REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 489/12

In the matter between:

NUM obo Johan SMITH **Applicant**

and

CCMA **First Respondent**

ELVISO ADAM N.O. **Second Respondent**

NAMAKWA SANDS, **Third Respondent**

A DIVISION OF EXXARO TSA SANDS (PTY) LTD

Heard: **5 March 2013**
Delivered: **20 March 2013**

Summary: Review – *Sidumo* – not unreasonable. Practice and procedure – admissibility of supplementary affidavit. Evidence – most plausible inference.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, the National Union of Mineworkers (NUM) represents its member, Mr Johan Smith (the employee). The employee was dismissed by the third respondent, Namakwa Sands. He referred an unfair dismissal dispute to the CCMA (the first respondent). The second respondent (the Commissioner) confirmed that the dismissal was substantively fair. Procedural fairness was not in dispute. The applicants (NUM and Smith) seek to have that award reviewed and set aside.

[2] There is also a preliminary point to be decided, and that is the admissibility of a supplementary affidavit that the applicants filed together with their heads of argument.

Background facts

[3] The employee was a plant operator. After a disciplinary hearing he was dismissed because of the following incidents of misconduct:

3.1 falsifying records at weighbridge;

3.2 conspiring in the theft of pig iron;

3.3 breach of the contract of employment and undertakings.

[4] It emerged subsequent to the arbitration hearing that, at the disciplinary hearing, the employee was found not to have committed misconduct styled as “conspiring in granting site access to a contractor under a false name”. That aspect was addressed in the supplementary affidavit to which I shall return later.

[5] The employee’s duties included working at the weighbridge. The purpose of the weighbridge is to weigh and record consignments entering and leaving the employer’s premises on a database. It is the responsibility of the weighbridge operator to enter details about the product and its destination.

[6] The employee was on duty on 12 May 2011. While he was on duty, a load of pig iron destined for Atlantis Foundries was stolen by Pietie Mouton, a driver working for his brother’s company, Mouton Transport. During the investigations leading to the discovery of the theft, a former employee,

Shaun Coetzee, admitted that he had been involved in stealing pig iron previously. He also conspired with Mouton to steal the load in question and sold it to a scrap yard in Atlantis.

[7] Mouton testified at the arbitration that, while his truck was standing outside the premises of Namakwa Sands, Coetzee phoned him and arranged with him to steal the consignment. Coetzee assured him that his "inside contacts" would take care of the paper trail and the CCTV footage. The transaction in question was amended on the database from the weighbridge office at 21:16 on 12 May 2011 to reflect that oxygen (instead of pig iron) was transported out of the premises by Afrox (and not by Mouton transport).

[8] The employer produced documentary evidence showing that a number of telephone calls were made to Coetzee from the weighbridge office on the night that the theft took place. One telephone call was also made from the tea room. The call that aroused the most suspicion was a call lasting 11 minutes at the time when changes were effected to the database in the weighbridge office.

[9] Although there was no direct evidence implicating Smith, the employer argued that he had committed the misconduct in question on a balance of probabilities, given the following circumstantial evidence:

9.1 Smith was the supervisor in charge on the night and he was the only employee on shift that at any knowledge or competency to operate the weighbridge.

9.2 Effecting changes to the system required a basic understanding of the weighbridge system. Smith possessed such knowledge and he had obtained a 100% pass mark in a test on the weighbridge system.

9.3 Mouton testified that Smith had put an access card to the premises in his (Mouton's) car (albeit after the theft had occurred). A person telephoned him and identified himself as "JJ". Mouton knew Smith as JJ and he had recognised Smith's voice.[1]

[1] Ms *Ralehoko* submitted in her heads of argument that the telephone call only occurred in June 2012, a month after the theft. Upon questioning by the Court, and after having been given an

The arbitration award

[10] The arbitrator accepted Mouton's evidence that he acted in concert with Coetzee to steal the shipment of pig iron on 12 May 2011 and that Coetzee assured him that "insiders" would look after the paperwork. On the probabilities, the arbitrator accepted that the outsider conspiring with Mouton was Coetzee. Mouton's version in this regard was bolstered by the fact that somebody from within the company – probably the "insider" who changed the documentation – phoned Coetzee en number of occasions during the night of 12 May 2011 at the time when the changes were made to the weighbridge system.

[11] The arbitrator noted that the next question was whether the employee, Smith, could be connected to Coetzee and the theft of the pig iron. He found that Mouton was a reliable witness. There was nothing for him to gain; instead, he incriminated himself. Mouton was confident that Smith had subsequently telephoned him and delivered an access card to him, saying that it was from Coetzee.

[12] The arbitrator found that, on a balance of probabilities, the inside contact referred to by Coetzee must have been Smith. This emerges from the following:

12.1 Smith was on night shift on 12 May 2011.

12.2 Smith was the supervisor working with outside contractors who would not ask questions if he left them for a short period.

12.3 He was tasked with driving the forklift, which meant that he was mobile and not confined to one area.

12.4 He tried hard to disguise his knowledge of the weighbridge system when in fact he had gone through quite an intensive theoretical training course with full marks.

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opportunity to file further submissions after the oral hearing, she conceded that no such evidence appears in the transcript of the record of the arbitration proceedings. It is common cause, though, that it was subsequent to the day of the theft.

12.5 As early as 5 May 2011 Smith signed off huge consignments, which indicated that he was trusted with such responsibility and was competent to work the system.

12.6 It could be inferred that Coetzee gave him guidance over the telephone on how to make changes to the database.

12.7 Smith was the only weighbridge staff member on duty.

12.8 Smith refused to answer questions relating to Coetzee, even after Mouton connected him with Coetzee. An inference could be drawn that he did not want to implicate Coetzee or himself.

[13] Taking all of these factors into account, the arbitrator found that the most probable inference was that Smith had made the changes to the weighbridge system on 12 May 2012 or at the very least he was aware of it. On a balance of probabilities, it was more probable than not that Smith was the one who changed the data on the system to conceal the theft or was at least aware of the person changing it.

[14] Having found that, on the probabilities, Smith had committed the misconduct, the arbitrator agreed that dismissal was the appropriate sanction as it had led to an irreparable breakdown in the trust relationship. The theft was premeditated, carefully planned and involved thousands of Rands.

Evaluation / Analysis

[15] The applicants raised the following grounds of review:

15.1 the arbitrator committed a gross irregularity in the conduct of the proceedings "by advising Smith not to answer questions about Coetzee and then using it against Smith that he had refused to answer questions about Coetzee";[2]

15.2 the arbitrator could not have come to a reasonable finding that Smith had committed the misconduct, as it was based on circumstantial evidence and that evidence was not conclusive.

[2] Applicant's heads of argument paragraph 36.

[16] There is a further aspect, not foreshadowed in the applicants' founding or supplementary affidavits in terms of rule 7A, and that is that, at the disciplinary hearing, Smith was found not guilty of the charge of "conspiring in granting site access to a contractor under a false name". This aspect was addressed in the supplementary affidavit that was only filed together with the applicant's heads of argument. Namakwa Sands objected to the admissibility of that affidavit. I will first deal with that aspect.

In limine: admissibility of supplementary affidavit

[17] Ms *Ralehoko* relied on *MISA/SAMWU v Madikor Drie (Pty) Ltd*[3] for the argument that the applicants' further supplementary affidavit (filed after the pleadings had closed and simultaneously with their heads of argument) should be admitted. In that case, the court noted that, as a general rule, there are three sets of affidavits in motion court proceedings. Rule 7 of the Labour Court rules incorporates this general rule. Under certain circumstances, though, the filing of further affidavits is permitted. The court has a discretion as to whether further affidavits will be permitted. This discretion must be exercised judicially, having considered whether a proper explanation for its belated filing exists; whether the material contained in the affidavits are relevant; and whether the finding of such affidavits would be prejudicial to the other party.

[18] Ms *Viljoen* pointed out that *Madikor Drie* dealt with a case concerning an application for specific performance and not an application to review an arbitration award. In the review of an arbitration award the Labour Court rules specifically provide in rule 7A(8) that the applicant may, after the registrar has made the record available, deliver an affidavit supplementing its founding affidavit. The principles, however, remain the same.

[19] It is so that, in this case, the applicants did not deal with the issue now addressed in the further supplementary affidavit, either in its founding affidavit in terms of rule 7A(2)(c) or in its supplementary affidavit in terms of rule 7A(8). Their argument is that it is only during consultation held with

[3] (2005) 26 *ILJ* 2374 (LC).

their attorneys in early November 2012 that "it was brought to the attorney's attention that in fact the disciplinary hearing had found Smith not guilty of the charge relating to leaving an access card in Mouton's car".

[20] It is surprising that the applicants did not bring this to the attention of the attorneys at any earlier stage. Neither party dealt with it in their affidavits before the applicants filed their supplementary affidavit. Nevertheless, taking into account the principles outlined in *Madikor Drie*, I am persuaded that I should exercise my discretion in favour of admitting it. That is so because:

20.1 the applicants and their attorneys did provide a proper explanation for its late filing;

20.2 the material contained in the supplementary affidavit is relevant to the review application; and

20.3 Namakwa Sands had an adequate opportunity to address any prejudice by delivering a further answering affidavit.

First review ground: advising the employee not to answer questions

[21] The applicants submitted that the arbitrator "committed a gross irregularity in the conduct of the proceedings by advising Smith not to answer questions about Coetzee and then using it against Smith that he had refused to answer questions about Coetzee." They argued that it was incumbent upon the arbitrator to warn Smith that, should he elect not to answer questions about Coetzee, an inference could be drawn that he was avoiding incriminating himself and Coetzee.

[22] These arguments would have been persuasive, had the arbitrator indeed advised Coetzee not to answer questions. On a proper reading of the record, that is not what he did. When Namakwa Sands's representative started cross-examining Smith about Coetzee, his representative, Ms Thomas, objected. The following exchange then occurred:

> "Me Thomas: Commissioner kan ek gou 'n objeksie maak, as hy [employer's representative] vir hom wil vrae vra oor Shaun [Coetzee], ek dink hy moet direkte vrae vir hom vra en nie vir hom vra wat weet hy van Shaun nie. Hy moet direkte vrae aan JJ [Smith] rig.

Kommissaris: Die getuie wat nou getuig is nie die meneer [Van Vuuren – employer's representative] se getuie nie. Die getuie kan of saamstem of nie saamstem nie. Dit maak nie saak nie, verstaan? Hy hoef ook nie saam te stem nie.hy kan sê hy weet nie. Hy kan sê 'moenie vir my sulke vrae vra nie...'

Me Thomas: So dit beteken hy hoef ook nie die antwoord te hê, die vrae te beantwoord nie?

Kommissaris: Hy kan sê 'ek wil nie antwoord nie'.

Mnr Smith: Ek sal geen vrae van Shaun Coetzee beantwoord nie, Commissioner.

Mnr van Vuuren: Jammer, u sê Mnr Smith?

Mnr Smith: Ek sal geen vrae in verband met Shaun Coetzee nie.

...

Mnr van Vuuren: So kom ons kry dit net op record Mnr Smith, want u sê vir ons u is glad nie bereid om enige vrae met betrekking tot Shaun Coetzee te antwoord nie?

Mnr Smith: Sekere vrae sal ek antwoord.

Kommissaris: Hang gou vas. Watter vrae meneer – elke keer gaan ek nou moet 'cover' watter vrae, watter vrae nie of wat? Hoe ver is u bereid om te antwoord of sê u u gaan niks vrae beantwoord nie? Ek wil hê – ek moet u beskerm en ek moet weet...

...

Mnr Smith: Ek sal geen vraag antwoord van Shaun Coetzee nie.

...

Kommissaris: U sê u gaan geen vrae beantwoord van Shaun Coetzee nie. Mnr van Vuuren u het gehoor wat die getuie sê en Juffrou Thomas u gehoor wat die getuie sê. U verstaan dat van die goeters jou 'connect' aan Shaun Coetzee, maar dit is u reg om nie vrae te vra of te antwoord oor hom nie, hoor."

[23] It was Smith's representative, Ms Thomas, who objected to him answering any questions about Coetzee. The Commissioner merely advised them that, should he wish to exercise the right not to answer questions, he

could. It may have been advisable for the Commissioner to go further and to advise him that an adverse inference could be drawn; but Smith was represented and the proceedings are meant to be informal. The inference that Smith did not want to implicate Coetzee or himself under oath is not an unreasonable one.

[24] This ground of review must fail.

Second review ground: assessing the evidence before the arbitrator

[25] The applicants' second main ground of review is that the arbitrator did not properly consider the evidence before him in coming to the conclusion, on a balance of probabilities, that Smith committed the misconduct. This review ground is based squarely on the test set out in *Sidumo*[4], i.e. whether the conclusion reached by the arbitrator was one that a reasonable arbitrator could reach.

[26] Firstly, the applicants argue that the Commissioner ought not to have accepted Mouton's evidence. They submit that Mouton "had a reason to lie" since he was involved in the theft.

[27] That is a *non sequitur*. The Commissioner cannot be faulted for having found Mouton to be a credible witness. In fact, Mouton had every reason to lie. In testifying under oath to his own involvement in the theft, he incriminated himself. He had everything to lose and nothing to gain. And he did not willingly assist the employer – he was subpoenaed to testify at the arbitration. There is no basis for this aspect of the review application.

[28] Secondly, the applicants object that the arbitrator found that Mouton's evidence was "corroborated" by Coetzee, whereas Coetzee did not testify.

[29] But that is not what the arbitrator found. Nowhere in the award could I find a statement to that effect by the arbitrator. When he did refer to Coetzee, it was with reference to Mouton stating that Coetzee had phoned him. That is not hearsay; it is Mouton's first-hand evidence.

[4] *Sidumo & ano v Rustenburg Platinum Mines Ltd & ors* (2007) 28 *ILJ* 2405 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC).

[30] What the arbitrator did, is to weigh up the evidence before him and to assess what the most probable inference was. That is exactly what an arbitrator should do when assessing the evidence on a balance of probabilities. As the commissioner pointed out in his award, "it appeared right through the proceedings that the [employee] was assessing his case based on the criminal standard of proof ... it is correct that the onus of proof was on the [employer], but the standard was that of proof on a balance of probabilities. What was required was that the probabilities in the case be such that, on a preponderance, it was probable that a particular state of affairs existed."

[31] The arbitrator did exactly that and came to the reasonable conclusion, on a balance of probabilities, that the most probable inference from all the evidence was that Smith had committed the misconduct. That was a reasonable inference and is not open to review based on the civil, and not criminal, standard of proof.

[32] The difference between criminal and civil cases in this regard was succinctly summarised by Zulman JA in *Cooper and Another NNO v Merchant Trade Finance Ltd:*[5]

> "It is not incumbent upon the party who bears the *onus* of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the 'two cardinal rules of logic' referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to G be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the *onus* rests he is entitled to judgment. If, on the other hand, an

[5] 2000 (3) SA 1009 (SCA) at para [7] 1027 E – 1028 D (footnotes omitted).

inference in favour of both parties is equally possible, the litigant will not have discharged the *onus* of proof. Viljoen JA put the matter as follows in *AA Onderlinge Assuransie Assosiasie Bpk v De Beer*:

'Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings.'

Selke J expressed the matter in *Govan v Skidmore* thus:

'. . . (I)n finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v Koch* explained that he understood 'plausible', in the context of the remarks of Selke J, to mean 'acceptable, credible, suitable'."

[33] And as the Labour Appeal Court pointed out in *SA Nylon Printers (Pty) Ltd v Davids*[6]*:*

"Circumstantial evidence, which this is, depends for its persuasive power on its cumulative effect. There comes a stage when so many *indiciae* point to the same conclusion that one may properly say that it is the most probable, or in some cases even the only, proper conclusion to be drawn."

[34] That is exactly what happened in this case. There came a stage when so many *indiciae*, as discussed by the arbitrator, pointed to the same conclusion that he came to the only probable conclusion that Smith did commit the misconduct. That was a reasonable conclusion.

[35] It is so that, at the disciplinary hearing, it now appears that Smith was not found to have "conspired to grant site access to a contractor under a false name". The evidence at that hearing was not tested at arbitration. It is still not clear who left the access card in Mouton's car. All that the arbitrator found in this regard is that, at the very least, Smith was aware of what was going on when the theft occurred on 12 May 2012. That is not an unreasonable conclusion, whether or not Smith was the one who subsequently left the access card in Mouton's car. The misconduct

[6] [1998] 2 BLLR 135 (LAC).

complained of – and the "most probable inference" to be drawn from the evidence before him, as the arbitrator found – was that Smith was involved in the conspiracy to steal pig iron from Namakwa Sands on the evening of 12 May 2012. Mouton did not need access to the premises for that to occur; he had already stolen the cargo. All that needed to be done on the evening was to change the information on the database; and the most probable person to have done that, was Smith. He was the supervisor in charge; he was the only Namakwa Sands employee with the necessary knowledge who had access to the weighbridge; he knew Coetzee; and a number of telephone calls, including the one of 11 minutes, were made to Coetzee while Smith was on duty. Taking all of these factors into account – and disregarding the question whether Smith had left an access card in Mouton's car – the overwhelming inference is still that Smith was the one who committed the misconduct.

Conclusion

[36] The arbitrator's finding is one that a reasonable arbitrator could have come to. It is not open to review.

[37] Both parties asked for costs to follow the result. I agree.

Order

[38] The application for review is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Tapiwa Ralehoko of Cheadle Thompson & Haysom.
THIRD RESPONDENT:	Siobhan Viljoen of Shepstone & Wylie.