CASE NO. SA.12/2004

IN THE SUPREME COURT OF NAMIBIA

HENDRIK JACOBUS VAN WYK APPELLANT

And

COMMERCIAL BANK OF NAMIBIA LIMITED RESPONDENT

CORAM: TEEK, JA., MARITZ, A.J.A. et CHOMBA, A.J.A.

HEARD ON : 26/10/2004
DELIVERED ON: 22/04/2005

APPEAL JUDGMENT

Chomba, A.J.A.: The Appellant (to whom I shall hereinafter refer by his name of Van Wyk) was employed by the Commercial Bank of Namibia Limited (to which I shall in this judgment refer as "the Bank") until 30th June, 2000 when his employment was terminated. The circumstances which led to termination and the events which have intervened since then are the ones which have occasioned this appeal. As a starting point, therefore, I shall summarise those circumstances and events before focusing attention on ways and means of resolving the appeal.

Circumstances leading to termination

Van Wyk was employed at the Central Cash Vault of the Bank at its Bulow Street Branch and worked with two colleagues, Pieter Links (Links) and Petrus Matheus Swarts (Swarts). The last named was his immediate supervisor. Part of Van Wyk's responsibility was to pack bank notes into vaults of the Bank. On three occasions in February 2000 a total of N$4,000 belonging to the Bank went missing allegedly in the

course of Van Wyk's work. On 25 of February 2000 Van Wyk sought and was granted permission by Swarts to leave his point of work and pay a short visit to his sister-in-law who worked at a nearby Pep Store. In seeking the permission he told Swarts that he wanted to fetch from the sister-in-law N$100 which he had earlier loaned her. During his absence an occasion arose for some money to be removed from the vault but this could not be done because Van Wyk had one of the keys to the vault. Links and Swats went out to look for him at Pep Store but he was not found there. On their way from Pep Store to the Bank the two checked for Van Wyk at a nearby gambling shop. He was found there gambling at the gambling machine. In the result Van Wyk was charged with four disciplinary offences including one of dishonesty and 26th June 2000 was fixed as the date of hearing of the disciplinary cases. Owing to transportation difficulties Van Wyk was unable to travel from Rehoboth where he lived to Windhoek to attend the hearing. He phoned an officer of the Bank and explained his difficulty to him, but that notwithstanding he was subsequently additionally charged with insubordination for failing to attend the disciplinary hearing.

The outcome of the disciplinary cases was that Van Wyk was found guilty on all five charges. On the first two charges the penalty meted out was a final warning while on the other three, including the charge of dishonesty, dismissal was imposed. Consequently Van Wyk's employment was terminated.

In due course he filed a complaint in the District Labour Court in Windhoek. The cause of action specified in the complaint was simply stated as "unfair Labour Practice" while the relief claimed was "reinstatement of the job with full benefits and any increase and payment for any inconvenience". The upshot of the proceedings in the District Labour Court was that the Bank was held to have committed an unfair practice by dismissing Van Wyk on the basis of the charges laid against him. The

District Labour Court then directed the Bank to reinstate Van Wyk and also, pursuant to section 46(1)(a)(i) and ((ii)(sic) of the Labour Act, No. 6 of 1992 ".....to pay (Van Wyk) an amount equal to any loss suffered by the complainant in consequence of such dismissal or an amount which could have been paid to him had he not been dismissed." Aggrieved by that outcome the Bank noted an appeal to the Labour Court (*court a quo*), which subsequently endorsed the District Labour Court's verdict on the first count of misappropriation of the Bank's funds, but made no specific determinations on the remaining counts with one exception.

On the charge of dishonesty the learned judge of the *court a* quo reversed the verdict of the District Labour Court as appears from the following extract of the judgment.

> " The Respondent (i.e. Van Wyk) was employed by the Appellant (i.e. the Bank) at Central Cash in its Bulow Street Branch in Windhoek. On the 25th February 2000 he requested and was granted permission to visit his sister-in-law who worked at a nearby Pep Retail Shop for the purpose of borrowing N$100 (sic). But before he returned to his station there was an urgent request for cash for which a set of keys in his possession was needed to access the cash. The Respondent's supervisor, Mr. Petrus Matheus Swarts, accompanied by a colleague, Mr. Pieter Links went to the Pep Store to look for him but he was not there. They continued the search and located him inside the gambling shop where he was engaged in the activity of gambling. It was for this reason that the Appellant dismissed the Respondent for dishonesty.
>
> The general principle governing this issue has been enunciated as follows :
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> > 'It is for the employer to determine the standards of conduct required of its employees and the courts should only intervene when any

sanction imposed for breach of these standards if it results in any unfairness: Maphetane v Shoprite Checkers (PTY 1996) 17 ILJ 964 (IC)'.

It is self evident that by virtue of the nature of work performed by bank employees, their employers are entitled to expect absolute integrity and absolute honesty at all times i.e. in and out of work places.

In *casu* the Respondent obtained the employer's permission for a brief absence from work for the purpose of visiting his sister-in-law to borrow N$100 from her. He indicated in his evidence that he would be calling her to testify but failed to do so or to give an explanation for his failure. His testimony shifted the evidential burden to him and the only reasonable inference to be drawn from the failure to call his sister-in-law is that he never visited her but deceived his employer and lied about his whereabouts with knowledge that his employer would not have given him permission to go gambling during office hours....." (emphasis supplied).

Van Wyk was aggrieved by the reversal of the verdict of the District Labour Court hence his present appeal. In expressing his unhappiness in this regard he filed the following grounds of appeal.

Grounds of Appeal

These were :

(1) The *court a quo* erred in finding that the failure by the Appellant to call his sister-in-law to testify or give an explanation for such failure shifted the evidential burden to the Appellant.

(2) The burden of proving dishonesty remained on the Respondent throughout and in the absence of evidence contradicting the Appellant's evidence that he went to see his sister-in-law the Appellant did not in law attract an evidential burden.

(3) Whether or not there is evidence on record from which the court *a quo* could reasonably have concluded that :

(i) Appellant did not visit his sister-in-law;

(ii) The Appellant deceived his employer and lied about his whereabouts and thus was guilty of dishonesty;

(4) Whether the court *a quo* could reasonably have concluded, based on the evidence on the record, that the Appellant was correctly dismissed for a fair and valid reason;

(5) Whether the court *a quo* could reasonably have concluded that the dismissal of the Appellant was a fair and appropriate sanction and therefore a far dismissal; and

(6) Whether or not based on the evidence, the court *a quo* should reasonably have found that, the Appellant having been convicted of gambling during office hours as the main charge (the alternative of which was absence from work without leave), that the further charge of dishonesty amounted to an inadmissible duplication of charges against the Appellant, based on the same facts as that of alternative charge to the gambling charge.

The foregoing grounds of appeal raise the following legal issues, *viz*:

(i) Whether or not Van Wyk was guilty of dishonesty – this issue is covered by grounds 1 – 3;

(ii) Whether or not having regard to the evidence on record, the dismissal of Van Wyk was reasonable and fair. Grounds 4 and 5 are pertinent to this issue;

(iii) Whether or not the charge of dishonesty was an admissible splitting of charges, regard being had to the fact that Van Wyk had also been charged with gambling during office hours, with the charge of being absent from work without leave as an alternative. This issue is covered by ground 6.

I shall now evaluate the three issues set out hereinbefore within the context of the facts already recapitulated.

Issue 1: Whether or not Van Wyk was guilty of dishonesty

As I have already noted the judge of the court *a quo* held that Van Wyk failed to discharge the evidential burden which shifted to him when earlier in his evidence he told the court that he would call his sister-in-law as a witness but did not do so in fact. He gave no plausible reason for failing to do so. Arising from that failure the judge concluded –

> "……the only reasonable inference to be drawn from the failure to call his sister-in-law is that he never visited her but deceived his employer and lied about his whereabouts with knowledge that his employer would not have given him permission to go gambling during office ours."

The learned judge in the *court a quo* having determined that the evidential burden had shifted to Van Wyk, it was unnecessary for him to draw the conclusion that the only inference remaining to be drawn was that Van Wyk never visited his sister-in-law and had thereby deceived his employers. In so doing the judge, in my view, applied to a civil case, which the present was, the higher burden of proof, namely proof beyond reasonable doubt which is applicable to criminal cases.

The following passage occurs at page 113 of the 7th edition of Cross on Evidence under the rubric "evidential burden":

> "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or nonexistence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation. The concluding clause is designed to meet the point that the amount of evidence required to induce a judge to leave an issue to the jury varies according to whether the case is civil or criminal and whether the party bearing the burden is plaintiff, prosecutor, defendant or accused."

It is settled law that when a party to an action adduces evidence and thereby establishes a prima facie case of the existence of a fact in issue, that party is likely to win on the issue to which the presumed fact relates in the absence of evidence to the contrary adduced by the other party: *ibid* at page 118. In *casu* the fact in issue which the Bank had to establish as a basic fact was that Van Wyk sought leave to visit his sister-in-law at Pep Store but that he did not do so. On his own evidence, Van Wyk was out from his place of work from 15.15 hours and returned to the Vaults, his working place at 15.45 or 15.50 hours (see at page 593 of the record of appeal). Therefore he was out for about 30 or 35 minutes. Within that period of time he, Van Wyk was sought at Pep Store by Swarts and Links but he was not found. Instead he was found gambling at the gambling house. That evidence having been adduced, a rebuttable presumption of fact was, in my view, raised that Van Wyk never visited his sister-in-law. There was therefore a duty on Van Wyk to rebut that presumption. It is granted that Van Wyk did testify that he did actually visit his sister-in-law. However when a person says that he is going to point A (in this case Pep Store), but he is instead, within a brief space of time (30 or 35 minutes) found at point B (in this case

the gambling house) his assertion simpliciter that he did in fact visit point A does not intrinsically carry a ring of truth. In such a case if other evidence is adduced extrinsically which affirms the visit, credibility would be added to the assertion. Such evidence would be more weighty as a rebuttal or as a discharge of an evidential burden which had shifted to the party making the assertion in answer to the prima facie case earlier raised by the other party. That is what made the need for the sister-in-law's evidence critical as rebutting evidence. However Van Wyk withheld it by not calling her.

Arising from the foregoing, I am of the considered opinion that the employer, the Bank, was justified to presume that Van Wyk had lied when he sought permission on the strength of the excuse that he wanted to visit his sister-in-law. To that extent I come to the same conclusion as the learned judge of the court a quo, although through a different route. I come to the same conclusion not because the only inference to be drawn was that Van Wyk lied to his employer, but because the evidence adduced on behalf of the Bank established a prima facie case or a rebuttable presumption that Van Wyk lied in seeking leave of absence from work, and in failing to call his sister-in-law as a witness he failed to adduce enough evidence to rebut the presumption. That was the same as failing to discharge the evidential burden which had shifted to him.

Issue 2: Whether or not having regard to the evidence on record the dismissal was reasonable and fair

In considering this issue it is necessary to revert to the passage already reproduced from the judgment of the court a quo. The tail end of that passage reads :

> " Indeed the personnel manual applicable to him (i.e. Van Wyk) specifically provided for dismissal for the first conviction of dishonesty and the

> Respondent (that is Van Wyk) did not suggest that he was unaware of the provision."

As the learned judge observed, Van Wyk did implicitly concede to the existence of the personnel manual. That manual prescribed dismissal as the applicable sanction on "conviction" for dishonesty. The use of the term "conviction" is prone to raise concern as to whether a criminal conviction was envisaged by the framer of the personnel manual. Since Van Wyk was not indicted for a criminal case it could be said that the term was inapplicable to him. However perusal of the record of appeal assuages any such concern. Testifying for the Bank in the District Labour Court, Ms. Rapsch, the officer in charge of Organization Internal Services in the Bank, testified that the rating of dishonesty as disciplinary offence was that it was a major offence (see at page 254 lines 10 to 11). Then page 283 shows that she was asked the question -

> " He alleges that dismissal on a charge of dishonesty was too severe, what are your comments?"

She queried, "dishonesty?" The prosecutor, Mr. Obbes answered "Yes" whereupon Ms. Rapsch stated –

> ".....Well we are working with money and unless we have got honest employees we can sooner or later close down. So dishonesty in the Bank is a very serious offence."

Therefore since the Bank's rating of the offence of dishonesty was that it was a major or very serious offence, it is no surprise that the Bank applied to it what was considered to be a commensurate punishment for it, namely dismissal. It is in that sense that the word conviction was used in the context of disciplinary proceedings.

The subjective opinion of the Bank officials as to the seriousness of the offence of dishonesty may not suffice as a yardstick which should bind the judiciary. However the learned judge in the court a quo applied an objective test and still came to the conclusion that the aberrant conduct of Van Wyk on the material date was enough to be visited by the sanction of dismissal and especially because that sanction was the one prescribed in the personnel manual applicable to the Bank employees. In doing so the judge relied, inter alia, on the dictum abstracted from the case of Mahlangu v CIM Detlak, Gallant v CIM Detlak (1986) 7ILJ 346, to wit –

> "It is expected that any act on the part of any employee in the performance of his employment activities, and of which dishonesty is a component, entitles the employer to dismiss the employee summarily. However, dishonesty must not be merely suspected, it must be proved, although this proof may be based on a balance of probabilities."

I am in full agreement with the view taken by both the Bank and the learned judge of the court a quo. My answer therefore to issue 2 is that that the dismissal was reasonable and fair.

Issue 3: Whether or not the charge of dishonesty was a splitting of charges regard being had to the fact that Van Wyk had also been charged with gambling within office hours in addition to absence from work without leave as an alternative.

On this issue the effective argument of Advocate Corbett, who represented Van Wyk in this appeal, was the following: When it is considered that his client had been charged with gambling during office hours and being absent from work without leave as an alternative, to have charged him additionally with dishonesty amounted to inadmissible splitting of charges. The premise for this argument was that all the

offences occurred contemporaneously and formed a series of one transaction. One of the cases Mr. Corbett cited in support of his contention was S v Ntswakele 1982(1) SA 325 (TPD). Ntswakele was a case in which the accused was charged before a magistrate on 8 counts of theft. He was convicted on only 3 of them. The evidence in support of the charges showed that all the victims in the 3 counts lived in one room and that the articles stolen were found missing on the same day, that is 28th of October 1980. On review of the case by a full bench of the High Court, Margo, J, who delivered the judgment of the court, held that there had been an inadmissible splitting of charges. The court's view was that the accused should have been charged on only one composite theft charge. In the course of his judgment Margo cited a number of cases, including R v Koekemoer 1956 (2) SA 140 (E), R v Rankolane 1931 EDL 159 and R v Pieterse 1916 CPD 262. In each of these cases the accused stood charged with several counts of theft arising from facts which occurred, as in Ntswakele, contemporaneously and in one place. The view that there had been undue splitting of charges was held in all those cases. The dictum of Gardiner, J.P., in Pieterse, supra, is however instructive. He said :

> "It is far easier to criticize any rules suggested than to lay down a principle which will govern all cases, and I do not pretend to be able to frame a rule which will prove infallible. The test however which I would venture to put forward for cases of theft is that where at the same place two acts of theft are committed, and between the commission of the two acts there is no substantial interval of time passed by the accused in some occupation other than the commission of the same acts, one offence only is committed."

In that dictum it is noteworthy that the judge was careful in his choice of words when he said "the test I would venture to put forward for cases of theft....." The clear implication is that the test he ventured to put forward was not of universal

application to all manner of offences, but only applied to offences of theft. That that test is not applicable in cases other than those of theft is demonstrated by the case of R v Mansfield (1977) 1WLR 1102, an English case. In that case the accused had set fire to a hotel in which there were several persons seven of whom perished in the fire. He was charged with arson and seven counts of murder, all arising from the same incident. The joinder in that case was not challenged.

It is a settled principle of law that a number of offences may be joined in the same indictment if those offences are founded on the same facts or form or are a part of a series of offences of similar character. It was upon that principle that the charges in Mansfield, supra, were justified. What is forbidden in law in the framing of charges is the inclusion of more than one distinct offence in one count. That is called duplicity and a charge is said to be bad if it is duplicitous: see Blackstone's Criminal Practice 2003 under the rubics – " Rule against duplicity" on page 1270 and "Joinder of counts in indictment" at page 1278.

In the present case the submission was that there had been a splitting of charges. However on the authority of Mansfield that submission does not hold water in all cases. Moreover it is not unusual that one course of conduct can engender a multiple of offences which do not belong to the same genus. In such a situation it is not practicable to prefer only one charge. In the Mansfield case, for example, how could arson and murder be charged in one count? It is the negative answer to that rhetorical question which justifies splitting in many instances.

In the recent case of Tjivela v The State, Appeal Case Number SA 14/2003, for instance the Appellant was charged on three counts, namely unlawfully and intentionally breaking and entering into the house of Hansina Guim on the second count, unlawfully and intentionally and under cover of coercive circumstances

committing a sexual act with the complainant Riana Guim on count three, and on the 4th count with unlawfully and intentionally killing Riana Guim. All these offences were alleged to have been committed on the 6th of February 2001 and in the same house. Granted that no issue of splitting charges was raised in that case, there is no doubt that if it was raised it would have been shot down. This is because it would have been legally impermissible to compound all the aforementioned offences into one count. Doing so would have made the composite count bad for duplicity.

Yet another reason why I feel that the argument of splitting charges cannot succeed in this case is that splitting charges should be frowned upon, quite apart from the reason alluded to in the cases earlier cited in this judgment, if by reason of splitting charges the accused was embarrassed and prejudiced in conducting his defence. In other words splitting leading to a miscarriage of justice is not permitted. In the present case no argument has been put forward that Van Wyk was embarrassed and/or prejudiced in presenting his case or that a miscarriage of justice was occasioned.

In the final analysis I hold the opinion that none of the grounds of appeal is sustainable. I find no merit in the appeal. It is hereby dismissed. I would however uphold the submission of Mr. Cohrssen, advocate for the Bank, that the order in this case should not be that of absolution from the instance. It is instead hereby ordered that the allegation that the Bank is guilty of unfair practice by dismissing Van Wyk was unsubstantiated because in my view and for the reasons contained in this judgment, the dismissal was fair and reasonable.

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CHOMBA, A.J.A.

I agree

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TEEK, J.A.

I agree

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MARITZ, A.J.A.

COUNSEL FOR THE APPELLANT:	MR. A.W. CORBETT
INSTRUCTED BY	(KAUTA, BASSON AND KAMUHANGA INC.)
COUNSEL FOR RESPONDENT :	MR. R.A. COHRSSEN
INSTRUCTED BY	(LORENZ AND BONE)