



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA11/2018

In the matter between:

VS **CONSTRUCTION t/a TECHNI-CIVILS CC**

Appellant

and

NUM obo MNGQOLA

First Respondent

BARGAINING COUNCIL OR THE CIVIL

ENGINEERING INDUSTRY

Second Respondent

MS M FOUCHE N.O

Third Respondent

Heard: 27 November 2019

Delivered: 23 July 2021

Coram: Davis JA, Sutherland JA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This appeal turns solely on whether, having found a dismissal for alleged misconduct to be substantively unfair because it was “inappropriate” the arbitrator (third respondent) could reasonably have refused to order that Mr Mngqola (the employee) be reinstated and, if so, whether the third respondent had erred by doing so, based on the facts of this case. A second, related issue, which concerns this Court is whether the court *a quo* could, on the evidence presented, have set aside the finding of the third respondent that the employee was entitled only to compensation which was equal to two months’ remuneration.
- [2] The employee was dismissed after being found guilty on a charge of “gross dishonesty” in that he had allegedly stated that the Chief Executive Officer of the appellant was a racist. He subsequently repeated the allegation to other employees, particularly to members of the appellant’s human resources department.
- [3] After hearing the evidence presented by the parties, the third respondent accepted the appellant’s evidence that the employee had made these statements, but found that the appellant had “overreacted” by imposing the sanction of dismissal. The dismissal was, accordingly, ruled to be substantively unfair.
- [4] Her main findings in this regard, which for purposes of this case must be accepted in that there was no appeal against them were set out as follows:
- ‘That the benefits accorded to one Riaan, a newly appointed white employee, pursuant to Riaan’s elevation above the employee were “likely to cause friction and perhaps even a perception of discrimination”; that “the utterances the [employee] made, true or false, display his unhappiness and perception of racism and are nothing more than expression of his feelings, his opinion”;

that the chair of the disciplinary hearing “erred in finding that the [employee] was guilty of gross dishonesty [W]hat the [employee] did was to express his opinion when asked to do so by three managers”; and that the employer had “quite frankly overreacted”.’

[5] Having found that the employee’s dismissal was substantively unfair, the third respondent decided that he ought not to be reinstated for two reasons: (i) “[c]onsidering the [appellant’s] submissions and the circumstances in their entirety the trust relationship between the [appellant] and the [employee] has broken down irretrievably”; and (ii) the employee “was not an honest witness”.

[6] On behalf of the employee, the first respondent approached the court *a quo* on review, contending that the third respondent had improperly exercised her discretion by refusing to reinstate the employee and that this decision was unreasonable in that it was not one to which a reasonable arbitrator could arrive and thus stood to be set aside.

[7] In upholding the application and thus ordering reinstatement, Whitcher J, sitting in the court *a quo*, held:

‘Given her findings on why dismissal was not an inappropriate sanction, the arbitrator could not possibly have found that a continued employment relationship would be intolerable.’

[8] Dissatisfied with this order, the appellant has approached this Court to set aside the relief granted by the court *a quo*, albeit that it accepts the finding that the dismissal was substantively unfair. In essence, the appellant contends that the remarks made by the employee were reasonably capable of being construed in the manner complained of by the appellant. The appellant contended that the burden shifts to the employee to show that, when he uttered these words, he did not mean it to be racist nor demeaning. The employee was the only one who could give this testimony, but he never did. Instead, he was adamant that he never made the remarks, which was a version which was rejected by the third respondent. In the view of the

appellant, the absence of any such evidence should have been the end of the matter where it came to his continued employment with the appellant in that his conduct had made it intolerable to have a continued employment relationship.

Evaluation

[9] An arbitrator must order reinstatement unless one of the exceptions in s 193(2) of the Labour Relations Act 66 of 1995 (the LRA) applies. The only exception applicable in this case is s 193(2)(b), which provides that reinstatement or reemployment needs not be granted when “the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable”. In this connection, this Court in *Glencore Holdings (Pty) Ltd and another v Gagi Joseph Sibeko and others* [2018] 1 BLLR 1 (LAC) at para 10, has held that an employee’s behaviour, even if deserving of reproach, could not be construed to inhibit an order of reinstatement.

[10] In the present case, the dismissal should not have legally taken place. So much is clear from the finding that the dismissal was substantively unfair, a finding that was not contested by the appellant. If a dismissal should not have occurred, the employment relationship would have continued, save for exceptional circumstances as envisaged in s 193(2)(b) of the LRA. Without a showing of exceptional circumstances, it is impermissible to couple a finding that a dismissal was inappropriate with a finding that reinstatement would not be appropriate.

[11] In this case, there is no such showing. No evidence was led during the arbitration hearing to the effect that reinstatement would be an inappropriate order. The closest the appellant came to providing any basis for exceptional circumstances was evidence that false accusations of racism aired in public would harm its business. But the allegation made by the employee was not made in public. Moreover, the truth or otherwise of the employee’s allegation

was never put to the test, and the third respondent made no express finding. That an allegation of racism is hurtful in the extreme when made with no justification. But in this case the core finding was that the conduct of the employee could not justify a dismissal.

[12] It is important to emphasize the basis on which this appeal has been brought and determined. The finding that the dismissal was substantively unfair is not the subject of this appeal. Had this finding been contested before this Court, the question of a remedy, in the event that such an appeal failed, would have posed a far more complex challenge. But the merits of the third respondent's determination was not contested. In this specific context, the appellant had to do more to ensure that reinstatement was not ordered than a reliance on the argument that the impugned statement had been made. That it failed to offer any further evidence is thus fatal to this appeal.

[13] In the result, there is no justification for disturbing the finding of the court *a quo*. The appeal is dismissed with costs.

Davis JA

Sutherland JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv John Grogan and

Instructed by Wesley Pretorius &
Associates Inc

FOR THE FIRST RESPONDENT:

Arend Posthuma of Snyman Attorneys