

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JA 81/97

IN THE MATTER BETWEEN:

R & C X-PRESS FREIGHT

APPELLANT

AND

PIET MUNRO

RESPONDENT

JUDGMENT

KROON JA:

[1] The respondent commenced employment with the appellant (“the company”) during 1992. At the time of his dismissal on 19 September 1995 he was second in command at the company’s Spartan depot and the position he held was that of operations manager. His salary was R5000,00 per month.

[2] The manager of the depot was Mr Morris. The latter’s private secretary was Ms Potgieter. The switchboard operator and receptionist was Ms Young. The administrative block of the depot comprised a reception area, where Ms Young sat, and a suite of offices in which Morris, Ms Potgieter, the appellant and other employees had offices. The Spartan depot was the “hub” of the company’s operations.

- [3] During September 1995 Morris, in consultation with the respondent, decided that the telephones at the depot (with the exception of the telephone in Morris' office which was locked in his absence, and the telephone in the collections department) would be "barred" so as to prevent the company's drivers from misusing the telephones at night time and over weekends by making private long distance telephone calls.
- [4] On the morning of 13 September 1995 the firm commissioned to attend to the barring of the telephones undertook the necessary work.
- [5] Ms Potgieter raised with Morris the problem that the barring of the respondent's telephone would prevent the respondent from making necessary long distance telephone calls to depots in other centres while he was on duty after normal hours. It was decided that the problem could be solved by the respondent being taught to operate the switchboard, to enable him to make such calls.
- [6] Ms Potgieter approached Ms Young and advised her of this decision. Ms Young was requested to type out the necessary steps to enable a person to use the switchboard to make long distance calls, and to give such directions to the respondent.
- [7] It was thereafter that the incident occurred which led to the respondent's dismissal. The details of that event will be set out later.
- [8] The respondent was thereafter charged with misconduct and appeared at an internal

disciplinary inquiry. On 19 September he was found guilty of using abusive and insulting language and also, in so doing, of not maintaining and not promoting sound relationships between the company and its employees.

[9] The sanction imposed was summary dismissal (together with full pay until the end of September).

[10] An internal appeal against the decision was dismissed on 27 September.

[11] In due course the respondent launched proceedings in the industrial court in terms of section 46(9) of the Labour Relations Act, No. 28 of 1956. It was his contention that an unfair labour practice had been perpetrated in that he had been unfairly dismissed. He initially sought relief in the form of an order for his reinstatement plus compensation. At the hearing he restricted his claim to one for compensation.

[12] The industrial court's determination was that the appellant's dismissal on 19 September had been substantively unfair and constituted an unfair labour practice. An award of compensation in the amount of R30 000,00, the equivalent of six months salary, was made in favour of the respondent.

[13] It is that decision which the appellant seeks to assail in this appeal.

[14] There was a dispute in the Court **a quo** as to how events unfolded when the incident in question occurred. In a reasoned judgment PIO AM concluded that the version deposed to by Morris, Ms Potgieter and Ms Young was to be accepted and that where

the respondent's version differed therefrom it fell to be rejected. On a consideration of the evidence and the reasons furnished by PIO AM I am not persuaded that interference with his factual findings in this regard is warranted. Indeed, the contrary was not argued. The relevant facts were accordingly as set out in the following paragraphs.

[15] While Ms Young was typing out directions for the use of the switchboard the respondent came in and enquired what she was doing. She replied that he was to learn how to use the switchboard "in the event that he needed to use the switchboard at night or at weekends". His response was that he did not need to know how to operate the switchboard and he went to his office.

[16] Ms Young advised Ms Potgieter that the respondent refused to use the switchboard. While they were speaking the respondent came out of his office and Ms Potgieter enquired what the problem was with his using the switchboard. Ms Potgieter was no more than puzzled that there should be a problem with the respondent using the switchboard and she was not upset or angry when she directed the query to the respondent. Ms Young confirmed that as far as she could see Ms Potgieter did not provoke the respondent in any way.

[17] The respondent's response was substantially as appears from the following extract from Ms Potgieter's evidence:

"Yes, please continue. --- And I simply said to him, "Mr Munro, what is the problem with the switchboard?". Mr Munro then said, "I am not (excuse me) a fucking switchboard operator. I will not learn to use the fucking switchboard, I am not doing a fucking woman's job. Do you ... (intervention)

PRESIDENT: Okay, go slowly. He first said, "I am not a fucking switchboard operator.". --- Switchboard operator. "I am not going to learn how to use the fucking switchboard. I am not going to do everybody else's fucking job.". I then said to him, "I am just simply showing you how to use the switchboard to make a call if you need to.". Mr Munro just didn't seem to want to listen and said, "Who the fuck are you to give me instructions? I don't take instructions from any fucking woman. I don't take instructions from my wife, why must I take it from you" Who the fuck are you?", and I kept saying, "Please don't swear at me, do not swear at me. I am simply asking to (sic) you what Mr Morris has asked me to tell you.". Eventually, I said, "Please, I'm going down to Mr Morris's office.", which I did. Mr Munro followed me down the passage, carrying on the swearing. "Fuck you", "Fuck off, I'm not going to do this.". We got to Mr Morris's office where I said, "Mr Morris, please ask Mr Munro to stop swearing at me.". Mr Munro then continued, "Fuck you", "Fuck off", then Mr Morris said, raised his voice and said, "Stop it, both of you, go back to your offices.". I then went back to my office and ... (intervention)"

- [18] The respondent's outburst also included a comment to the effect that he was not going to answer telephones. Ms Potgieter attempted to explain to him that the purpose of his learning to operate the switchboard was to enable him to make telephone calls after hours, but she was shouted down by the respondent. The evidence of Ms Potgieter in this regard reads as follows:

"Why did you not try to explain to him as it appears to be the obvious thing to do under the circumstances? --- I did. I tried to explain but he wouldn't let me speak. He was really swearing at me continuously. He wouldn't let me speak. Every time I tried to say something, he would swear at me more.

Yes. --- Until I said, "Don't swear at me", and all I remember saying after that was, "Don't you swear at me", until I walked down the passage.

Was he talking so loud that you couldn't speak?

--- Yes, he was talking loud.

Yes, but so loud that you couldn't get in a word?

--- He wouldn't let me get in a word. He wouldn't let me get in a word."

- [19] Ms Young testified that the respondent's attitude was such that she feared that he might strike Ms Potgieter. In the words of the latter, when she asked the question of the respondent referred to earlier, "all hell broke loose", the respondent was "very

loud” and he was “beyond it”.

[20] As the incident progressed Ms Potgieter also raised her voice. She explained this by saying that she was attempting to get the respondent to heed her pleas that he stop swearing at her.

[21] The incident was very upsetting for Ms Potgieter and she was reduced to tears.

[22] Three days later the respondent approached Ms Potgieter and enquired of her whether she would accept an apology from him. Her reply was that she was not prepared to do so at that stage. In explanation of that attitude she pointed to the fact that the apology was only tendered three days after the incident and added that the respondent did not appear apologetic or contrite; instead, he was “cocky” and not sorry for what he had done.

[23] Support for Ms Potgieter’s assessment that the respondent had no remorse for his conduct appears from the following two passages in his evidence under cross-examination in the court **a quo** (in regard to which it should be recorded that it was the respondent’s claim that initially Ms Potgieter addressed him in a loud and aggressive tone):

“And when you say that Mrs Potgieter raised her voice and said to you that you were to learn how to use the switchboard, that caused you to lose your temper to such an extent that you couldn’t control what you were saying. --- That’s correct.

Now, don’t you believe that that is an entirely disproportionate response?, --- I think at the time it was, that the way that [I] was instructed to do it, it was aggressive and that’s, as I said before, I did lose my temper that time.

Yes. But what I’m saying to you is that it was a completely disproportionate response to the provocation. --- Sorry, I don’t understand.

PRESIDENT: So you were totally over-reacting. ---No, I don't think I was over-reacting at all.

MR FRANKLIN: I see. So if somebody says, "Please will you learn the switchboard" in a raised voice, and you don't think it's disproportionate to respond, "Fuck you, why should I do everyone's fucking job? I don't take orders from any fucking woman.", you don't think that's an over-reaction? --- No, at that stage, no. When that occurred, no, it wasn't an over-reaction."

"So would you accept that you were not justified in these circumstances either in swearing at Mrs Potgieter? --- No. In [these] circumstances, I think it was, unfortunately, as I stated previously, justified because Mrs Potgieter shouldn't have raised her voice in an aggressive manner to me in the first place."

[24] Accordingly, no fault is to be found with the finding of PIO AM, who had the benefit of observing the respondent in the witness box, that the respondent displayed no remorse for his conduct.

[25] In the court **a quo** the respondent further sought to justify his conduct on the basis of a claim that he did not connect the proposal that he learn to operate the switchboard with the joint decision reached by him and Morris that, **inter alia**, his, the respondent's, telephone be "barred" to prevent long distance calls being made therefrom after hours. Instead, so he claimed, he formed the impression that it was intended that he perform the functions of switchboard operator. The claim has only to be stated to be rejected.

[26] Further objections raised by the respondent in the court **a quo** against the necessity for him to learn how to operate the switchboard (which objections simultaneously went in justification of his conduct) were firstly, that his telephone had in fact not been barred and, secondly, that he could have used the telephone attached to the fax machine to

make long distance calls. The stance carried no weight. In the first place, he did not raise the objections at the time. In the second place, he conceded that if in fact his telephone had not been barred (something which was not common cause), that would have been a mistake. In the third place, Ms Potgieter stated that, in order to prevent unauthorised long distance calls being made from the fax machine telephone, it was kept locked, with the key in her possession, and it was not used as a telephone at all. But, in any event, if the respondent was of the view that there were alternatives to his using the switchboard to make long distance calls after hours, the obvious course was for him to raise same with Ms Potgieter or, if he so preferred, with Morris and certainly not to subject Ms Potgieter to the tirade in question.

[27] Two further aspects were invoked by the respondent as having a bearing on the blameworthiness of his conduct. Firstly, he testified that he had been under pressure at work, had been working long hours and was very tired and fatigued. To the extent that it is warranted, some mitigatory effect must be accorded to this feature, notwithstanding that Morris would not accept that pressure of work could have contributed to the respondent's conduct.

[28] Secondly, the respondent testified that Ms Potgieter had in the past been guilty of interfering in his work. He had in fact raised this matter with Morris on one occasion and subsequently also with one Venter (who, incidentally, presided at his internal disciplinary hearing). Nothing had been done about his complaint, however. Morris admitted these allegations, but added that the respondent had merely said that Ms Potgieter should stop interfering in his job and had not indicated that he wished to

take the matter further. On analysis this aspect is not of assistance to the respondent. What the respondent was referring to was the fact that Ms Potgieter had relayed instructions from Morris to the respondent and/or workers under him. However, the court **a quo** correctly held that Ms Potgieter had done nothing wrong in this regard. At best therefore it was merely a perception on the part of the respondent, possibly because of the manner in which Ms Potgieter went about things, that she was interfering with his work. But even if he subjectively had such a perception, on his own showing in the court **a quo** this was not a contributory factor to his outburst. In examination-in-chief he said that when Ms Potgieter allegedly raised her voice to him, he, being very busy and tired, lost his temper and swore at her. Under cross-examination, although initially ascribing a contributory role to the alleged interference by Ms Potgieter and the failure by Morris and Venter to address his complaint thereanent, he thereafter stated that it was not the interference that caused him to lose his temper, but the alleged aggressive manner in which she addressed him (an allegation which, as intimated earlier, is not to be accepted). Moreover, and this is an important aspect, it is difficult to see why Ms Potgieter's conduct on the day in question could have been viewed by the respondent as interference in his job. Ms Potgieter further testified that at no stage did she receive any inkling that the respondent did not like the way in which she relayed messages from Morris and the respondent's evidence was that save for the alleged interference by Ms Potgieter, he and she got on well together.

[29] During argument Mr THEKO, on behalf of the respondent, contended that some blame for the incident should be ascribed to Ms Potgieter, and the respondent's blame

correspondingly lessened, on the basis that, the respondent being her senior, she should not have broached his refusal to learn the workings of the switchboard with him, but should have reported the matter to Morris and left it to him to resolve the issue. With respect to counsel, I am not persuaded that the point has any validity.

[30] Morris testified that the respondent's conduct had damaged the relationship between the parties and rendered him unsuitable to hold his position. In this regard Morris stated as follows: he regarded the incident as "very, very serious"; the respondent lost his temper and swore and used abusive language at his, Morris', secretary in the presence of the switchboard operator; that a computer operator must have overheard the respondent's outburst (a comment confirmed by Ms Potgieter who added that another supervisor must also have overheard the respondent's language); the incident took place in the middle of the day in the company's reception area and had a client walked in at that stage a very embarrassing situation for the company would have been the result; the incident had damaged their relationship; the respondent had shown himself capable of flaring up, losing his temper and swearing in the fashion in question when the issue at stake was an insignificant one; the respondent was accordingly not suitable to hold his position; he, Morris, would not welcome the respondent's reinstatement and in fact could not work with him again.

[31] The position, so Morris continued, had been exacerbated by the respondent's testimony in the court **a quo**. In terms of that testimony the respondent accused Morris of lying in the witness box, of having his knife in for him and of having wanted to get rid of him over a considerable period of time. On the contrary, so

Morris stated, it was he who had suggested that the respondent be promoted to the position of operations manager.

[32] The respondent himself acknowledged that as the second in command at the Spartan depot he had supervisory staff, drivers and general workers under his command, that it was vital for the proper running of the business that his staff had respect for his authority and that the relationships between him and his staff and between him and Morris were good and harmonious and that he got along with and dealt on a proper footing with the company's customers.

[33] A relevant mitigatory factor in favour of the respondent is that he had an unblemished disciplinary record with the company.

[34] PIO AM reached the conclusion that the whole incident was the result of an unfortunate misunderstanding; otherwise the finding would have to be that the respondent either lost his temper for no reason at all or deliberately decided to cross swords with Ms Potgieter, neither of which found acceptance with PIO AM. Precisely what misunderstanding was being referred to is, with respect, not clear to me. It would seem that what the court **a quo** had in mind was the dispute whether it was necessary for the respondent to learn how to operate the switchboard or whether there were alternatives to that course.

[35] With respect, however, I am unable to grasp why it was considered that there was a cause and effect relationship between this dispute and the respondent's outburst. As stated in [26] above, if the respondent considered that there were alternative courses,

he should simply have adverted thereto. What was not justified at all was his tirade against Ms Potgieter.

- [36] PIO AM further held that, while he could not find that Ms Potgieter had actually done anything wrong in the matter of her “interference” with the respondent’s work, the respondent did have the perception that she was interfering with his work. He had raised this “bone of contention” with Morris, but the latter had, wrongly, from a management point of view, done nothing about the complaint. The judgment then continues as follows:

“In my opinion, to determine whether the dismissal was substantively fair, one must ask oneself whether it is fair that an employee, with an unblemished disciplinary record, who for the first time completely loses his temper with a co-employee over a problem of which his superior is aware of (sic), but fails to address, should be summarily dismissed. I think not. The Respondent should at least have investigated the allegations levelled by the Applicant against Ms Potgieter. Further, even if the problem with Ms Potgieter was only perceived by the Applicant, in my opinion, a final warning would have been sufficient.

However, I have regard to the fact that the Applicant’s conduct was, to say the least, totally unacceptable and that it can never be tolerated by any employer on an ongoing basis. However, under these circumstances, to sentence the Applicant to the proverbial death sentence in labour law is not fair. In the [premises] I find that the Applicant’s dismissal was substantively unfair and constituted an unfair labour practice.

Had the Applicant not indicated during the trial that he no longer prays for reinstatement as Mr Morris testified that he does not see his way open to work with the Applicant anymore, a determination of reinstatement without compensation might have been appropriate. However, I am now forced to consider an appropriate amount of compensation only.”

- [37] In fixing the amount of compensation to be awarded PIO AM took into account the fact that, to a large extent, the respondent had been the co-author of his own misfortune. In this regard the presiding officer referred to the relatively serious nature of the respondent’s misconduct, his absence of remorse, his failure to apologise

properly to Ms Potgieter, and the fact that he had attempted to “sell” to the court a much more moderate version of the incident than what actually happened.

[38] With respect I am unable to subscribe to PIO AM’s finding that the respondent’s dismissal was substantively unfair.

[39] A causal relationship between the respondent’s perception that Ms Potgieter was interfering in his work and the respondent’s outburst was non-existent or, at the very best, it was a tenuous one. See [28] above. In any event I agree with counsel for the company that even if there was some perception on the part of the respondent that this was yet another instance of “interference” by Ms Potgieter, to be seen also in the light thereof that the respondent had earlier raised the complaint of her interference with Morris and nothing had been done thereanent, the respondent’s outburst was a response that was wholly disproportionate thereto.

[40] It is trite law that dismissal is an appropriate remedy if the employee’s conduct has caused the relationship between him and his employer to break down or, put differently, if the employer cannot be expected to continue the employment relationship, given the employee’s misconduct.

[41] Conspicuous by its absence in the judgment of the court **a quo** was any consideration of the question as to what extent the respondent’s conduct had damaged the viability of the employment relationship, notwithstanding the evidence of Morris thereanent referred to in [30] and [31] above.

- [42] “The use by an employee of abusive language in the workplace impacts both on the individual employment relationship and more broadly on the interests of the employer’s business. ... Where abusive language is directed at one or more co-employees, the ill feeling and even division which this may create has the potential to damage the productive efficiency of the business. ... Factors which serve to aggravate the offence include the extent of the abuse, its degree, and the level of malice with which it is accompanied.”

THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL : PAK LE ROUX and ANDRÉ VAN NIEKERK, at pp. 124-125.

- [43] **In casu** the extent and degree of the abuse was indeed considerable; it was accompanied by a marked degree of aggression and malice; it was persisted in; it was directed at and against a woman; it was indulged in in the presence or hearing of other persons, one of whom was also a woman and another of whom was the respondent’s superior and manager of the depot; it took place in a public area of the company, with the potential of harm to the company’s image and business relationships; it was not thereafter followed by a genuine apology to the complainant or any show of remorse; instead justification for the conduct was still contended for in the court **a quo**; there was in fact no cognizable justification for it.

- [44] These factors overwhelmingly outweigh any mitigating features operating in the respondent’s favour.

- [45] In the result I am persuaded that the contention of Morris that the respondent’s conduct had put an end to any employment relationship between the parties was valid and should have been upheld.

[46] In **Jamieson v Elsworth** 1915 AD 115, INNES CJ made the following comment:

“And the position of the manager as compared with that of his employer was a distinctly subordinate one, so that the latter was entitled to expect from the former, not indeed subservience, but ordinary courtesy and civility certainly.”

The entitlement to ordinary courtesy and civility is, however, not the exclusive right of a superior. A subordinate has a reciprocal entitlement to expect courtesy and civility from a superior. And an employer is entitled to expect that a superior employee will show such courtesy and civility to a subordinate employee.

[47] During argument Mr THEKO sought to make capital out of the decision in **National Union of Metalworkers of S.A & Another v Schnaier Metal Industries (Pty) Ltd** (1992) 13 ILJ 112 (LAC). In that case a worker summarily dismissed for the use of abusive language was reinstated in his employment. The decision is, however, distinguishable. The **ratio** of the decision was not that the use of the abusive language did not warrant dismissal, but that a disciplinary hearing had not been held and it had not been shown that had such a hearing been held the result would not have been different.

[48] The dismissal of the respondent was accordingly substantively fair.

[49] The appeal is upheld with costs. For the order of the industrial court is substituted the following:

“The application is dismissed”

KROON JA

I agree

MYBURGH JP

I agree

FRONEMAN DJP

DATE OF HEARING: 13 February 1998

DATE OF JUDGMENT: 20 February 1998

FOR APPELLANT: A.E. FRANKLIN instructed by
Bowman Gilfillan Hayman Godfrey

FOR RESPONDENT: C.K. THEKO instructed by MNR Inc.

This judgment is available on the Internet at Website: <http://www.law.wits.ac.za/labourcrt>.