *Secondly* if there is any irrational jump in logic it is the proposition that her finding of an agreement to sell prunes for profit was consent to make a *secret* profit. *Thirdly*, all those at the meeting (other than Mr Ringelman) stated that the sale for profit was discussed and agreed. The only difference between Mr Lotter, who did not give evidence, and the others, was that he regarded the permission to be once off. *Fourthly*, Mr Ringelman himself did not contest that the discussion took place – he stated that he was hard of hearing. *Fifthly*, Mr Ringelman's testified that he agreed to allow Mr Van der Westhuizen to buy plums and resell them for his own benefit and that he gave him cardboard boxes to pack them – albeit on Mr Ringelman's version that it was on a once off basis. *Sixthly* Mr Ringelman's testimony was that he asked Mr Van der Westhuizen at a later stage if he was still making a commission and despite not being entirely satisfied with his answer, did nothing about it until early March. *Finally*, the packing, transporting, purchasing and sale of the prunes was done openly. This analysis does not amount to a jump in logic. It demonstrates a careful and considered analysis of the evidence presented. She analysed the

evidence and came to the conclusion in a manner that a reasonable decision maker would. These grounds of review are accordingly without merit.

Substantive fairness (failure to disclose and removing evidence)

[30] The Applicant contends in paragraph 14.3 read with paragraph 17.2 of the founding affidavit (PB10 and 12) that the 1st Respondent's finding that there was 'no evidence' to prove that the 3rd respondent removed the pages from the delivery book constitutes a 'startling failure to consider the facts' and the imputation that there were others who had an interest in removing the pages was 'irrational as having no connection with the facts' and 'defamatory and offensive' in so far as it included Mr Potgieter and Mr Ringelman. It should be borne in mind that she came to this conclusion in the context of the following uncontested facts: copies were made of the pages and the 3rd respondent readily admitted to Mr Potgieter that the handwriting on those pages were his.

[31] Dealing with the attack that the 1st respondent failed consider the facts in making the finding that there was 'no evidence' to prove that the 3rd respondent removed the relevant pages, it is noteworthy that the 1st respondent did not find that there was 'no evidence' but that there was '*not enough*' evidence to prove that the 3rd respondent removed the pages (PB 54.77). It is also worth noting that the applicant fails to identify the facts 'not taken into account'. In paragraph 42.4 of his affidavit (PB 30) where Mr Potgieter deals specifically with this finding, he states that 'the probabilities on the proven facts are overwhelming to the effect that Du Toit tore them out' without ever identifying the proven facts.

[32] On the probabilities, she concludes that there wasn't enough evidence to find against the 3rd respondent. She goes on to say that any one of a number 'could' have removed the pages. It may be that the probabilities may vary as between them but that does not undermine her conclusion that there was not enough evidence, on the probabilities, to prove that the

3rd respondent was guilty of the charge. Another decision maker may come to a different conclusion on the probabilities but that does not constitute grounds for interfering with the 1st respondent's decision on review.

Procedural fairness

[33] The 1st respondent found that the dismissal was procedurally unfair because the chairperson of the enquiry was biased (PB 55.83). He was biased she said because he had an interest in dismissing the 3rd respondent. That interest was found to have arisen because of Mr Ringelman's threat to pay out his shares if Mr Potgieter appointed the 3rd respondent into the new position of estate/production manager. The applicant contends that there was no evidence except Mr Du Toit's belated testimony to that effect when he gave evidence. It is clear from both the evidence before her and the illogicality of the reasoning that the 1st respondent misdirected herself in concluding that Mr Potgieter was biased.

[34] *Firstly*, the only evidence of the threat was the 3rd respondent's testimony that Mr Van der Westhuizen had told him of the threat. *Secondly*, the 3rd respondent never put the threat to Mr Ringelman or Mr Potgieter when they gave evidence. *Thirdly*, he never puts the threat to Mr Van der Westhuizen. All that he does is solicit testimony from his wife that Mr Ringelman told them that he wanted to get rid of the 3rd respondent (TB 148.9 – 149.2). Although he asks the same question to Mr Van der Westhuizen, Mr Van der Westhuizen does not definitively answer it (TB 150.4-13). *Fourthly*, it is illogical to infer an interest to dismiss from a threat linked to a proposal to appoint. The fact that Mr Ringelman, a co-director, wanted to get rid of the 3rd respondent may constitute some basis for inferring that the applicant wished to dismiss him but not a particularly strong one particularly in the face of the uncontested evidence that Mr Potgieter was the executive director and made the final decisions concerning staff.

[35] The 1st respondent seeks to bolster her finding of bias by pointing to the difference in Mr Potgieter's findings concerning the tearing out of the pages of the delivery book. She says that it is unexplained. But Mr Potgieter does explain the difference – he believed Mr Van der Westhuizen because he was open and a trustworthy witness (TB 26). In his decision in the disciplinary hearing, he states that the 3rd respondent was in possession of the delivery book; he had (from Mr Potgieter's point of view) acted unethically and had not been open about the transactions (PB 57G). While the 1st respondent may come to a different conclusion, which she does, that does not mean that Mr Potgieter was biased in coming to a different conclusion.

[36] The 1st respondent also finds that Mr Potgieter's failure to recuse himself because of his involvement and appoint an independent person to chair the enquiry as a factor in concluding that the dismissal was procedurally unfair. There are two answers to this. *Firstly*, the test is not the test under the law of criminal procedure but simply whether the employees were given an opportunity to defend themselves-in other words, the bias must be so palpable as to draw the inference that the employees did not have that opportunity. That is what *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others [2006] 9 BLLR 833 (LC)* says. *Secondly*, the Code does not require an employer to give up its power to make the final decision to dismiss and accordingly it should not be interpreted in a manner that regards a failure to appoint an independent person as unfair.

[37] Accordingly, the 1st respondent misdirected herself in concluding that the dismissal of the 3rd respondent was procedurally unfair. It was a decision that a decision maker could not have reasonably made on the evidence before her and in the manner in which she reasoned.

The appropriate order

[38] Having decided to partially review and set aside the 1st respondent's award, the issue is whether the matter should be referred back to the 1st respondent for a fresh decision or whether I should substitute the decision with my own.

[39] Both parties agreed that I should substitute my decision if I decided to partially review the 1st respondent's award. I am satisfied that I have all the evidence before me to make such a decision and it is in the interests of justice and expeditious resolution of disputes for me to substitute my decision for that of the 1st respondent.

[40] That then raises the question of compensation and the costs. In so far as compensation is concerned, I am of the view that given what the 1st respondent awarded for both substantive and procedural fairness, that an award of 6 months would be appropriate.

[41] In so far as costs are concerned, both parties have been partially successful – the applicant in respect of procedural fairness and the 3rd respondent in respect of substantive fairness. In these circumstances, it is appropriate that each party pay their own costs.

Order

[42] The following order is made:

42.1 The 1st respondent's award dated 7 July 2008 in CCMA Case No: WE 4964-08 is reviewed and set aside in respect of her decision on procedural fairness and her award of compensation.

42.2 Paragraphs 88 and 89 of her award are substituted with the following award:

"88 The dismissal of the Applicant is unfair.

89 The applicant is awarded compensation of 6 months wages

Amounting to R94 800 (subject to taxes)'.

42.3 Each party to pay their own costs.

_____

CHEADLE AJ

Date of Hearing : 21/04/2010

Date of Judgment : 28/05/2010

Appearances

For the Applicant : Adv J.H Loots

Instructed by : Marleen Potgieter Attorneys

For the Respondent : Adv A. Nel

Instructed by : Bloem Attorneys