



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 56/19

In the matter between:

SECURITAS SPECIALISED SERVICES (PTY) LTD Appellant

and

SAMSON KABELANE Respondent

Heard: 27 November 2020

Delivered: 14 December 2020

Coram: Coppin JA, Murphy AJA and Savage AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Mahosi J) delivered on 29 March 2019 in which it found that the dismissal of the respondent was automatically unfair and ordered his reinstatement. The appellant contends that the Labour Court erred in finding that the respondent was dismissed for participating in union activities and should instead have found that the appellant dismissed the respondent for misconduct.

[2] The respondent was in the employ of the appellant as a security officer from 22 August 2008 until his dismissal on 19 January 2017. At the time of his dismissal,

he was deployed to one of the appellant's important clients, Kentucky Fried Chicken ("KFC"), at its outlet in Akasia, Pretoria. The respondent joined the United Private Sector Workers Union ("UPSWU") in 2015.

- [3.] In January 2016, UPSWU issued a letter addressed to "whom it may concern" advising that the respondent was duly authorised by UPSWU to represent any UPSWU union member before any "authorised institutions, CCMA and bargaining council".
- [4] On 15 November 2016, the respondent represented Mr. Stanley Mhangwani ("Mhangwani"), a former employee of KFC Akasia, in an unfair dismissal dispute before a bargaining council. Mhangwani had been dismissed by KFC Akasia for theft. KFC was not happy about the respondent, a security officer, representing one of its employees in a dispute against it. KFC wrote to the appellant expressing its disquiet, emphasising that it had a difficulty with a security officer deployed to protect its business acting on behalf of an employee who had stolen from it.
- [5] On 8 December 2016, the appellant issued a notice to the respondent directing him to attend a disciplinary enquiry and requiring him to answer certain allegations of misconduct. The appellant formulated five different charges against the respondent all emanating from the respondent acting on behalf of Mhangwani, namely: committing an act detrimental to the company; disruption of company activities; bringing the company's name into disrepute; disloyalty; and breach of a specific clause of the contract of employment. The charges involve a measure of duplication and splitting. The key allegation of misconduct was that the respondent acted contrary to the interests of the appellant by representing Mhangwani.
- [6] The respondent was found guilty of the misconduct. The appellant regarded the offence as serious as it had put the relationship with an important client at risk. It accordingly dismissed the respondent.
- [7] The respondent thereafter referred an automatically unfair dismissal dispute as

contemplated in ~~section~~ 187(1) of the Labour Relations Act¹ (“the LRA”) to the Labour Court. Section 187(1) of the LRA provides inter alia that a dismissal is automatically unfair if the employer in dismissing the employee acts contrary to ~~section~~ 5 of the LRA, which proscribes anti-union discrimination, prejudicing or disadvantaging an employee for exercising any right conferred by the LRA or participation in any proceedings in terms of the Act. The respondent alleged that his dismissal was discriminatory because he was victimised for being involved in the activities of a trade union.

[8] The appellant submitted that the respondent’s representation of Mhangwani at the bargaining council strained the relationship between the appellant and its client and put the service level agreement at risk. By representing Mhangwani at the bargaining council, the respondent clearly acted detrimentally to the interests of the appellant and compromised the appellant’s business relationship with the client. Acting detrimentally to the interests of the appellant is a dismissible offence in terms of the appellant’s employee relations policy. Hence, the dominant reason for the dismissal of the respondent was not his participation in union activities or in statutory proceedings but his acting to the detriment of the appellant by representing Mhangwani at the bargaining council without the permission or knowledge of the appellant.

[9] The Labour Court held:

‘By representing a union member as [a] shop steward or union official, the applicant [the respondent] did not commit an act detrimental to the respondent [the appellant], severely disrupt the respondent’s activities or breach his contract of employment as charged. In addition, his act did not amount to disloyalty against the respondent. All he did, was to exercise his rights conferred upon him in terms of the Constitution and the LRA. Accordingly, the falls within the scope of ~~section~~ 187(1)(d) of the LRA and is automatically unfair.’

[10] The appellant maintains that the Labour Court erred in two respects. Firstly, there was no evidence before the Labour Court that the respondent was a union

¹ Act 66 of 1995.

official of UPSWU. The respondent did testify that he was a shop steward of UPSWU. However, UPSWU did not enjoy organizational rights at the appellant or at KFC and the respondent, therefore, could not be regarded as a shop steward at the workplace of either the appellant or KFC, where he was not an employee. It is thus doubtful that the respondent had exercised his rights as a union official or as a shop steward.

[11] Nonetheless, it is arguable that the respondent might have been prejudiced for his participation in proceedings in terms of the LRA, which conduct is proscribed by [section 5\(2\)\(c\)\(vii\)](#) of the LRA. However, the charges and the evidence of the appellant's witness convincingly show that the appellant instituted disciplinary action not on account solely of the respondent's participation in proceedings at the bargaining council, but rather because of his lack of judgement in disregarding his employer's interests by representing an employee of KFC dismissed for theft when it was part of his job to protect the client. And, thus, it was argued, the Labour Court erred in concluding that the dominant reason for dismissal was union activity or participation in the statutory procedures.

[12] When there are a number of factors or reasons contributing to an employer's decision to dismiss an employee, it is necessary when deciding whether the reason for dismissal renders it automatically unfair to establish which reason of the various reasons was the dominant or proximate reason. In *SA Chemical Workers Union & others v Afrox Ltd*,² this ~~c~~Court held that a causation analysis was the best way to determine the most likely reason for the dismissal.³ In this instance, the court must first determine factual causation by asking whether the dismissal would have occurred if the employee had not participated in the statutory proceedings. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as is in fact the case, that does not

² (1999) ILJ 1718 (LAC).

³ In *National Union of Metalworkers of SA and & others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another* (2021) 42 ILJ 67 (CC) [GGT-178/19-2020-10-27](#), the Constitutional Court was divided equally on whether the test was useful. The second judgment held that where there are conflicting reasons, the ordinary rules of evidence are sufficient to determine the issue without reference to a causation analysis. The virtue of *Afrox* is that it assists in the determination of a true reason when the court is faced not with conflicting reasons but cumulative or co-contributing reasons. As the second judgment did not command a majority, *Afrox* remains good law.

immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.

[13] The cumulative reasons informing the decision to dismiss the respondent were firstly that he participated in statutory proceedings but more significantly that he represented an allegedly dishonest employee of the client of his employer in apparent conflict with his duties and his own employer's contractual obligation to provide protection services. The clear wording of the charges, and the evidence overall, show that the dominant reason for the dismissal was the latter not his trade union activities.

[14] It might be argued that dismissal for this infraction was inappropriately harsh in light of the respondent's length of service. But the Labour Court had no jurisdiction to determine an unfair dismissal case as contemplated in [section 188](#) of the LRA. No application or decision was made in terms of [section 158\(2\)](#) of the LRA for the Labour Court to act as an arbitrator in respect of an ordinary unfair dismissal referral that should have been referred to arbitration in terms of the LRA. This court too thus lacks jurisdiction to consider whether the dismissal was substantively unfair or to grant any relief in that regard. Employees should take caution and not too readily characterise a dismissal as automatically unfair when the evidence may be insufficient to substantiate such a claim.

[15] Fairness dictates that there should be no award of costs.

[16] The appeal is upheld and the order of the Labour Court is set aside and substituted with an order dismissing the application.

JR Murphy

Acting Judge of Appeal

COPPIN JA and SAVAGE AJA concur red-in-the judgment.

Appellant's Attorneys: Fluxmans Inc

Respondent's Attorneys: Mabaso Attorneys

APPEARANCES:

FOR THE APPELLANT: _____ Adv. M van As

Instructed by: Fluxmans Inc

FOR THE RESPONDENT: _____ Adv L Mosala

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