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**Compiled by: Adv J Delpont
Delpont Labour Consultants**



Edcon Ltd v Pillemer NO and Others (191/08) [2009] ZASCA 135 (5 October 2009)

JUDGMENT: MLAMBO JA (MPATI P, HEHER, MAYA JJA, TSHIQI AJA
CONCURRING)

Introduction

The appellant Edcon had dismissed the third respondent (Reddy) for misconduct. Contending that her dismissal was unfair Reddy referred a dispute to the CCMA for resolution through conciliation and, failing that, through arbitration. The CCMA appointed a commissioner Pillemer to arbitrate the dispute. Having conducted the arbitration proceedings Pillemer made an award in which she concluded that Reddy's dismissal was substantively unfair and ordered Edcon to reinstate her but without arrear salary.

Unhappy with the award Edcon launched review proceedings in the Labour Court (LC). The LC (Pillay J) declined to set the award aside. Undaunted, Edcon appealed to the Labour Appeal Court (LAC), with that court's leave, but that effort again came unstuck

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when the LAC dismissed the appeal, concluding that the award was unassailable. Edcon appealed to this court.

Facts:

Reddy was the beneficial user of a company vehicle, a Toyota Corolla (the Corolla), courtesy of Edcon's car scheme policy (the policy). In June 2003 the Corolla was involved in a collision with another vehicle whilst driven by Reddy's son, Andre. Reddy was not in the Corolla at the time. In terms of the policy Reddy was obliged, amongst others, to report the accident to Edcon, the South African Police Service and the relevant insurance company within 24 hours and not carry out repairs to the Corolla without the approval of the insurance company. Reddy did none of the above, arranging, instead, with her husband to repair the Corolla at his panel beating shop at own cost. As fate would have it, a combination of factors led to Edcon getting to know of the collision some six months later.

On being confronted by Dwyer, Reddy's supervisor she initially denied that the Corolla had been involved in a collision but later admitted the occurrence, stating that the collision had occurred whilst she was driving it at a time when she was still employed by a company that had later merged with Edcon. Dwyer referred the matter to Mr Naidoo, a security manager employed by Edcon, for investigation. At Naidoo's request for a further statement Reddy changed her version, this time stating that the collision had



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occurred whilst Andre was driving, but that she was a passenger. Her final statement was when she came clean and told the truth with an offer to repay the costs associated with the required repairs. Andre had also, in the mean time, made a statement to Naidoo confirming that he was driving the Corolla and that he was alone when the collision occurred. It is common cause that in terms of the policy Andre was entitled to drive the Corolla as he was in possession of a valid driver's licence.

Disciplinary enquiry

Edcon convened a disciplinary enquiry to look into the matter. The charge levelled against Reddy was: **'failure to be honest and act with integrity in that you committed an act, which has affected the trust relationship between the company and the employee in that she failed to report an accident of a company vehicle'**. Reddy pleaded guilty to the charge at the commencement of the enquiry, stating that her ignorance of the policy rule that Andre was entitled to drive the Corolla had driven her to be deceitful as an attempt to protect him. She was found guilty and dismissed from her employment.

Ms Ismail an employee of Edcon chaired the hearing. Ms Ismail's decision to dismiss Reddy appears to have been motivated by her view that:

- Reddy had behaved without integrity and honesty, values regarded highly by Edcon.



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- In this regard Ms Ismail regarded Reddy's unblemished record and character as not sufficiently mitigatory of her conduct.

Appeal

Reddy appealed her dismissal and the resultant appeal hearing was chaired by Mr Maponya, another employee. Reddy's grounds of appeal were:

- **Penalty too harsh** – in that although serious offences generally warrant dismissal, the nature of the offence in this instance had not completely destroyed the trust relationship between the accused and the employer.
- The accused wishes the following to be considered – That she has dedicated most part of her working life to the company and is two years away from retirement age.
- She accepts full responsibility for all the necessary and reasonable **costs of repairing** the company vehicle and therefore the company will incur no loss.
- She is **diabetic** and hypertensive and the sequence of events have been stressful, seeing that she always provided a loyal service to the company.'

Maponya upheld the sanction of dismissal, concluding that:



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- 'In evaluating the nature and the role played by Ms Reddy in the commission of the above misconduct, it is clear that it resulted in a negative impact on the trust relationship.
- When Ms Reddy was confronted about the accident she lied throughout the investigation, with the aim to hide the true facts of what really happened to the company car.
- It is trite law that an act of dishonesty undermines the trust relationship and therefore may justify dismissal.
- Ms Reddy has been remorseful for her actions, however in the above case the gravity of her offence does not justify a deviation from the prescribed penalty.'

CCMA

This turn of events prompted Reddy to initiate the CCMA proceedings referred to earlier. When Pillemer became seized with the arbitration, she identified the fairness or otherwise of the sanction of dismissal as the issue requiring determination. Analysing the evidence:

- Pillemer remarked that Reddy's failure to report the collision in itself was not misconduct that warranted dismissal, but that the issue was whether her lack of candour thereafter destroyed the trust relationship, justifying her dismissal.



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- Pillemer also determined, referring to section 138(2) of the LRA, that as arbitrator she was entitled to have regard to certain correspondence from Dwyer and one Val Barnes, also a manager employed by Edcon, who had at some stage worked with Reddy. Both had not testified in the arbitration but their views, captured in the correspondence, were a disavowal of a breakdown in the trust relationship.
- Pillemer found that no direct evidence had been led by Edcon to show that the trust relationship had been destroyed by Reddy's misconduct and lack of candour.
- She further found that for a decision to dismiss a person with Reddy's track record of 43 years unblemished employment with Edcon and related companies, the misconduct committed had to be gross and evidence was necessary to show that the trust relationship had in fact been destroyed. She went on to find that Reddy's long and unblemished track record militated against a decision to dismiss her under the circumstances.
- She also found that the views expressed by Barnes and Dwyer were an indication that dismissal in those circumstances was not an inevitable result.
- She consequently concluded that Edcon had failed to prove that dismissal was a fair sanction.



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Conclusion:

The court held that reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a **reasonable decision maker** could arrive at considering the material placed before him.

The court held that the thrust of Edcon's case is that Pillemer had ample material before her showing that the trust relationship between it and Reddy had been destroyed by Reddy's misconduct and lack of candour. This, it was submitted, showed that the decision to dismiss her was justified. The determinant issue in the appeal must therefore be whether the trust relationship between Edcon and Reddy had been shown in the arbitration to have been destroyed. This calls for an examination of Pillemer's reasons for her conclusion and the material that was available to her in arriving at it.

As already stated, Pillemer concluded that Edcon had failed to show that the trust relationship had been destroyed by Reddy's deceitful conduct. Both the LC and LAC upheld this conclusion. Naidoo was Edcon's sole witness in the arbitration and Reddy testified in support of her own case. The records of the disciplinary enquiry and appeal hearing, as well as all statements collated by Naidoo during the investigation, were also before Pillemer as well as the correspondence from Barnes and Dwyer.



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It is to Naidoo's testimony, as Edcon's sole witness in the arbitration, as well as the documentary evidence referred to above, that one must look to see if indeed there was evidence showing that Reddy's conduct had destroyed the trust relationship between her and Edcon. What becomes immediately apparent is that Naidoo's evidence did not, and could not, deal with the impact of Reddy's conduct on the trust relationship. Neither did Naidoo testify that Reddy's conduct had destroyed the trust relationship. This was the domain of those managers to whom Reddy reported. They are the persons who could shed light on the issue. None testified.

Edcon's policy regarding the misconduct at issue here was also before Pillemer. But that document is just that – a policy – and is no evidence of the consequences of misconduct based on it. Someone in management and who had dealings with Reddy in the employment setup was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship. All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature and scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, e.g. because of precedent or example to others. In *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 ILJ 1051



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(LAC) at paras [17] to [27] Conradie JA considered the relationship between an employee's dishonesty and continued employment, and the bearing of such factors as long service, which Pillemer also considered. In the present context he said (at para [23]):

'The seriousness of dishonesty – ie whether it can be stigmatized as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way it impacts on the employer's business'.

But to get here evidence showing adverse impact, if any, on the 'business' is critical.

The court held that it also cannot be correct as submitted by Mr Redding, that Ismail and Maponya, who were the internal disciplinary enquiry and appeal chairpersons respectively, provided the management view regarding the damaged trust relationship. It needs hardly be stated that their role in those proceedings was not as witnesses. They were there to ensure that a fair conclusion was reached by Edcon regarding Reddy's fate. The surprising feature regarding the findings by Ismail, and especially Maponya, is that Barnes had testified in the disciplinary enquiry and stated that she could still work with Reddy. She was not challenged by Naidoo.



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The court held that Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy's long and unblemished track record was also an important consideration in determining the appropriateness of her dismissal.

In the court's view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a CCMA arbitrator. The challenge, therefore, to Pillemer's award on this basis is without merit.



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The appeal was dismissed with costs.

