



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA8/2020

In the matter between:

BAKENRUG MEAT (PTY) LTD t/a JOOSTENBERG MEAT

Appellant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER JJ KITSHOFF N.O

Second Respondent

CORISA HOUGH (OOSTHUIZEN)

Third Respondent

Heard: 25 November 2021

Delivered: 18 January 2022

Coram: Waglay JP, Davis JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This appeal concerns the determination of the scope of the duty of good faith owed by an employee to an employer. In this case, the employee (third respondent), was employed as a sales representative by the appellant on 28 October 2013. Appellant conducts a business which produces and then sells a range of meat products. On 10 October 2016, she was dismissed, after having been found guilty of a charge of dishonesty because she failed to inform the appellant that she operated a business of her own which marketed dried meat products and thus had failed to give full attention to marketing the meat products produced by the appellant.
- [2] Upon being dismissed, the third respondent referred an unfair dismissal dispute to the first respondent. An arbitration hearing was conducted by the second respondent.
- [3] The second respondent heard evidence relating to the charges which had been brought against the third respondent, being:
- '1. (she) took on employment while you were also working in other capacity.
 2. (she) undertook that she would be physically calling weekly + on regular basis but as today it was found that she hadn't been calling.'
- [4] The second respondent found that the third respondent's dismissal was substantively fair for the following reasons:
- 'In this instance, the applicant operated a formal business with at least one full-time employee from rented premises and marketed dried meat products. The respondent marketed meat products and at the very least it should have been aware of the applicant's activities so that it could decide whether the applicant's activities were in conflict. The applicant chose to not tell the respondent. It was dishonest not to do so.'

The effect was that she could not have given full attention to her duties. The respondent provided evidence that it was constantly attempting to impress upon the applicant that she was not performing her duties.

The fact that the applicant believed that the respondent should have known what she was doing because Wesley knew, and he did not testify to this, is unacceptable. The fact that the respondent may not have marketed biltong prior to September 2016 is also not an acceptable excuse for the applicant to operate a formal business, marketing meat products, without telling the respondent.

I find that the applicant has acted in a dishonest and an unacceptable manner.'

- [5] The third respondent then launched a review application before the court *a quo*. Her application proved to be successful and accordingly, the arbitration award of the second respondent was reviewed and set aside. It is against this decision, with the leave of this Court, that the appellant contends that the decision to dismiss the third respondent was substantively fair and hence the order of the court *a quo* stands to be set aside.

The reasoning of the court *a quo*

- [6] Sitting in the court *a quo*, Cele J found on the evidence presented to the second respondent, that the third respondent ran her business only on weekends. For the learned judge, this was a significant fact in that "it may well be that the applicant could have done some activities in furtherance of her side-line business such as ordering stock or checking on the employee operating it. She was not employed 24 hours by Mr Myburgh (on behalf of the appellant)".
- [7] For this reason, Cele J found that the second respondent was bound to accept the third respondent's version that the business only ran on weekends and hence there was "no nexus between her performance for the third respondent (appellant) and the running of the side-line business." Consequently, the learned judge found that the second respondent had arrived at a conclusion which no reasonable decision-maker could have reached, namely that the record of evidence did not sustain the charge that she "took on employment whilst you were also working in another capacity."

The case of appellant

- [8] On appeal, the appellant's counsel contended that the third respondent in her capacity as an employee owed the appellant a duty of good faith, so that anything done by her which was incompatible with her duties as an employee would justify a dismissal. In this connection, counsel relied on a *dictum* in *Sappi Novo Board (Pty) Ltd v Bolleurs* (1998) (19) ILJ 784 LAC) at para 7:

'If an employee does anything incompatible with his due or faithful discharge of his duty to his master, the latter has a right to dismiss him.'

- [9] While there was some dispute as to whether the third respondent sold more than biltong products, it was clearly accepted by the court *a quo* that she had sold biltong products pursuant to her own business. It is also common cause that the appellant's business comprised of the marketing and distribution of various types of cold meat products and, later, biltong as from September 2016. Much was made by the court *a quo* that the business of the appellant did not include biltong until sometime in September or October 2016. The significance of this finding for the court *a quo* was that this date was presumably after the charges had been brought by the appellant against the third respondent. Significantly, the third respondent testified that she would have ceased selling biltong if she had been instructed to do so by the appellant. This concession, according to the appellant's counsel, revealed an awareness on her part that she was competing with her employer and that she owed the employer a duty to disclose her independent business activities.

- [10] On the basis of the decision in *Schwartz v Sasol Polymers and others* (2017) 38 ILJ 915 (LAC) at para 30, counsel submitted that dishonest non-disclosure of a material fact justifies a dismissal and further that a calculated silence in the face of a duty to inform an employer of a material facts amounted to a fraudulent non-disclosure.

- [11] Appellant's counsel also referred to uncontested evidence given by Mr Myburgh, on behalf of the appellant before the second respondent, as to the type of business that the third respondent had conducted which included:

'Cutting up of meat, goat, lamb, pork etc. Deboning of carcasses and cuts, cutting up of bones, Goulash, steak. It's all business, all activities that we are busy with. This business is competing directly with what we do and then game meat processing, dry wors, biltong, packing, packing into smaller packages.'

- [12] Appellant's counsel also noted that the third respondent had informed the appellant in a letter, that apart from maintenance which she claimed as a result of her divorce, her only form of income was the salary she was paid by the appellant, a fact that was not challenged in the review application. In short, the submission was made that the third respondent had secreted her business activities from her employer in clear violation of her fiduciary duty to her employer.

Evaluation

- [13] The approach adopted by the court *a quo* appeared to amount to the following: unless an employee informed her employer that she was moonlighting to the extent that there was some competition with her employer's business, no dismissible offence had been conducted. In other words, there was no duty of an employee to inform an employer about a potential conflict of interest.
- [14] Much was made by the third respondent's counsel that the third respondent only operated her biltong business on weekends, at which point, in the view of counsel, the third respondent was not acting in conflict with her duties to the appellant as an employee. Furthermore, the submission was made that the third respondent had not been dismissed for poor work performance nor was there any evidence to substantiate any such allegation. It was also contended that her biltong business had not negatively impacted upon her work for the appellant.

- [15] The evidence clearly indicates however that the third respondent failed to disclose an essential and important fact that she was running “a side-line business” in the market for the sale of meat products, albeit that they might not have been identical to the meat products which were sold by appellant. That she was able to discharge her duties to the appellant does not take her case any further. She was employed as a sales representative in a business that was involved in the sale of meat products. As a side-line business, she conducted a business which involved the sale of biltong, namely a meat product. She failed to disclose these obviously material activities to her employer and was therefore manifestly acting in violation of her duty of good faith to her employer.
- [16] The conclusion reached by the second respondent that “employees act in bad faith if conflict of interest may arise even though no real competition actually results” is unassailable. The finding, on the uncontested evidence, of the second respondent that the third respondent operated a formal business with at least one full-time employee from rented premises and marketed at least one category of meat product, without at all informing the appellant thereof, absent any evidence to gainsay these findings, must be accepted as the factual matrix upon which a reasonable decision must be predicated.
- [17] Accordingly, when the second respondent found that the third respondent had acted in a dishonest and unacceptable manner, he came to a conclusion which most certainly on the facts, was a reasonable one. Expressed differently, there was no basis on the evidence, which constituted the record of the arbitration hearing, that a conclusion could justifiably be reached that the outcome reached by the second respondent was one that could not reasonably be reached. See *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA). It follows that there was no basis by which the court *a quo* should have interfered with this finding. Accordingly, the appeal must succeed.
- [18] The following order is therefore made:

1. The order of the court *a quo* of 12 September 2019 is set aside and replaced with the following:
 - a. *The application to review the arbitration award issued by the second respondent on 22 March 2017 under case number WECT 17540-16 is dismissed.*
 - b. *There is no order as to costs.*

Davis JA

Waglay JP and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Instructed by Frank Biccari Attorneys

FOR THE THIRD RESPONDENT:

Instructed by Macgregor Erasmus Attorneys