IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA59/20

KAEFER ENERGY PROJECTS (PTY) LTD	**Appellant**
and	
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER MATOME VICTOR SEHUNANE	**Second Respondent**
LIFA SUKAZI	**Third Respondent**

Heard: **31 August 2021**

Delivered: **26 October 2021**

Coram: Waglay JP, Jappie JA and Coppin JA

JUDGMENT

WAGLAY JP

Introduction

[1] This is an appeal against the judgment of the Labour Court which dismissed the appellant's application to review and set aside the award of the second respondent and replace the award with an order that the dismissal of the third respondent (the employee) was fair.

Background

[2] Briefly, the employee was appointed as an assistant administrator in 2012 and was later promoted to the position of human resource admin clerk. She was about two months into her new position when, on 18 July 2017, she was dismissed for misconduct.

[3] Two charges were levelled against the employee. The first related to her refusal to testify against her co-employee on behalf of the appellant, her employer, at a misconduct arbitration. It is common cause that a heated altercation occurred between one, Avasha Govender (Govender), the appellant's manager and an employee, one Tebogo Maili (Maili) in Govender's office and their voices could be heard by other colleagues. What was said between the two is not clear nor relevant in this matter. The employee heard the loud argument so she rushed to Govender's office and escorted Maili out of Govender's office to avoid things getting out of hand. It was this incident that led to disciplinary action being taken against Maili and resulting in his dismissal. Maili challenged his dismissal which eventually was set down for arbitration at the Commission for Conciliation, Mediation and Arbitration (CCMA). The appellant sought the employee to testify at the arbitration.

[4] The second charge related to the breach of her employment contract, by leaking confidential information, in that the employee informed one, Victor Phosa, that she had received a call which said that he (Phosa) had presented false qualifications to obtain employment with the appellant.

[5] At her disciplinary hearing, the employee was found guilty and dismissed. Aggrieved by her dismissal, the employee referred a dispute to the CCMA alleging that her dismissal was unfair.

The arbitration

[6] As regards the first charge, the Commissioner stated that he would not entertain the question whether the employee refused and later agreed to testify, or whether she was threatened to testify. He proceeded to deal with the issue as to whether an employer can dismiss an employee for refusing to testify. He found that since there was no evidence led to show that the employee deliberately refused to testify in order to protect Maili or to conceal evidence, the employee had not committed any misconduct. The Commissioner ruled that if the employee was an important witness, the employer should have subpoenaed her. The Commissioner added that there was doubt about the importance of the employee's testimony at Maili's arbitration hearing and that there was no bad faith on the part of the employee.

[7] With respect to the second charge, the Commissioner found that because the employee was new in her position, an induction was needed so that she could have been aware of the consequences of handling and/or of disclosing confidential information. The employee was nevertheless found to have misconducted herself, but because of the employee's clean disciplinary record, the Commissioner found that a sanction short of dismissal was the appropriate sanction. To this end, the Commissioner issued a final warning valid for six months. The appellant had nothing to say on this issue, I assume it was satisfied with the arbitrator's finding and decision on this issue.

The Labour Court

[8] However, the appellant was dissatisfied with the arbitrator's finding that the employee had committed no misconduct in failing to comply with an instruction to testify, and sought to set the award aside and to have it substituted with an order that the dismissal was fair. The Labour Court arrived at the same conclusion as the arbitrator, albeit for different reasons, namely, that the appellant could not dismiss the employee for refusing to testify. The Labour Court held that a corollary to section 5(3) of the Labour Relations Act 66 of 1995 (LRA), that no person may be advantaged in exchange for not participating in

any proceedings in terms of the LRA, is that no person may be prejudiced for refusing to participate in any proceedings.

[9] The Labour Court found that a witness who refused to testify may be compelled to do so through a subpoena. It surveyed foreign cases and took the view that it would be improper to suggest that an employer's contractual powers extend to instructing an employee to testify against her will and that the only way to compel an employee to testify is to cause a subpoena to be issued against the employee.

The appeal

[10] On appeal, the appellant contends that the employee owes a duty of good faith which stems from her contractual obligations towards the appellant. To this end, the appellant submits that the refusal to testify on behalf of the appellant amounts to insubordination, as the employee had breached her duty of good faith. The appellant further contends that the employee was a key witness as she had witnessed the altercation between Govender and Maili.

[11] The appellant, in support, relies on the Constitutional case of *National Union of Metalworkers of SA on behalf of Nganezi & others v Dunlop Mixing & Technical Services (Pty) Ltd & others (Casual Workers Advice Office as Amicus Curiae)* (2019) 40 ILJ 1957 (CC) (*Dunlop*). In that matter, one of the questions faced by the court was whether there was a duty on employees to inform the employer which employees were responsible for the acts of violence during a strike. The appellant did however go on to say that the present case is far more straightforward. The employee was a witness to an alleged serious misconduct by a fellow employee. She was instructed to make herself available to testify on behalf of the company as to her recollection of events at the arbitration. She was not required to perjure herself, or to testify to anything other than her own recollection of events. There was no threat of harm or risk of recrimination if she testified at the arbitration. She was merely required to testify about an incident in which she had played a role.

[12] The employee's case is that she refused to be a witness at the arbitration because she did not think her evidence was relevant and she did not want to

"make a fool of herself", because she did not remember what was said between Govender and Maili. Govender's testimony confirmed that the employee had repeatedly said that she did not have a recollection of what was said during the altercation The employee stated that the arbitrator correctly found that there was no basis for making a misconduct finding against an employee for her refusal to testify at an arbitration because her refusal was neither deliberate nor did she act in bad faith in that regard. Also important was the fact that the employee was not called to give evidence at Maili's internal disciplinary hearing. Finally, the employee submitted that if the appellant was of the view that her evidence was important, then it could and should have secured her attendance at arbitration by means of a subpoena.

[13] In determining whether the employee was guilty, the arbitrator had to consider:

(a) The misconduct that the employee was said to have committed- this was her refusal to carry out an instruction given to her;

(b) Whether the instruction was lawful, reasonable or fair;

(c) Whether the employee was in a position to carry out the instruction; and

(d) Whether there was a lawful or reasonable excuse for her to refuse to carry out the instruction?

[14] The evidence before the arbitrator was that the employer, through Govender, approached the employee and instructed her to be a witness for the appellant at the arbitration which was to take place in respect of the unfair dismissal claim made by Maili against the appellant. The employee reacted by saying she could not remember everything that happened regarding the incident. The arbitration was set down for a Monday, and, either on the Thursday, or the Friday preceding the Monday, Govender again approached the employee indicating the importance of her testimony at Maili's arbitration, but the employee maintained that she could not recall what happened and did not want to be a witness. Govender then told her to take some time and think about it and to get back to her later. In her testimony, the employee said that Govender said to her that if she does not testify, she could be dismissed (this was never put to

Govender who was the first witness to testify, notwithstanding that the employee, unlike the appellant, was legally represented).

[15] In any event, a few hours after she was told to think about the Govender/Maili incident, the employee returned to Govender's office and indicated to Govender that she does remember everything relating to the incident. In the presence of another witness Mr Kent Ziervogel, she confirmed her memory recall, this was after she was given the questions that would be asked of at the arbitration. The employee therefore was acknowledging that she was in a position to answer the question the Appellant said will be put to her and that she would testify at the Maili's arbitration.

[16] There was no editing or coaching of the employee as to what answers she should give to the questions asked. It is clear from the evidence presented that the employer wanted the employee to testify at the arbitration about her involvement in the Govender/Maili incident which was that: there was an altercation between Govender and Maili where voices were raised; things were said by each other which was heard by her; that it was a loud altercation where she (the employee) felt compelled to intervene because she feared things may get out of hand; and she did so; she went into the open office where Govender and Maili were screaming at each other and removed Maili from Govender's office before things got out of hand.

[17] Having agreed to testify which was the position until the close of business on the Friday before the Monday, when the arbitration was to take place, two things were certain (a) that the employee remembered everything with regard to the incident on which she was instructed to testify and (b) she was willing and would be testifying on Monday.

[18] Sometime on Friday evening, the employee sent a message to Govender to say that she no longer intended to testify. Govender tried to contact her to establish the reason why the employee had changed her mind. The employee refused to answer or return Govender's calls, but replied to one of Govender's messages to say that they should proceed without her.

[19] The arbitration into the fairness of Maili's dismissal took place on Monday, as scheduled, and the employee did not attend the arbitration.

[20] The arbitrator, notwithstanding the evidence set out above, as stated earlier, decided that if the employer wanted the employee to testify, it could have subpoenaed her and since that could have addressed the problem, there was no misconduct committed by the employee.

[21] The arbitrator totally misconstrued what was required of him. Based on what he was required to consider, he seemed to have missed the point altogether.

[22] The fact of the matter is that the employee was given a clear instruction, which was neither unreasonable, nor unfair. She was asked to testify, but not told what to say although she was asked to try and remember what had been said. The one issue she could testify about, notwithstanding her periodic amnesia, was that there was an altercation in Govender's office between Govender and Maili and she intervened and removed Maili from the office to calm things down, as the argument between them could have gotten out of hand.

[23] The employee's justification for her refusal to testify was twofold: that she could not remember everything that happened during the incident about which she was required to testify, other than what was stated in the preceding paragraph, and that her evidence would be of no use to the appellant, and, worst still, that she will make a fool of herself if she gave evidence. An important fact is that it was not for the employee to decide whether her evidence would be relevant. She had been instructed to testify and she had a duty to comply with that instruction. That is an obligation that an employee has. The employee may however raise an excuse for not wanting to do so, provided it constitutes a valid, and acceptable excuse for non-compliance. Sometimes, employees are threatened or other pressures are brought to bear upon them by co-employees or their community to stop them from testifying, which, properly are matters that must be brought to the employer's attention and be dealt with by the employer and may well constitute valid and reasonable excuses that justify an employee's refusal to testify against a co-employee. It is in such cases that the issue of a

subpoena may be pursued, while providing the employee with the necessary protection.

[24] In this matter, there was no evidence of threats or any other external pressures that played any role in the employee's decision not to testify. Furthermore, although she had maintained that she was not comfortable to testify she agreed to testify in the week before the arbitration, then changed her mind at the end of the work day on Friday, effectively, the day before the arbitration.

[25] Other than her belief that she had no relevant evidence to give and that she did not want to make a fool of herself, there is simply no evidence whatsoever, to indicate or from which to properly draw any kind of inference that she may have been threatened, or that she feared reprisals from fellow workers if she testified.

[26] The red herring, both at the arbitration and at the Labour Court, was the issue of the subpoena. Any litigant has that as a tool to compel a witness to testify. The fact that that tool is available does not mean that because it is not used, an employee witness can simply refuse an employer's instruction that he/she testifies at a hearing, or that the refusal by the employee to carry out the employer's instruction to testify, where the demand is not unreasonable, cannot lead to disciplinary action being taken against the employee.

[27] Essentially, there was no reason whatsoever for the employee to refuse to testify. It was not for her to say whether or not her evidence was relevant. On a very basic level, even though she claimed that she could not remember what was said between Govender and Maili, her corroborative evidence that there was an altercation with harshly raised voices, might have been relevant, assuming the employee against whom she testified denied any altercation. She has not denied that she, at least, remembered this.

[28] In these circumstances, the arbitrator's decision that the employee committed no wrong, that her decision not to testify was, neither deliberate, nor in bad faith, is not a decision that a reasonable person, sitting as an arbitrator with the evidence that was before him could have arrived at. The employee was guilty of the misconduct complained of and that should have been the arbitrator's finding.

[29] With regard to what is the appropriate sanction, no purpose can be served in referring the matter back to the CCMA to determine the appropriate sanction this court is in as good a position to deal with and finalise the matter.

[30] The refusal to obey the instruction has to be seen in a serious light. The employee challenged the authority of the employer and this can have the consequence of hamstringing the employer's enforcement of discipline in the workplace. An employee is, in my view, obliged to carry out a reasonable instruction given to her/him by the employer. Refusing to do so, may amount to insubordination. Depending on the importance of the instruction and the absence of any acceptable excuse for the refusal to carry out the instruction, it can correctly be held to be sufficiently serious to warrant the sanction of dismissal.

[31] It was argued that at the arbitration into Maili's dismissal the CCMA found his dismissal to be fair without the employee's evidence. That, in my view, is irrelevant and does not excuse or extenuate the egregiousness of the insubordination. The employee was instructed to perform an act which was reasonable and valid and she refused to obey that instruction. She has not proffered any acceptable and valid reason for not complying with the instruction. As stated earlier, that the evidence you are called upon to give, is neither important nor relevant, is not a decision that the witness, who is called upon to testify, can make, and act upon, as if, or even if, his/her belief is correct. The misconduct in this instance is compounded by the fact that she was not being honest. A working day or two before the arbitration, she remembered the whole of the incident and sat with the employer's management where she was told what she would be asked and she answered those questions, but a day later she claimed she could not remember. Furthermore, the consequence of treating lightly such misconduct, is that it will have a negative impact on the entire workforce and management when it comes to disciplining any individual in the workforce by relying on evidence of a fellow employee or employees.

[32] Imposing a final written warning on an employee, who unjustifiably refuses to testify in a disciplinary hearing, or at arbitration hearing would be to condone obstructive conduct on the part of such an employee to the employer's right to

enforce disciplinary against (possible) errant employees, which, clearly, cannot be countenanced.

[33] Had the arbitrator correctly found the employee guilty of insubordination for failing to comply with a reasonable instruction, I have little doubt that he would have imposed the penalty of dismissal, which was appropriate in the circumstances

[34] In the result, I make the following order:

1 The appeal is upheld;

2 The order of the Labour Court is set aside and replaced with the following:

"The arbitrator's award is reviewed and set aside and replaced with an award that the dismissal of the employee was fair."

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Waglay JP

Jappie and Coppin JJA concur in the judgment of Waglay JP

APPEARANCES

FOR THE APPELLANT: Mr G Fourie SC

Instructed by Brian Bleazard Attorneys

FOR THE RESPONDENT: Mr C Berkowitz of Berkowitz Attorneys