



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 90/2021

In the matter between:

SGB CAPE OCTOREX (PTY) LTD

Appellant

and

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

First Respondent

NOKO NKGOENG N.O

Second respondent

UASA OBO SIPHAMANDLA SHABANGU

Third Respondent

Heard: 15 September 2022

Delivered: 18 October 2022

Coram: Sutherland JA, Coppin JA et Tokota AJA

JUDGMENT

TOKOTA AJA

- [1] Mr Siphamandla Shabangu (the employee), who was employed by the appellant, was dismissed from his employment on 12 April 2019. He referred an unfair dismissal dispute to the first respondent for resolution. The conciliation

failed and the matter was referred to arbitration before the second respondent (the commissioner). The commissioner found that the dismissal was substantively unfair and ordered the reinstatement of the employee. An application by the appellant for the review of the commissioner's decision was dismissed by the Labour Court. After an application for leave to appeal to this Court was dismissed by the Labour Court, such leave was granted on petition by this Court.

[2] The employee was employed by the appellant on 15 February 2015. At the time of his dismissal, he held the position of supervisor. On 23 March 2019, one of the appellant's managers, Mr Desemele, received a call in the morning at work from his manager that the employee was seen smoking dagga whilst on duty at boiler 5 level 9. Mr Desemele then called the employee to his office and confronted him with the allegation. The employee denied that he had been smoking any drugs.

[3] Mr Desemele then, with his consent, conducted tests to check the presence of drugs in his urine. The employee tested positive for THC. THC is said to stand for dagga or cannabis. He was then taken to Murray and Roberts paramedics to conduct a second test of saliva. Again he tested positive for THC.

[4] Following the tests, the employee was suspended from duty pending the finalisation of a disciplinary process against him. He was subsequently charged with having tested positive for THC. He was found guilty and dismissed.

[5] Dissatisfied with the outcome of the disciplinary process, the employee referred a dispute of unfair dismissal to the Bargaining Council. The commissioner held that the dismissal was substantively unfair and ordered the reinstatement of the employee, but without back pay. The reasons for the commissioner's finding were based on his observations of the following:

- 5.1 The employee pleaded guilty after the test results;
- 5.2 He was in the employ of the appellant for more than four years and had a clean record;
- 5.3 This was his first offence;
- 5.4 The appellant did not suffer any prejudice;

5.5 Because of his behaviour, the employee was promoted to a supervisory position;

5.6 He did not believe that the employee would repeat the same offence in future; and

5.7 The relationship between the parties could still be restored.

[6] The appellant took the award in favour of the employee on review to the Labour Court. The appellant contended that the commissioner ignored the zero-tolerance approach adopted by the employer on the use of drugs at work. It contended that the decision by the commissioner was not a decision that fell within the band of reasonableness.

[7] The Labour Court held that the contention that the commissioner ignored the zero-tolerance approach had no substance. It held that no such evidence in that regard was adduced at the arbitration. It held further that there was no evidence that the employee had compromised the safety and integrity of other workers. Accordingly, it dismissed the review application.

[8] On appeal, Mr Soldatos for the appellant submitted that although the employee was not charged with smoking dagga, the testing followed a tip-off that he was smoking dagga at the workplace. The inference is irresistible, so the argument ran, that he was smoking dagga hence he tested positive. He submitted that the false claim that he last smoked dagga in 2017 (two years prior to the incident) demonstrated his lack of candour. He contended that the appellant's policy on the use of drugs at work was concerned with the safety of workers and, therefore, any sanction short of dismissal would invite the would-be offenders to break the rule.

[9] In its judgment, the Labour Court did not deal with factors taken into account by the commissioner in arriving at the decision that the dismissal was substantively unfair. I must therefore accept that it agreed with the commissioner in that regard.

[10] However, I am unable to agree with the commissioner. Firstly, when he was confronted by Mr Desemele, the employee denied that he had used any drugs. His admission of guilt only came when the test results were positive. Where a

plea of guilty in the face of an open and shut case is tendered, it becomes a neutral factor. He had no choice but to plead guilty after he tested positive.

[11] Secondly, the question of a clean record can be dealt with together with the fact that it was his first offence. The policy is clear about this. Regardless of whether an employee had a clean record, the first offence attracted dismissal. The employee conceded that he had attended inductions and that these rules were explained to them. The evidence led was that the employer has been consistent in imposing dismissals in all cases where this offence had been committed.

[12] Thirdly, the question of the appellant's prejudice is, in my view, obvious. Where an employer sets out the code of conduct for the employees, it is expected from its employees that breaching such code undermines the authority of the employer. A breach thereof is therefore prejudicial to the administration of discipline. Furthermore, the employer in this case was concerned about the safety of its employees since they were working on heights. The employee was working either on the 8th or 9th level on the day in question. Consequently, the reasoning that there was no prejudice was unreasonable.

[13] Fourth, there was no evidence led to the effect that the employee "*behaved himself hence he was promoted to supervisory position*". As a matter of logic, the very fact that he was a supervisor militates against a lenient sanction. The employer placed its trust in him to ensure that its rules are obeyed. He betrayed that trust. It is expected of a supervisor to lead by example. In my view, the commissioner's assessment in this regard was unreasonable.

[14] Fifth, there was no evidence which evinced any belief that the employee would not commit the same offence in future. On the contrary, his evidence was that he was addicted to drugs. In my view, there was no basis for the commissioner's belief.

[15] Sixth, the commissioner found that the broken relationship could be restored. No evidence was adduced to lay the basis for this finding. The finding itself presupposes that there was a breakdown in the relationship. The employee denied that he smoked any dagga when he was first confronted but changed

only after the test results. He was the eyes and ears of his employer but betrayed the trust bestowed on him.

[16] In my opinion, the Labour Court failed to appreciate the importance of the policy. Furthermore, the findings of facts were erroneous. It is not correct that there was no evidence of a zero-tolerance approach. This finding flies in the face of Mr Desemele's evidence that firstly, the company's 'Golden Rule' was that anyone who violated the policy prohibiting the use of drugs at the workplace would be faced with a dismissal even if it was that person's 'first offence'; and, secondly, the employee was not the only person who had tested positive for THC. Mr Desemele testified that "a lot of them" were discovered and "[e]veryone is getting dismissed as per the company procedure". This evidence was never challenged. In my opinion, from this evidence, it is clear that there was a zero-tolerance approach when it came to a violation of this rule.

[17] It is permissible for the employer to adopt its own disciplinary rules that establish the standard of conduct required of its employees.¹ The purpose of the adoption of these rules is to create certainty and consistency in the enforcement of discipline. These rules must be made clear and be readily available to employees in a manner that is easily understood. The employee conceded that inductions were held in this regard.

[18] Furthermore, the Code of Good Practice²(Code) provides that "[t]he employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration."³

[19] This Code has been consistently applied by the appellant.

[20] In my view, the commissioner failed to recognise that the employer is entitled to set its own standards to enforce discipline in its workplace. In *Rustenburg*

¹ *Shoprite Checkers (Pty) Ltd v Ramdani NO and others* (2001) 22 ILJ 1603 (LAC) at para 98.
² Schedule 8 of the Labour Relations Act no 66 of 1995, as amended.
³ Item 6 of the Code.

*Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and others*⁴, Cameron JA, as he then was, said:

'The mere fact that a CCMA commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair. Commissioners must bear in mind that fairness is a relative concept, and that employers should be permitted leeway in determining a fair sanction. As Myburgh and Van Niekerk suggest:

'The first step in the reasoning process of the commissioner should be to recognise that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of the business. That much is trite. The employer is entitled to set the standard and to determine the sanction with which non-compliance with the standard will be visited.'⁵

Todd and Damant explain:

"The court must necessarily recognise that there may be a range of possible decisions that the employer may take, some of which may be fair and some of which may be unfair. The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair";

[21] In my view, the decision of the appellant to dismiss the employee was fair, taking into account the nature of its business and similar sanctions which have been imposed on other offending employees.

[22] In the premises, the Labour Court erred in its assessment of the commissioner's reasoning. Accordingly, the review ought to have succeeded.

[23] The general rule in labour matters is that costs do not necessarily follow the result but are determined on the basis of fairness and the law I see no reason to make an order of costs.

⁴ (2006) 27 ILJ 2076 (SCA) at para 46.

⁵ (2000) 21 ILJ 2145 at 2158.

⁶ *Chris Todd and Graham Damant 'Unfair dismissal - operational requirements'* (2004) 25 ILJ 896 at 907.

[24] In the result, the following is ordered:

Order

- 1 The appeal is upheld;
2. The order of the court *a quo* is set aside and substituted with the following order:
 - “(a) The review application succeeds;
 - (b) The arbitration award of the commissioner is set aside.
 - (c) It is declared that the dismissal was procedurally and substantively fair.
 - (d) There is no order as to costs.”

_____ B R Tokota AJA

Sutherland and Coppin JJA concurring.

APPEARANCES:

FOR THE APPELLANT:

Ari Saldatos of Soldatos Cooper Inc.

FOR THE THIRD RESPONDENT:

UASA