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CASE NO: **MIPT29922**

In the matter between:

MPHO MOLEFE Employee

and

MSSL GLOBAL RSA Module Engineering Employer

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

The alleged unfair dismissal as referred by Mr. Mpho Molefe (hereinafter referred to as the Employee) against MSSL Global RSA Module Engineering (hereinafter referred to as the Employer) was scheduled for arbitration before me on 18 August 2020 when it became partheard and the arbitration was finalized on 24 February 2021. Throughout the arbitration the Employee represented himself and the Employer was represented on

the first day of the arbitration by Ms. Sindana and on the final day of the arbitration by Mr. Nel.

At the arbitration, a bundle of documents was handed up by the Employer. The arbitration proceedings were recorded, both manually and electronically. I also made available the services of an interpreter.

I had afforded the Employer party an opportunity to submit closing argument in writing on or before 5 March 2021 since a new representative came aboard, whereas the Employee delivered his closing argument on the last day of the arbitration.

Although Mr. Tshepo Motau had also referred a matter under the same case number (MIPT 29922), I had dismissed his matter, as he failed to attend any of the arbitration sittings.

2. BACKGROUND TO THE DISPUTE

The Employee, an operator, was dismissed pursuant to a disciplinary enquiry for an incident involving alleged dishonesty. He earned R 7 895-03 per month at the time of his dismissal and had approximately 5 years of service.

3. ISSUE TO BE DECIDED

The issue to be decided is whether the dismissal of the Employee was fair. The Employee sought compensation as the appropriate relief, if successful in his claim for unfair dismissal.

4. SURVEY OF EVIDENCE AND ARGUMENT

I had decided to only summarise the salient points of the testimony of the respective witnesses. Although not specifically referred to, all evidence was taken into consideration in arriving at the decision. All the witnesses testified under oath.

Employer's case:

The Employer led the evidence of two witnesses:

Mr. **LEBOGANG NAKEDI,** the supervisor of the Employee, testified with reference to the video footage that it was evident that the Employee had been involved in theft from the Company, as he hid the box of fog lamps between the racks and covered it in order for no one to detect it. He also said the Employee was trying to obstruct the camera. This witness further said that that the Employee was not supposed to have given Tshepo the box of fog lamps, as such was not procedure. It was also the testimony of this witness that he did not call the Employee for the shipping of the fog lamps, nor the offloading of such fog lamps and that he had no permission to go to the stores. He further said the Employee should never have been driving the forklift in the first place and said he has never seen the Employee before offloading fog lamps prior to this incident and thus it was the testimony of this witness that the Employee was not following correct procedure.

Mr. **ISAAC NETSHIVHANGANI,** the initiator in the internal hearing, testified that he had watched the video footage of the incident. He also said that the Employee had changed his written statement once he had viewed the video footage. It was the testimony of this witness that the Employee was afforded the opportunity to view the footage before being formally charged and that was the rationale for calling him to a meeting during which the Employee could come clean, should he wish to. This witness also testified that all the rights of the Employee were observed during the internal hearing and he denied that the Employee was threatened with calling the police.

Employee's case:

The Employee testified that he did indeed hide the box of fog lamps. However, he said it was only because he did not want his manager to find out. He also said he gave the box to Tshepo. The Employee further conceded that he was not supposed to be involved in the incident at all and that he had taken the box of fog lamps and hid it, as he did not want the Manager to know about the extra box. He further conceded that he had changed his statement once he viewed the video evidence at the disciplinary enquiry and that the second statement was in fact the truth. It was also the testimony of this witness that he did not have access to the video footage prior to the disciplinary enquiry and that he only saw the video footage in the actual disciplinary enquiry.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

In terms of section 192 of the LRA, as amended the Employer is to discharge the onus that the dismissal was fair. Such onus is to be discharged on a balance of probabilities.

PROCEDURAL FAIRNESS:

The Employee raised as a procedural defect the fact that he only saw the video evidence at the disciplinary enquiry for the first time and having viewed such, this had necessitated him to change his written statement. Based on the evidence led by Mr. Isaac Netshivhangani, who had impressed me as a reliable witness, I reject the Employee's version in this regard and I find that the Employee was not ambushed, as alleged.

Based on the above, I find the dismissal was procedurally fair in that the Employee was afforded the opportunity to view the video footage before being called to a disciplinary enquiry.

SUBSTANTIVE FAIRNESS:

In the present matter before me the Employer relied on video evidence and the testimony of witnesses to substantiate its case.

The evidentiary value of such video evidence will be assessed first and foremost.

Video Evidence:

Having viewed the video evidence, it shows the Employee was colluding with a co-employee to hide a box of fog lamps. I therefore find that the video evidence presented supports the Employer's version that the Employee was grossly dishonest.

Was there a rule and if so, was it breached?

In terms of the CCMA Guidelines on Misconduct Arbitration (Arbitration Guidelines), which was amended and came into operation on 1 April 2015 and which Arbitration Guidelines are binding on all arbitrators in terms of section 138(6) of the LRA, as amended, I am required to determine whether a dismissal for misconduct is unfair or not with reference to the following:

- Whether or not the Employee contravened a rule or standard regulating conduct in, or relevant to, the workplace;
- If a rule or standard was contravened, whether or not such rule is valid or reasonable; the Employee was aware of such rule or could reasonably be aware of the rule or standard; whether the rule is consistently applied and finally, whether dismissal is the appropriate sanction.

Having applied my mind to all the evidence and argument led, I find that the Employer discharged the onus that the Employee had breached a rule. I find the Employee was dishonest. On his own version, he had hidden the box of fog lamps and such could only have been done with dishonest intentions.

Was dismissal the appropriate sanction?

As to whether the dismissal was the appropriate sanction, the Labour Appeal Court (LAC) in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[1] quoted with approval the earlier *dictum* of the Labour Court in *Standard Bank of SA Ltd v CCMA and Others*[2] to the effect that:

> *"It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee … a breach*

[1] (2008) 29 ILJ 2581 (LAC).
[2] (1998) 19 ILJ 903 (LC).

of this trust in the form of conduct involving dishonest is one that goes to the heart of the employment relationship and is destructive of it."

A further reference in the judgment and one frequently quoted by the LAC is the *dictum* in *De Beers Consolidated Mines Ltd v CCMA and Others*[3] namely:

"A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is or should be a sensible operational response to risk management in the particular enterprise……; it has everything to do with the operational requirements of the employer's enterprise."

In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*[4] the Court commented as follows:

"*Turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scale to an extent that even the strongest mitigating factors, like long service and a clear record of a discipline are likely to have minimal impact on the sanction to be imposed. In other words, whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship."*

It is clear from the above judgments relied upon that our courts place a high premium on honesty in the workplace and that there are many cases dealing with matters of outright dishonesty, such as the one before me, where it was found that the sanction of dismissal is justified. Ultimately, the task of an arbitrator, such as myself, is to pass a value judgment and I find that the trust relationship has

3 (2000) 21 ILJ 1051 (LAC).
4 (2008) 29 ILJ 1180 (LC).

irretrievably broken down and cannot be restored. The misconduct committed by the Employee was serious and he showed no remorse whatsoever at this arbitration.

The Court in *Kalik v Truworths (Gateway) and Others*[5] (dealing with theft as a form of dishonesty), held as follows:

> *"[27] An employment relationship broken down as a result of an act of dishonesty can never be restored by whatever amount of mitigation. The underlying reason for this approach is that an employer cannot be expected to keep dishonest workers in his/her employ. The other reason for this is to send an unequivocal message to other employees that dishonesty will not be tolerated … The rational for this approach are also informed by the consideration that a worker with an unblemished record cannot after an incident relating to an act of dishonesty, continue to be trusted. It is the operational risk to the business of an employer that arises from the dishonest conduct, which cancels off whatever good record the worker may have had before the commission of the offence. In other words, there would be no purpose in conducting an inquiry into mitigating circumstances where a worker is guilty of misconduct relating to dishonesty. However, this approach would not apply in cases involving other forms of misconduct."*

The LAC has emphasized in many judgments that the main consideration for a finding that dismissal was the appropriate sanction in matters involving dishonesty, such as the one before me, is not one of vengeance or moral outrage, but a sensible operational response to risk management.[6] Employees should be encouraged to avoid dishonest conduct and therefore a finding in the Employee's favour in these circumstances will set the wrong precedent.

In a recent judgment of the LAC in *Autozone v Dispute Resolution Centre of the Motor Industry and Others* (JA 52/2015) [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 *ILJ* 1501 (LAC) (a judgment handed down on 13 February 2019), the Court held that where the offence in question reveals a stratagem of dishonesty or deceit, as has happened in the matter before me, as is evident from the video evidence and the Employee's own version at this arbitration, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have

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5 [2008] 1 BLLR 45 (LC) at [27].

6 De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 *ILJ* 1051 (LAC).

demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible. The Court further said that dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. An employer thereafter will be hard pressed to place trust in such an employee.

Based on the above binding dicta of the Courts and the evidence and arguments led, I find that dismissal was the appropriate sanction.

COSTS:

Although the representative for the Employer in its closing argument sought for costs to be awarded against the Employee, such cost order was unsubstantiated. In any event, in terms of the DRC Rules, legal costs may only be awarded if both parties are represented by legal practitioners.

6. AWARD

1. I find the dismissal of the Employee to be both substantively and procedurally fair.
2. Accordingly, no relief is awarded.
3. No order as to costs is made.

Signed at Johannesburg this the 14th day of March 2021.

E. Hambidge (ARBITRATOR)