

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: DA 12/08

In the matter between:

SAPPI FORESTS (PTY) LTD

APPELLANT

and

CCMA

FIRST RESPONDENT

ANASHRIN PILLAY N.O

SECOND RESPONDENT

DOUGLA ALEXANDER BOYD

THIRD RESPONDENT

JUDGMENT

WAGLAY DJP

- [1] The Second respondent issued an award in favour of the third respondent in terms of which he held that the appellant's decision to change the terms of the third respondent's suspension, from suspension with pay to suspension without pay, was both substantively and procedurally unfair. He ordered the

appellant to reinstate the original terms of the suspension and to back pay the third respondent his salary during the period of suspension without pay. At the time of the arbitration the third respondent was still on suspension.

- [2] The appellant launched an application to the Labour Court to review and set aside the arbitration award. The Labour Court (Pillay J) dismissed the review application but granted the appellant leave to appeal to this court. The Labour Court found that the appellant had no contractual right to suspend the third respondent without pay and, therefore, the suspension without pay was unfair and that the arbitrator committed no reviewable irregularity.
- [3] The facts in this matter are mostly common cause. The third respondent was employed in the capacity of management forester. He concluded a written contract of employment with the appellant on 25 October 2001. Clause 11 of the contract provided as follows “... *it is mutually understood that you shall be bound by and comply with the rules and policies of the company **in force from time to time**, including its grievance and disciplinary procedures.*” (emphasis added)
- [4] There was no evidence led by either party as to what the applicable policy (hereafter the “disciplinary code”) said about suspension at the time the contract was concluded. In fact the third respondent testified that at the time he concluded his employment contract he had neither access to nor was he shown a copy of the applicable disciplinary code.

- [5] The third respondent had no reason to consider the disciplinary code prior to his suspension, following his release on bail on charges of corruption and/or fraud on 28 October 2005. The criminal charges were initiated by the appellant on the basis of allegations that the third respondent had fraudulently and dishonestly received monies from its clients.
- [6] The third respondent's suspension on 28 October 2005 was with pay *pending the outcome of a disciplinary investigation*. On 31 October 2005 the third respondent was handed a *Notice of a Disciplinary Hearing*. The disciplinary hearing was scheduled for 2 November 2005.
- [7] A recording was made of what was said at the hearing on 2 November 2005. A transcript thereof was submitted as part of the record at the arbitration. Both parties confirm that the transcript properly records what transpired at the Hearing.
- [8] Prior to the hearing the third respondent's wife requested a copy of the applicable disciplinary code from the appellant's Human Resources department. Someone in appellant's employ provided her with a disciplinary code described as *revision 2.1* dated 21 November 2003. This disciplinary code contained an unusual clause which reads as follows: "*Where an employee is criminally charged no hearing will be conducted save and except for suspending him with pay until such time as the criminal case is finalised.*"

- [9] Also prior to the scheduled disciplinary hearing the third respondent's attorney, relying upon the provisions of the disciplinary code, wrote a letter to the appellant informing it that in terms of its disciplinary code it was not entitled to hold a disciplinary hearing until such time as the criminal trial had been finalised. The letter also stated that the third respondent was not given sufficient time to prepare for the hearing; that he needed the hearing to be postponed for at least ten days to prepare for it; that the disciplinary notice was vague; and, that the third respondent be allowed to be legally represented at the disciplinary hearing.
- [10] The above letter was handed to the chairperson at the commencement of the disciplinary hearing. It is evident that Jonker, the company's representative, was surprised at this development. He immediately requested for and was granted an adjournment to study the letter and the disciplinary code referred to. On his return he did not dispute that the disciplinary code relied upon by the third respondent was not the company's disciplinary code but argued that the provisions of the disciplinary code served only as guidelines. Jonker then requested the chairperson to suspend the third respondent without pay stating that the disciplinary hearing was in the hands of the third respondent. The chairperson agreed to this request.
- [11] The transcript of the disciplinary hearing also reveals that the third respondent did not understand the import of the decision. A discussion then took place between Jonker and the third respondent. It is instructive to note the discussion, all of which was recorded:

Mr Jonker: Mr Chairman, maybe I didn't make myself clear. If that's the case, my humble apologies, but what I want to put forward is, in very simplistic terms, Mr Boyd, and I'll try and make the decision easy for yourself, is to go and glean legal advice, that's your constitutional right. What I'm saying is that the decision to ask for a postponement was yours, via your legal advisor... (inaudible). That is fine. What I'm saying to you is that we will oblige to your request for a postponement, but you will be suspended without pay, because according to my interpretation of it, it's on your request. Now, if you come back to me now and you say, "Okay, I hear what you say, I understand what you're saying", you are asking for ten days, I'm saying to you, being fair, although I don't agree that it's necessary, I will grant you a five day grace in terms of the disciplinary code and procedure and in terms of the charges as you requested to prepare yourself, okay. I pointed out to you that we will not allow legal representation. You need to deal with that issue with your attorney. So, the decision you have to make and come back to me with in order for me to make a judgement call on that is, I'm saying I'm happy to postpone for five days, then your suspension stays as is. We set a new date. When you come back we agree on a new date and you set out everything. You come and appear before a disciplinary inquiry, you bring witnesses if you've got any. I will lead my evidence, I'll bring my witnesses and we put everything on the table for the Chairman to decide and make a ruling on it. So, that is entirely up to you. So, if I didn't make myself clear, Mr Chairman, if Mr Boyd does not agree on a five day postponement and he does not agree on that we set a date today here for the next hearing, then I stay with my request that he be suspended without pay.

Mr Boyd: *Sorry, I'm not trying to awkward.*

Mr Jonker: *No, No, I understand that.*

Mr Boyd (*Inaudible*). *So, all that you are saying is, it doesn't matter when the hearing takes place, I'm suspended without pay. So, in six months time, it's really doesn't matter that's the conditions.*

Mr Jonker: *Let me just clarify this for you. I'm happy to grant you the postponement for five days under your now suspended (inaudible) in order for you to prepare, in order for you to do whatever you want to. If you want to get a fairly senior Sappi employee to represent you, that's your right in terms of the company's policy, in terms of the Constitution. What I will not allow in an internal company inquiry, legal representation. So, you need to deal with that with your attorney. If you've dealt with your attorney and come back then you need to give me an answer. We'll postpone for five days and we have the disciplinary hearing with your consent on an agreed date, and you go away and have five days to prepare yourself etcetera. Alternatively you come back and you say, "Look, I've gleaned legal advice. My legal advice tells me that I will not attend the disciplinary hearing until the criminal charges have been dealt with." Then I will accede to that demand, but then your suspension is without pay.*

Mr Boyd: *Sorry that's perfectly clear now.*

Mr Jonker: *Are you happy, maybe I didn't make myself clear, but that's my decision.*

Mr Boyd: *No, I understand.*

Mr Jonker: *Okay, so, Mr Chairman, what I would like to propose is for Mr Boyd to be given the opportunity to speak to his attorney. You can*

use a telephone, I'll direct to and an office you can use the phone, you can close the door and then come back to us within a reasonable period, say 20/25 minutes and give us an answer. Then we can decide which way to go.

Mr Boyd: No, I've made the decision myself. I remain suspended in the meantime. I don't need to consult.

Mr Chairman: You don't want to consult ... (inaudible). What you're requesting is you be suspended without pay?

Mr Boyd: To go with the clause in company disciplinary procedure.

Mr Jonker: That is until the criminal charges be dealt with. In that case Mr Chairman, I stay with my proposal. My request is that the suspension is without pay.

Chairman: I agree to that.

[12] It is clear from the above extract that Jonker, *inter alia* gave the third respondent a choice: he could either chose to be suspended without pay till his criminal matter is finalised or he could take a five day postponement and continue to be suspended with pay. Jonker also informed the third respondent that the appellant would not agree to him being legally represented at the disciplinary hearing and that ultimately it was he (the third respondent) who was in control of the process by which he meant that the third respondent could determine when he was prepared to have his disciplinary hearing.

[13] I must also add that after Jonker asked the chairperson to postpone the disciplinary hearing pending the finalisation of the criminal trial and for the third respondent to remain suspended but without pay, the chairperson,

called upon the third respondent to comment thereon but the third respondent said that he had no comment to make.

- [14] The third respondent was then suspended without pay pending the day of the disciplinary hearing which hearing would not commence until the finalisation of the third respondent's criminal trial. On 2 November 2005, after the hearing, the appellant wrote to the third respondent's attorney stating the following:

“We would like to bring the following to your attention:

- 1. We heard Mr Boyd's representations this morning.*
- 2. We agreed to his request to postpone the Disciplinary Hearing until the criminal charges against him have been dealt with in a Court of Law.*
- 3. His suspension effective 2 November 2005 will be without pay.”*

- [15] The third respondent's attorney responded by letter dated 3 November 2005. In this letter the only complaint raised was that the appellant was not entitled, in terms of its disciplinary code, to suspend the third respondent without pay. The appellant's reply to that was that if the third respondent is aggrieved by the suspension without pay he should avail himself to attend a disciplinary hearing without delay. The third respondent's attorney only replied two months later re-stating the contents of its previous letter of 3 November 2005. In addition, this time the attorney threatened to refer the matter to the CCMA unless the appellant agreed to comply with its disciplinary code. Once again the appellant's response was the same as in its previous

correspondence, which was that the third respondent should agree to an immediate disciplinary hearing and the whole matter will be resolved.

[16] The third respondent's actions signalled that he had no desire to participate in the disciplinary hearing at that stage and referred an unfair labour practice dispute to the CCMA. The referral to the CCMA was couched as follows:

- (a) The issues in dispute: *"I was suspended without pay contrary to company's (SAPPI) disciplinary code and the Labour Relations Act"*.
- (b) What decision would you like the commissioner to make: *"I would like SAPPI to comply with its own disciplinary code and pay me whilst on suspension together with all benefits."*

[17] During the hearing at the CCMA the appellant firstly argued that the CCMA lacked jurisdiction to determine the dispute because it was only entitled to arbitrate alleged unfair suspension disputes if the suspension is meted out as part of a disciplinary sanction short of dismissal. The CCMA dismissed this argument.

[18] On the merits of the dispute, at the arbitration, the appellant produced a different disciplinary code (hereafter referred to as the "new disciplinary code") which it said was the disciplinary code applicable at the time of the third respondent's suspension. Jonker testified that he only discovered the error about the applicable disciplinary code when preparing for the conciliation meeting. This new disciplinary code, he said, originated on 1 June 1995 and was revised on 1 July 2002 and again on 1 January 2004; it was placed on the intranet and authorised by the Human Resources

department. Unlike the disciplinary code that the third respondent relied upon at the disciplinary hearing, this code had a numerical code and was in fact attached to a recognition agreement which the appellant had concluded with the trade union SATAWU. It was, he said, the applicable disciplinary code.

- [19] The new disciplinary code did not have a clause like the one in the disciplinary code produced by the third respondent at the disciplinary hearing¹. Instead, it had a clause reading: *“The Company shall not wait for the result of a criminal prosecution before taking disciplinary action.”*
- [20] The evidence before the arbitrator was therefore that the parties had both been under a common mistake at the disciplinary hearing and were operating from an incorrect disciplinary code and therefore from an incorrect premise. The appellant’s HR department must take the blame for this but the third respondent is not totally blameless. The correct code was available on the intranet and was at the respondent’s disposal.
- [21] The arbitrator decided however, that the question of which disciplinary code was applicable was not important for a determination of the matter. He held that the appellant had no right to suspend the third respondent without pay under either of the codes or under the contract of employment and thus it followed that the suspension without pay was unfair. The Court *a quo* agreed with the arbitrator and dismissed with costs the application sought by the appellant to review, set aside and correct the arbitration award.

¹ See paragraph [8] above.

- [22] In my view, the arbitrator was firstly required to decide whether or not the disciplinary code relied upon by the third respondent was binding. This he failed to do. Had he done this and found that it was binding that would have been the end of the matter because in terms of that disciplinary code the appellant could only proceed with the disciplinary hearing after the criminal trial against the third respondent was finalised, and pending that, the third respondent was entitled to remain on suspension on full pay.
- [23] I am however, of the view that based on the evidence before the arbitrator, the disciplinary code relied upon by the third respondent was not in fact binding. The authenticity of the new disciplinary code produced at the arbitration hearing by Jonker was not disputed and the fact that it was the applicable disciplinary code at the relevant time was borne out by Jonker's evidence. The new disciplinary code was properly coded; attached to the recognition agreement which the appellant had concluded with the trade union; and, it was available on the appellant's intranet, thus available to members of its staff. As opposed to the new disciplinary code the one upon which the third respondent relied was not properly coded; it was not on the intranet; and, there was no evidence that it was ever approved. The document in possession of the third respondent was simply a working draft which served for purposes of discussion; it was also fraught with errors both, grammatical and otherwise.
- [24] The new disciplinary code being the relevant document meant that the matter had to be resolved on the basis that the third respondent did not have a right

to be on suspension with pay pending the finalisation of his criminal trial. It also meant that the fairness of the appellant's suspension without pay was to be dependent upon the new disciplinary code and an analysis of what took place at and after the hearing on 2 November 2005.

[25] The fact that the applicable disciplinary code provided for the holding of a disciplinary hearing notwithstanding a pending criminal trial did not mean that the appellant was compelled to do so, especially, since third respondent applied for the postponement of the disciplinary hearing pending the finalisation of his criminal trial. Hence the indefinite adjournment of the third respondent's disciplinary hearing did not contravene the disciplinary code in operation at the time.

[26] Turning to what transpired at and after the scheduled disciplinary hearing on 2 November 2005:

26.1 The appellant was agreeable to grant the third respondent a postponement of 5 days (as opposed to 10 days) to prepare for the disciplinary hearing. He would remain on suspension for the five days but on full pay. On the other hand, if the third respondent wanted a longer postponement or postponement until the finalisation of his criminal trial then the appellant would agree to such postponement however, it would mean that the third respondent would remain on suspension pending the disciplinary hearing but without pay.

26.2 The third respondent understood the appellant's proposal but believing that the disciplinary code in his possession was the

applicable code accepted the postponement pending the finalisation of his criminal trial reserving his rights with respect to payment of his remuneration while on suspension.

26.3 The third respondent was then suspended, without pay pending the finalisation of his criminal trial.

26.4 The third respondent demanded payment in compliance with the disciplinary code. Appellant's response was that the third respondent should agree to the holding of a disciplinary hearing and the matter could be finalised, if not, he will remain suspended without pay.

[27] Clearly the third respondent was not prepared to have the disciplinary hearing take place and as such remained on suspension – this is a choice he exercised. He also does not raise any objection against his suspension *per se*. However, when it came to pay, it was his belief that he was entitled to be paid while on suspension. His belief was based on the disciplinary code which was never applicable. Once the disciplinary code is found to have no application he is not entitled as of right to remain on suspension pending the finalisation of his criminal trial and be paid. But, he was not without relief, he could have accepted the appellant's invitation to have his disciplinary hearing and finalise the matter and end the suspension. What the third respondent really sought was, as appellant properly contended, as the saying goes, to have his cake and eat it.

[28] The third respondent's entitlement to be paid for the period whilst on suspension pending the criminal trial was dependent upon the validity of the

disciplinary code upon which he relied. That is how he dealt with the matter and that's what his attorney understood when he wrote to the appellant on 3 November 2005 and then again on 13 January 2006. That was the issue before the arbitrator. The arbitrator however operated from the premise that the third respondent was entitled to be paid whilst on suspension simply because the appellant could not provide a written document stating that it had a right to suspend him without pay. This was misdirection because there is no rule that provides that suspension without pay, no matter what the circumstances, is unfair. The misdirection obviously went to the root of the decision arrived at by the arbitrator.

- [29] The arbitrator simply failed to appreciate the issues he was called upon to determine. The referral to arbitration set out the dispute and the relief sought and this related to the appellants failure to implement its disciplinary code, yet the arbitrator failed to consider this at all. It was correct to look at the issue of payment of salary during suspension but this had to be done in the light of the applicable disciplinary code and the evidence presented to him. Again he failed to consider the evidence properly or at all. In the matter of ***CICUSA v Tao Ying Metal Industries & others***² the Court said:

“It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, supra, the matter was put thus: “It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a

CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute...”

[30] Furthermore, in matters such as this, where an employee seeks a postponement of a disciplinary hearing and the employer, who is ready to proceed with the disciplinary hearing, is agreeable to grant that postponement, it simply cannot be unfair to refuse to pay that employee, especially, where the employee is properly on suspension pending a disciplinary hearing. The employer in such a case is granting an indulgence, which it is not obliged to do and cannot be compelled as a consequence of granting an indulgence to cause itself prejudice. The situation would be different if there was an agreement between the parties to the effect that there can be no suspension without pay in any circumstances.

[31] In the circumstances and for the reasons set out above, the misdirection; and the arbitrator's failure to apply his mind to the issues and the material before him, his decision is liable to be set aside. Had he properly considered all the factors the only conclusion he could have arrived at was that the third respondent's suspension without pay pending the disciplinary hearing was not unfair

² [2009] 1 BLLR 1 (CC)

[32] On procedural fairness, this issue does not arise in the matter nor did the third respondent raise it as an issue at the arbitration.

[33] Having regard to the conclusion I have arrived at in respect of the merits I do not believe it necessary to deal with the other issue raised by the appellant in this appeal.

[34] Finally, the issue of costs: this is not a matter in which I believe that costs should follow the results. Had I believed otherwise I still would not have ordered the third respondent to pay costs because of the appellant's failure to prepare a proper record in the appeal. Notwithstanding a muddled record counsel for the appellant had the temerity to suggest that the record complied with the rules of this Court or, at least was in "substantial compliance" (whatever that means), with the rules of this Court. I think this Court should in future visit punitive costs orders against parties who fail to prepare a proper record for appeal.

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

- (i) The appeal is upheld.
- (ii) The arbitration award of the second respondent is reviewed and set aside and substituted with the following order " *the suspension of the third respondent without pay pending his disciplinary hearing was substantively and procedurally fair.*"
- (iii) There is no order as to costs.

Waglay DJP

I agree.

Tlaletsi JA

I agree.

Musi AJA

Appearances:

For the appellant :	Adv M Pillemer SC
Instructed by :	Millar and Reardon Attorneys
For the respondent :	Adv C Nel
Instructed by :	Austen Smith Attorneys