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EMPLOYMENT ALERT

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ACCOMPLICES AND THE APPLICATION OF THE CAUTIONARY RULE

Soka and another v AMG Power System CC [2016] 8 BALR 894 (CCMA)

What is the "cautionary rule" and how is it to be applied in labour tribunals? The cautionary rule is a rule of law which obliges a court to warn itself of the danger of convicting a person on the basis of the evidence of an accomplice alone. An accomplice was defined in *S v Kellner* 1963 (2) SA 435 (A) as a person who is liable to be prosecuted either for the same offence with which the accused is charged or as an accessory to such charge.



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ACCOMPLICES AND THE APPLICATION OF THE CAUTIONARY RULE

The cautionary rule is a rule of law which obliges a court to warn itself of the danger of convicting a person on the basis of the evidence of an accomplice alone.

“An accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth.”



What is the “cautionary rule” and how is it to be applied in labour tribunals? The cautionary rule is a rule of law which obliges a court to warn itself of the danger of convicting a person on the basis of the evidence of an accomplice alone. An accomplice was defined in *S v Kellner* 1963 (2) SA 435 (A) as a person who is liable to be prosecuted either for the same offence with which the accused is charged or as an accessory to such charge.

The leading case concerning the application of the cautionary rule is *R v Ncanana* 1948 (4) SA 399 (A) where Schreiner JA described accomplices as follows:

For an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth.

The application of the above rule was recently considered by the CCMA in *Soka and another v AMG Power System CC* [2016] 8 BALR 894 (CCMA) [2016] 8. The facts are briefly as follows. A team of three employees was employed by AMG as electrical assistants. They were accused of stealing or conspiring to steal from their employer, two copper busbars which they intended to sell as scrap metal. The employees were alleged to have placed the busbars into the boot of Cele, who owned a vehicle which the employees utilised as transport to work. When the busbars were discovered missing by their line manager, the line manager requested Cele to open his boot. He initially refused stating that he did not have his car key. The following day, however, Cele admitted to his line manager that he and his two fellow employees had taken the busbars. He opened the boot in the presence of his line manager, but not his two fellow employees, and subsequently returned the busbars to the storeroom. All three employees were subsequently dismissed.

Cele found alternative work soon after his dismissal. The remaining two employees, however, referred an unfair dismissal dispute to the CCMA. During the disciplinary inquiries they denied being involved in the theft of the busbars. They both testified that whilst they had been aware of Cele’s intention to steal the busbars, they were not involved in his misconduct. Cele testified during the disciplinary inquiries and subsequently at the arbitration that they all collaborated to steal the bars, in fact it was the applicants who had placed the bars into the boot of his car. He had only consented to the use of his car, nothing else. The arbitrator assessed the evidence and arguments submitted by the parties and found that Cele had little to gain by incriminating his colleagues in the conspiracy to steal. There were no reasons for him to falsely accuse the applicants as they had a very good working relationship which had been in existence for a substantial number of years. Both applicants were found to be poor witnesses who were illogical and unconvincing. On a balance of probabilities, Cele’s evidence was found to be more convincing, and consequently the dismissals were found to be substantively fair.

The arbitrator nonetheless found that the chairperson at the disciplinary hearing overlooked the fact that evidence of accomplices, including Cele, has limited probative value unless the cautionary rules of evidence are applied. The applicants had been long serving employees with

ACCOMPLICES AND THE APPLICATION OF THE CAUTIONARY RULE

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The arbitrator found that the cautionary rules of evidence should have been applied at the disciplinary hearing, and because there was no evidence that this was done, it affected the fairness of the procedure rendering the dismissals procedurally unfair.



clean records and they should have been cautioned that they were being charged as accomplices. The arbitrator noted that it is trite that the cautionary rule requires a presiding officer to exercise caution when considering the evidence of an accomplice. This makes the evidence of an accomplice potentially dangerous and unreliable, hence caution must be exercised when such evidence is considered.

The arbitrator found that the cautionary rules of evidence should have been applied at the disciplinary hearing, and because there was no evidence that this was done, it affected the fairness of the procedure rendering the dismissals procedurally unfair. The arbitrator awarded two months' compensation to each applicant since reinstatement was not a competent remedy where only procedural fairness is at issue.

Is the decision correct, in particular the arbitrator's finding that the failure to observe the cautionary rule impacted on the procedural fairness of the dismissal? Properly construed, if the cautionary rule is correctly applied, this is an aspect which as the arbitrator himself correctly noted, impacts on the probative value of the evidence. An assessment of the weight of the evidence must therefore be carried out and, if it is found that the evidence is unreliable due to the application of the cautionary rule, the evidence falls to be rejected. This is an issue which should therefore impact on substantive and not procedural fairness. However, it is apparent that the arbitrator nonetheless accepted the evidence of Cele and the employer's other witnesses which he found to be reliable. He also preferred their evidence to that of the applicants which he found to be inconsistent and illogical. It is therefore on this basis perhaps that despite the application of the cautionary rule, the arbitrator nonetheless found for the employer.

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Gavin Stansfield and Zola Mcaciso

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