

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: DA13/2006

2008-03-17

10 **In the matter between**

AIRPORT COMPANY OF SOUTH AFRICA

Appellant

And

MOHAMED NABEE & OTHERS

Respondent

J U D G M E N T

DAVIS JA: This is an appeal against a judgment of Ngcamu J which was delivered on 14 February 2006, with the leave of the court *a quo* the matter has come before this court.

20 Briefly, the relevant facts to the extent that I need to traverse them are as follows: First respondent was employed by the appellant in Durban International Airport as a security officer. Following an incident involving a passenger, first respondent was dismissed for behaviour unbecoming an employee of the appellant; and “manhandling” the passenger. The matter proceeded to arbitration before the third respondent under the auspicious

of the second respondent. His award, determined that first respondent's dismissal was both substantially and procedurally fair. The first respondent then launched an application to review and set aside the award in terms of Section 145 of the Labour Relations Act 66 of 1995 ('LAR').

In his judgment, Ngcamu AJ accepted that first respondent was guilty as charged. He held as follows:

10 "The finding ... that first respondent was guilty of the offence was rational. The court cannot interfere with the finding. It is clear that it is the aggressive manner in which Cominelli was handled that is described as manhandling. The action was violent in nature".

The court *a quo* then proceeded to find that third respondent's decision on sanction, that is decision to dismiss the first respondent was reviewable on four grounds. Each of these grounds was described by Ngcamu AJ, as constituting a gross irregularity.

The grounds were set out in the judgment. In paragraph 18 of the judgment:

20 "The incident in respect of which the employee had been charged was old. The warning had expired. It follows that it should not have been considered against the employee. It was a reviewable irregularity take this into account. The employee was dismissed on the strength of the "misconduct for which he was never disciplined as was the position in *Flex-o-thene*

Plastics v Chemical Workers Industrial Union (1999)

(20) ILJ 1028 (LAC). This prevented a fair trial of issues at it amounted to a gross irregularity.”

In short, the first gross irregularity was a consideration that a previous disciplinary misconduct had been taken into account by the third respondent and by the chair of the disciplinary enquiry.

The second gross irregularity was set out in paragraph 28 as follows:

10 *“The applicant was not found guilty of fraud or having acted in a dishonest manner. The commissioner did not deal with the question whether the applicant’s action destroyed the trust relationship. On the evidence presented, I do not agree that it can be said that the trust relationship was destroyed.”*

20 The third gross irregularity as found by the court *a quo*, follows upon an analysis of law which preceded the definitive decision handed down by the Constitutional Court long after the matter had come before the court *a quo* in *Sidumo v Rustenburg Platinum Mines Limited*, 2008 (2) BCLR 158 (CC). The thrust of the reasoning of the court *a quo* was that the third respondent had employed a reasonable employer test in assessing the sanction. Accordingly, *“I am convinced the commissioner misconceived his functions, in relation to his duties of assessing the fair sanction this constitutes a gross irregularity as it prevented a fair hearing on sanction.”* At para 35.

The fourth and final irregularity concerned the finding of the court *a quo*, as third respondent did not consider several mitigating factors which had been raised.

On the basis of these four forms of gross irregularity, the court *a quo* found that “the applicant did not deserve to be dismissed” and accordingly replaced the decision of third respondent of dismissal with a sanction of a final written warning.

It is important to emphasis that this case is not about the finding of misconduct. That is not part of this appeal. All that this appeal deals
10 with is the question of the sanction which must follow from the misconduct. In this regard, it is important to amplify upon the summary provided above of the findings of third respondent in this regard.

*“The passenger Cominelli was adamant that the applicant had in fact grabbed her and that he was extremely rude to her when she made enquiries about the x-ray machines. Cominelli proved to be a good witness and it is hard to believe that she went through the trouble of submitting a written complaint and agreeing to give evidence at his hearing if he
20 did in actual fact act in an unacceptable manner. It is difficult to accept or believe that a customer who was spoken to cordially and calmly when being told to ask management upstairs about the delay and was insipidly and calmly asked to leave the controlled area, would then go through the trouble of*

writing a formal complaint about someone. Cominelli was obviously outraged by something and she claims it was the applicant's conduct and rudeness when responding to her question and his unwarranted action of grabbing her "violently". At the hearing she her version of events and the applicant chose not to question her, ...[indistinct] to question of veracity of her version of events. He led no evidence to suggest to the chair of the hearing that he did not commit the offences that Cominelli had accused him of. Similarly the applicant led no convincing evidence at the arbitration proceedings to convince me that Cominelli was indeed lying and that he did not commit the offence ...[indistinct] and dismissed. Thus is fair to seem that on a balance of probabilities the applicant was indeed guilty of offences for which he was charged."

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That finding is beyond the reach of reconsideration for this Court.

I turn then to the four findings of gross irregularity upon which the court *a quo* justified its interference. Dealing with the question of the other allegations of misconduct by first respondent, it is important to note that the issue of a previous record was raised in terms of a procedural challenge. Third respondent found as follows:

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"The second issue at hand is the manner in which the aggravating circumstances had been taken into

account prior to the decision to dismiss Nabee. Essentially Nabee's contention was that the seven items submitted as aggravating circumstances ... should not be part of the deliberations to decide the sanction at his hearing. The contention was that he was only aware of incidents 1 and 7 and pointed out that incident 1 occurred in 2000 and was therefore no longer valid as a warning. However, during cross examination Nabee did admit that the National Key Point Act, 102 of 1980 did apply to the Durban International Airport and he stated that he was not aware of the clause which stated that a security officer who conduct himself in disgrace and improper unbecoming manner, may have his services terminated ... Although the veracity of the above incidents are called into question, it seems difficult to believe that the employer fabricated these incidents in order to portray Nabee in a negative light and thus expedite his dismissal. The chances are that a number of these incidents did occur (at least two did definitely occurred) and they demonstrate that Nabee has at very least a chequered career regards his conduct with fellow employees, and as more importantly customers. I am therefore of the opinion that the employer was justified in considering the

aggravating circumstances cited in the disciplinary hearing. I am therefore not convinced that this act in any way compromised the procedural fairness of Nabee's dismissal."

When third respondent's reasoning together with that of the disciplinary procedure is examined, it is clear that the warning which had expired had remained on file and that it was taken into account as being relevant in establishing a trend or tracking of behaviour, was well the manner in which the chairman of the appeal also construed the
10 consideration of previous conduct. To the extent that previous misconduct can establish a pattern or a trend, that is something which any disciplinary hearing is entitled to take into account.

I turn to the second irregularity, that is the issue of the destruction of the trust relationship. Once more, there seems to be no basis for finding that only a guilty finding of fraud or dishonesty is sufficient to justify a conclusion that an employment relationship has not broken down. Indeed, there is evidence from Ms Reddy that "we need employees that can uphold the values of our company to fit in and try and drive the thrust of the company and further, I think that the
20 customer's key, we do have rude passengers, I think its you know you need in calm and unflappable, that is how our staff are trained. We have people being abused by passengers but it is how they respond." She then said, "our staff are so calm, they are trained because they do it all the time, they just know how to calm them down, they reason with them and they say "we've got a standard form, tell us exactly what your issues

are and we will respond to you". But we are not allowed to raise our voices or to respond in the same way that passenger is doing because then we will be defeating the purpose."

It is clear from these passages that the approach which were adopted by appellant, was that when, severe misconduct takes place, in the context of this particular form of employment, the employment relationship can be regarded as having being destroyed. There does not seem to be any justification for finding that the third respondent had been guilty of a gross irregularity.

10 There was a considerable debate as to whether in fact the third ground of gross irregularity, namely, that third respondent adopted a reasonable employer test, was justified in terms of third respondent's findings. The key passage of third respondent's award reads thus:

 "This Act (National Key Point Act) provides a regulatory framework and includes the section that delineates a code of conduct for employees and particularly security officers at airports. The above Act stipulates that security officers who conduct themselves in a manner of being improper, disgraceful and unbecoming, may have their employment terminated. It will be difficult to show that the employer has acted unreasonably in
20 deciding to dismiss the applicant for the incident with the passenger. In view of the above, it is prudent to conclude that on a balance of probabilities, the

applicant's sanction was not too harsh in the circumstances."

Mr Omar, who appeared on behalf of the first respondent, attempted to construe the words "the employer has acted unreasonably" as a source for the court *a quo*'s justification that a reasonable employer test has been adopted and that being the test, it no longer finds favour in our law, see *Sidumo* supra at para 61.

I am not convinced that was what the third respondent intended. This court has said before and it is worthy of repetition: arbitration
10 awards drafted by a person such as third respondent, are not to be
parsed as carefully crafted reserved judgments. They are drafted by a
commissioner under severe pressure and it is understandable that often
they may not measure up to a precise standard of a High Court
judgment. That is not fatal to the process. Indeed in a very useful
explication of the approach adopted in *Sidumo*, was given by Zondo JP
in *Fidelity Cash Management Services v CCMA & Others* (unreported
decision, (5 December 2007) at paragraph 103,) where after careful
examination of the implications of the Constitutional Court decision,
Sidumo, he said the following, "in my view the same can be said at a
20 determination of the reasonableness or otherwise of a decision or
finding of an arbitration award made by a CCMA commissioner, under
the compulsory arbitration provisions of the Act. Whether or not an
arbitration award or decision or finding of a CCMA commissioner is
reasonable, must be determined objectively with due regard to all the
evidence that was before the commissioner and what the issues were

that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively is reasonable, should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding of the arbitration award."

Hence, in a case such as the present, based on a finding of misconduct, was it at all unreasonable to conclude that dismissal was an appropriate sanction. That particular approach is one that follows
10 the principles laid down in *Sidumo* at paragraphs 61, 110 and 119. Once it is accepted that this appeal is based on facts which are now no longer in dispute, namely the finding of misconduct, questions of mitigation, that is the fourth form of gross irregularity, are of very little consequence to the dispute.

The question is not whether the court *a quo* considered there to exist mitigating circumstances that caused it to arrive at the conclusion that the sanction of dismissal was unfair, but rather whether the decision of the appellant fell within a range of reasonable responses to the finding of misconduct.

20 For all of these reasons, I am of the view that the court *a quo* erred in its finding of gross irregularity on the part of third respondent. Furthermore, to the extent that it is relevant, I am of the view that the application of the *Sidumo* test justify the finding that third respondent's decision should be confirmed.

For these reasons the appeal succeeds.

The order of the court *a quo* of 14 February 2006 is set aside and replaced with the following:

1. The dismissal of the applicant was fair;
2. The applicant is ordered to pay the costs incurred by third respondent.

There is no costs order made insofar as the appeal is concerned.

JAPPIE & LEEUW JJA: Concurred.

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On behalf of the Appellant: Advocate Myburgh

On behalf of the Respondent: Advocate Omar