



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PA12/2020

WOOLWORTHS (PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION

First Respondent

COMMISSIONER FREDERICK SAULS

Second Respondent

BRIAN HILTON ALEXANDER

Third Respondent

Heard: 03 November 2021

Delivered: 10 December 2021

Coram: Waglay JP, Davis JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

- [1] When does attendance at a rugby match trigger a dismissal from employment? This case turns on an answer to that question. On the morning of 9 June 2018, the third respondent advised one of the appellant's managers that he had taken ill and that he would not be attending work on that day. It turned out that on that very day,

that the third respondent claimed to be ill, he and his father travelled for at least an hour from Jeffreys Bay, where he resided to Port Elizabeth to attend a rugby match. It is instructive to note, that had he left his home and attended to his employment responsibilities, the trip would have taken 20 minutes.

[2] When he returned to work for his next shift, his manager Mr Jonel Krige enquired as to where the third respondent had been on the previous day. He responded, that although he was not well, , he returned to work, ,on the previous day (9 June) he had attended a rugby match.

[3] Pursuant thereto, the appellant investigated the circumstances of the third respondent's disappearance from work, and following thereon instituted a disciplinary enquiry against the third respondent based on the following charge:

'Gross misconduct in that on 9th June 2018 you breached company policies and procedures when you abused authorised leave in the form of sick leave when you informed your manager that you were unable to report for your scheduled shift but was observed at an extended function in Port Elizabeth. This could have resulted in your claiming wages to which you were not entitled to in the form of sick leave if this was not picked up.'

[4] The third respondent was found guilty of the charge and dismissed. He then referred an unfair dismissal dispute to the first respondent which was arbitrated by the second respondent who issued an award in which he found the dismissal substantively and procedurally unfair.

[5] After considering the testimony of both the appellant and the third respondent, the second respondent found that the third respondent had not sought to hide the fact that he had attended a rugby match, that there was no evidence that he had previously been given a written or final warning. Further the appellant had not charged him for dishonesty and thus the employment relationship had not yet broken down. The second respondent therefore concluded that the dismissal was unfair and ordered the appellant to reinstate the third respondent retrospectively

with effect from 18 February 2019. It is against these findings that the appellant applied to set aside this award on review before the court *a quo*.

The court *a quo*

- [6] Although Lallie J held that the second respondent had erred in finding the dismissal procedurally unfair, the learned judge found that the dismissal was substantively unfair. Following the approach adopted by the second respondent, Lallie J said:

‘When the evidence which was led at arbitration is considered in its totality it proves that the commissioner considered whether the third respondent acted dishonestly. He found that he did not. He based his finding on the applicant’s failure to tender admissible evidence proving the dishonesty as well as the absence of a policy which required the third respondent to report for duty when his condition had improved. The error therefore had no distorting effect on his decision.

The commissioner considered the applicant’s evidence that the third respondent should have gone to work when he felt better instead of attending a rugby match. He rejected it on the grounds that the applicant submitted no policy of what an employee who had been booked medically unfit to work was not entitled to do when not at work. He added that the contention by the line manager, that if a person was sick such person was expected to stay at home, appeared to be her personal view.’

- [7] In the view of the learned judge, the finding of the second respondent that the dismissal was substantively unfair could not be set aside because the appellant had not proved that the second respondent’s decision was unreasonable. With the leave of this court, the appellant has approached this court on appeal against this order.

The appeal

- [8] It is important to emphasise that the charge brought by the appellant against the third respondent was on the basis of gross misconduct in that he had ‘breached

company policies and procedures when he abused authorised leave in the form of sick leave.'

- [9] There was little dispute about the dishonesty of the third respondent's action. Indeed, he confirmed that his action was dishonest. The following extract from his evidence illustrates this luminously.

'Respondent rep: Okay, so when you made the phone call to say you are sick that would that mean from work?

Mr Alexander: that I am going to be absent

Respondent rep: and?

Mr Alexander: that I am not going to be perform (sic).

Respondent rep: and be paid for the day

Mr Alexander: come again

Respondent rep: you will be paid for the day

Mr Alexander: that I would be paid for the day, yes

Respondent rep: Okay. Is it honest that we must pay you for the day and also pay for the part where you would be at the rugby?

Mr Alexander: No, I don't think so'

- [10] It is also instructive that the third respondent, who was employed as an end of day controller at the appellant's stores in Humansdorp, accepted that his behaviour could hardly be regarded as setting a good example for his subordinates.

- [11] Manifestly, the third respondent acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then travelled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day. The finding of the second respondent that there had been no act of dishonesty is obviously subject to review, even if the standard for review were so

onerous that an award could only be set aside on the basis of an egregious error. This is exactly the appropriate term to describe the approach adopted by the second respondent and regrettably it was repeated by the court *a quo*.

The question of dismissal

- [12] The second respondent ordered the appellant to reinstate the third respondent retrospectively to the date of dismissal on the terms and conditions of employment as applicable to him on that date. The second respondent reasoned that it was “apparent that the conduct and behaviour displayed by the applicant (the third respondent) was not such, as to make a continued employment relationship at the respondent (the appellant) impossible or untenable.”
- [13] This lenient approach to dishonesty cannot be countenanced. The third respondent held a relatively senior position within the organisation of the appellant at Humansdorp. He was palpably dishonest, even on his own version. He expected to get away with the enjoyment of attendance at a rugby match on the basis of claiming sick leave and then enjoying the benefits thereof. This is dishonest conduct of a kind which clearly negatively impairs upon a relationship of trust between an employer and employee.
- [14] In addition, the third respondent had been disciplined on previous occasions for being absent as well as for coming late. Although most of these warnings had expired, the last one expired on 13 August 2018, which was subsequent to the date of the disciplinary hearing.
- [15] For the appellant to adopt the approach that the third respondent was required to act with integrity and abide by the appellant’s policies, procedures and codes is manifestly justifiable.
- [16] In the circumstances, it is clear that the relationship of trust as a result of his initial unreliability and now dishonest conduct had broken down. Viewed from the record of this employee, dismissal was clearly the appropriate sanction.

[17] This may be the kind of case envisaged by the Constitutional Court in *Union for Police Security and Correctional Organisation v South African Custodial Management (Pty) Ltd and others* 2021 (11) BCLR 1249 (CC) where costs should be awarded against the losing party as a result of egregious conduct. However, given that the third respondent would have lost his job and been an individual applicant involved in litigation with a large company, there will be no order as to costs.

[18] In the result,

1. The appeal is upheld.
2. The order of the court a quo of 28 May 2020 is set aside and replaced with the following order:

‘The arbitration award handed down by second respondent under Case Number ECPE 5477-18 dated 4 February 2019 is reviewed and set aside and replaced with the following:

The third respondent was dismissed both substantively and procedurally fairly.’

3. There is no order as to costs.

Davis JA

Waglay JP and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT: Macgregor Erasmus attorneys

FOR THE THIRD RESPONDENT: NEL Mentz Steyn Ellis Inc.

LABOUR APPEAL COURT