

FOQDCON (PTY) LTD versus AMOYRE SCHWARTZ

CASE NO. LCA 23/98 Silungwe. J.

2000.05.08

**LABOUR LAW** -- Employer/employee relationship - dishonest conduct - employer should feel confident it can trust employee not to steal or in any way to be dishonest - employee's dishonesty destroys or substantially diminishes confidence in the employer/employee relationship and has the effect of rendering the continuation of such relationship intolerable - Theft is theft regardless of value of item stolen - Trust is the core of employment relationship - Dishonest conduct is breach of such trust - it is immaterial that the employee has hitherto been a person of good character or that his/her breach of trust is a solitary act - such breach will justify dismissal.

CASE NO. LCA 23/98

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

FOODCON (PTY) LTD

APPELLANT

and

AMOYRE SCHWARTZ

RESPONDENT

CORAM: SILUNGWE, J., PRESIDENT

Heard on: 1999.09.13

Delivered on: 1999.09.29

JUDGMENT

SILUNGWE, J.: This is an appeal against a judgment of the District Labour Court at Walvis Bay

wherein the following order was made:

1. that the complainant is guilty of misconduct in respect of counts 3 and 4, i.e.
  1. unauthorised absence and delaying a vessel; and
  2. unauthorised possession of company property;
  3. that the complainant should be reinstated;
  4. that summary dismissal as a sanction is replaced with a final warning which will come into force on a date that the complainant resumes his duties; and
  5. that the respondent pays the complainant the equivalent of 6 months wages and emoluments on the basis of his monthly average earnings at the time of dismissal.

Mr Dicks represents the appellant and Mr Shikongo appears for the respondent.

A brief background of the case is that the respondent had been employed by the appellant for about 4 years up to the time that his contract of employment was terminated on March 26, 1997. By then, he was a 2<sup>nd</sup> Engineer and, as such, he was an officer and a crew member.

On February 2, 1997, the respondent was found in possession of biscuits, oros cooldrink and a tin of beef as he went past security at the end of his work. This was a violation of the appellant's disciplinary code.

On March 26, 1997, 4 disciplinary charges were leveled against the respondent including the two already referred to in order 1.1 and 1.2 above. He pleaded guilty, *inter alia*, to having been found in unauthorised possession of company property and was, at the end of the disciplinary hearing, found guilty on all the counts and the sanction meted out against him was one of dismissal.

Thereafter, the appellant brought the matter before the District Labour Court which, after evidence had been led by both sides, overturned findings of guilty on the first two counts but upheld the findings on the remaining two counts as reflected in order 1.1 and 1.2. In the result, the respondent's dismissal was set aside on the ground that this sanction was substantively unfair and the order to which reference has already been made was put in place.

The appeal is against the setting aside of the respondent's dismissal and the order made by the Court *a quo*.

In arguing this appeal, Mr Dicks confines himself to the issue of the respondent's dishonesty which he contends was the thrust behind his dismissal, following the disciplinary hearing.

The crux of the matter, so submits Mr Dicks, is: what was the effect of the respondent's

misconduct upon the employer/employee's relationship? He claims that this was not considered by the Court *a quo* when it overturned the disciplinary sanction of dismissal. According to him, the confidence that the appellant had had in the respondent was destroyed or substantially diminished on a realization that the respondent was a dishonest person and, as such, the respondent's relationship with the appellant became intolerable in the eyes of the appellant.

Mr Shikongo, on the other hand, submits that, although theft of an employer's property is viewed in a serious light and will normally justify dismissal, it is contended that, in the present case, the Learned Chairperson correctly found that the dismissal of the respondent was substantively unfair, regard being had to the circumstances of the case, namely, that this was a case of petty pilfering since the value of the property stolen was small. Consequently, he continues, despite the seriousness of the crime of theft, dismissal was not warranted and, therefore, continued employer/employee relationship cannot be said to be intolerable. He points out that the nature of the items stolen, their value and the fact that they were retrieved from the respondent, are some of the factors that operate in his favour and thus militate against his dismissal.

I am much indebted to both Messrs Dicks and Shikongo for the assistance they have accorded to me and particularly for drawing relevant authorities to the Court's attention.

I accept Mr Dicks' submission that the Learned Chairperson in the District Labour Court did not consider the effect that the respondent's dishonest conduct had, and still has, upon the employer/employee relationship, looked at from the appellant's point view.

Although we are here concerned with a labour matter, as opposed to a criminal one, this is in effect a clear case of theft and was ostensibly the most serious disciplinary charge laid against the respondent and, as such, must have weighed heavily on the mind of Mr Thomas Bergman, the appellant's Operations Manager, who presided over the disciplinary proceedings and ordered the respondent's dismissal from his employment.

The maintenance of confidence in an employer/employee relationship is so vital that it must enjoy

an abiding nurturing. A violation of such relationship will normally be visited with severe sanctions at the hands of an employer, not to mention dismissal.

In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 1992, 13 LLJ 573 at 574 I and 575 A the Labour Appeal Court observed that -

"Where the relationship between an employer and its employee is of such a nature that, for it to be healthy, the employer must, of necessity, be confident that it can trust the employee not to steal its stock-in-trade and that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth the employer will have to check continually whether the employee is being honest. That the thing stolen is of comparatively little value is not relevant; the correct test is whether or not the employee's misconduct has had the effect that the continuation of the employer/employee relationship has been rendered intolerable."

Thus, where an employee ruptures the trust reposed in, or expected of, him/her, such rupture may result in the termination of his/her contract of employment. *Central News Agency (Pty) Ltd v Commercial Catering and Allied Workers Union of SA and Another* (1991) 12 ILJ 340 (LAC) at 344F-G is a case in point where the following was stated:

"In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely on the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee."

Such a result may flow from an employee's breach of trust, notwithstanding the fact that he/she has hitherto been of good character or that his/her breach is a solitary act. See, for example, *General Industrial Union of SA and Another v VM Construction* (1994) 5(12) (SALLR.)I(IC)

where the following was observed:

"Notwithstanding that dismissal is seen as an extreme sanction and one not to be imposed lightly, there are cases in which the single act of an employee breaching a rule will justify dismissal."

Any form of dishonesty tends to undermine trust in an employee/employer relationship. As it was fittingly put in *Metcash Trading LTD t/a Metro Cash and Carry v Fobb and Another* (1998) ILJ 1516 (LC):

"Theft is theft. It does not become less so because the value of the items stolen. Trust is the core of employment relationship. Dishonest conduct is a breach of that trust. Accordingly dismissal is the appropriate action."

In the case under consideration, there is cogent evidence on record to show that the appellant had established a disciplinary code of conduct for the observance of its employees, inclusive of the respondent, and that despite what the respondent said in the District Labour Court, its rules were published at the work place strictly forbidding the taking away of any of the appellant's items of property, save perishable food items which were given, or taken away with the appellant's permission. Thus, the respondent knew, or ought to have known, that items of the otherwise forbidden food allocated to employees had to either be consumed on the premises or left behind. The fact that the property was recovered in full or, as we have seen, that its value was modest, is immaterial, for dishonesty is dishonesty.

In any event, and since the respondent was a relatively senior member of the crew, it was particularly incumbent upon him to set and maintain a good personal example to others, especially to his subordinates; in this, he was found sadly lacking. All employees, especially those in senior and/or more responsible positions ought, like Caesar's wife, to be above suspicion.

Ultimately, I have no difficulty in coming to the conclusion that, *in casu*, the respondent's

dismissal was justified since there was nothing improper that was occasioned to the respondent at the disciplinary hearing. In the premises, the Learned Chairperson of the District Labour Court was in error when he set aside the respondent's dismissal.

During the course of presenting his argument, Mr Dicks has alluded to the standard of proof.

In my view, there can be no doubt that, although the principal disciplinary charge had criminal connotations, the respondent was not tried criminally; he was tried civilly and, consequently, the usual standard of proof in a civil matter applied. Proceedings in Labour and District Labour Courts are civil proceedings, as opposed to criminal proceedings. Hence, the standard of proof is on balance or preponderance of probabilities. As it was succinctly stated in Anglo American Farms, supra:

"In my view, the proceedings in industrial courts are accordingly to be categorised as being civil or civil in nature or character, other than criminal, even though the misconduct with which the respondent was charged constituted a criminal offence, viz theft. This being so, the appropriate measure of proof was proof on preponderance of probabilities.."

In so far as the reinstatement part of the Learned Chairperson's order is concerned, it cannot conceivably stand in the light of my decision to uphold the respondent's dismissal.

I now turn to the 4<sup>th</sup> part of the order made by the Court *a quo* to recompense the respondent. As Mr Dicks properly contends, there was no evidence or any basis upon which this award could be made and, consequently, it too must fall away.

In any event, the respondent did not discharge his onus of proof. However, what I said here should not in anyway be construed to mean that, if the respondent is entitled to any relief against the appellant, he is precluded from pursuing it before a court of competent jurisdiction.

In conclusion, I made the following order:

6. The appeal succeeds,
7. the termination of the respondent's contract of employment with the appellant is confirmed;
8. the order to give the respondent a final warning is set aside and so also is the order to award compensation to him; and
9. there shall be no order as to costs.

**ON BEHALF OF THE APPELLANT**  
**Instructed by:**

**MR DICKS**

**ON BEHALF OF THE RESPONDENT**  
**Instructed by:**

**MR SHIKONGO**