

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Durban

Case no: DA 8/07

In the matter between

N. Narainsamy

Appellant

And

Mutual & Federal Insurance Company Ltd

Respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal from a judgment of the Labour Court in an application that had been brought by the respondent to have reviewed and set aside an arbitration award that had been issued by the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) through one of its commissioners, B. Pillemer. The arbitration award related to a dispute that the appellant had referred to the CCMA for conciliation which was later followed up with arbitration when conciliation failed to produce a resolution. The dispute was between the appellant and first respondent and was about the fairness or otherwise of the appellant’s dismissal by the first respondent. The reference to the first respondent is a reference to Mutual and Federal Insurance Company Ltd, the appellant’s

former employer. Although the record and the parties' heads of argument reflect Mutual and Federal Insurance Company as the only respondent, and in that way give the wrong impression that this matter relates to a trial in the Labour Court as opposed to a review application, there were two other parties in the Court below, namely, the Commission for Conciliation Mediation and Arbitration and the commissioner who arbitrated the dispute. They were the second and third respondents respectively. The commissioner found that the appellant's dismissal was unfair and ordered the first respondent to reinstate the appellant retrospectively.

- [2] The first respondent was aggrieved by the arbitration award. It brought an application in the Labour Court to have the arbitration award reviewed and set aside. The appellant opposed that application. The review application was successful and the arbitration award was set aside. The appellant, aggrieved by this outcome of the review application, applied unsuccessfully to the Labour Court for leave to appeal. It subsequently petitioned the Judge President of this Court for leave to appeal and this Court granted her leave to appeal against the whole of the judgment of the Labour Court. Before considering the appeal, it is necessary to set out the facts of this case.

The facts

- [3] The facts of this case are brief and largely common cause. In the arbitration before the third respondent the parties handed in an agreed set of facts. The appellant was employed by the first respondent in 1994. She was dismissed from the first respondent's

employment on the 24th May 2003. At the time of her dismissal, the appellant was employed as a cashier.

- [4] In December 2002 the appellant indicated to one Clements who was superintendent, Durban Accounts, that she would like to have leave from the 28th March to the 7th April 2003. Clements indicated that leave “**would be authorised closer to the time**”. The quoted part of this sentence is taken from par 6 of the agreed statement of facts between the parties. The quoted part was not relied upon to suggest that the appellant was by virtue thereof granted leave for the period that she had requested. It must be taken to mean that consideration as to whether or not authorisation for that period should be granted was going to be given closer to the period requested.
- [5] In February 2003 the appellant was informed by way of an e-mail from Vanessa Jacobs, her immediate superior, and Section Head, Accounts Department, that she would not be allowed to take leave during the period that she had requested, that is, 28 March – 7 April 2003. As an alternative she was offered leave for the period 1-9 April 2003. She was not happy with this response to her request. She thereafter made representations to one Roxana Vahed who was the Accounts Superintendent as a result of which Vahed granted the appellant leave for the period 28 March – 2 April 2003. The appellant made further attempts to obtain the 3rd and 4th April as leave but these were unsuccessful.
- [6] Before going on leave the appellant informed Clements that she might not be able to return to work on the 3rd April. An

arrangement was then made between the two that in the event of such eventuality materialising, the appellant would telephone Ms Jacobs on the morning of the 3rd April. She went away on leave. On the 3rd April 2003 she asked her brother-in-law at about 07h30 to call Jacobs and advise her that she would not be at work on that day and would be back at work only on the 7th April. This meant that she was to be away for the full period for which she had wanted leave including days for which no authorisation for leave had been granted.

- [7] The appellant returned to work on Monday the 7th April 2003. She then filled in a form for an application for leave in respect of the 3rd and 4th April 2003 as the leave that she had been granted was for up to the 2nd April 2003. She handed the completed form to Heather Fountain who was “**Acting Branch Manager**”, Durban Accounts, who signed it at a later stage.
- [8] On the 8th April 2003 a disciplinary inquiry was convened in which the appellant was charged with absence from work on the 3rd and 4th April without authorisation. The appellant had been away on a holiday at Sun City during her leave and on the 3rd April. On the 4th April she returned to Durban. In order to obtain the leave that Vahed granted, the appellant had lied and said that she needed to be in Johannesburg in Court in connection with the appearance in Court of suspects in the case relating to the murder of her brother. This was what she had said to Vahed but the truth was that she was going on a holiday – and to Sun City – not Johannesburg.

- [9] In the disciplinary hearing of the 8th April 2003 the appellant repeated to Clements and Fountain the lies she had told Vahed about what she wanted leave for. The appellant said that on the 23rd April 2003 she was **“in Court (in Johannesburg all day...and was unable to make the call to the company)”** and **“(her) legal advisor...stepped out of the Court room to make the call”**. The appellant was not disciplined for her absence from work and she was asked to keep the inquiry confidential. The version that the appellant told the inquiry was all a lie. The appellant had not been in Court and the person who she asked to telephone the company was not her legal advisor but her brother-in-law. Accordingly, it was not true that that person had **“stepped out of the Courtroom”** to make the call to the company.
- [10] Clements was away on leave from the day after the disciplinary inquiry until the 29th April 2003. Upon her return to work she and Foutain discussed the explanation which the appellant had given them in the disciplinary inquiry for her absence from work on the 3rd and 4th April. A decision was taken to report the matter to Mr Gary Slater of the Forensic Department on the 14th May 2003. This was done. Thereafter Slater formulated a number of questions which were to be handed to the appellant to answer. The questions related to her explanation for her absence from work. These included the identification of the Court that she had said she had attended, the furnishing of the case number, whether she was a material witness in the case and whether the legal advisor who had called on her behalf on the 3rd April was a practising attorney. The appellant’s response was that she could not provide a case number, could not say which court she had attended and that she had been

unable to make the call herself on the 3rd April because she was in court. In other words the appellant continued with her dishonesty and perpetuated the lies she had previously told.

- [11] Slater was not satisfied with the appellant's response to his questions which the appellant provided. On the 20th May the appellant was suspended from work on full pay pending a disciplinary inquiry. On the 23rd May she was charged with **“serious misconduct arising out of gross dishonesty in that on or about 8 April 2003 you made false statements to your superior relating to your whereabouts on 3 and 4 April 2003 thereby irretrievably damaging the trust relationship”**. The disciplinary inquiry was held on the 13th June 2003. The appellant did not **“come clean”** but persisted in her act of dishonesty and in effect insisted that her story was the truth when it was in fact a lie. She was found guilty. On the 24th June 2003 she was summarily dismissed.

Arbitration

- [12] In a subsequent CCMA arbitration before the third respondent the appellant admitted for the first time that what she had told her superiors and in effect the explanation she had given at the disciplinary inquiry of the 8th April was a lie. In effect she admitted having acted dishonestly. The parties simply asked the commissioner to decide what the appropriate sanction was or should have been. This means that in effect the question that the commissioner was called upon to determine was whether dismissal as a sanction had been appropriate in this case.

- [13] I have already said above that the commissioner found dismissal to have been substantively unfair in this case, that she ordered the reinstatement of the appellant and said that her award was to serve as a written warning to be placed in the appellant's file.

Labour Court proceedings

- [14] In the review application that was brought before the Labour Court, the first respondent attacked the award on a number of grounds. The Labour Court, per Gush AJ, granted the review application and set aside the arbitration award. Quite correctly, Gush AJ viewed the appellant's misconduct very seriously which was different from the way that the commissioner had viewed the misconduct. In para 13 of his judgment Gush AJ said of the commissioner's conclusion:

“The 2nd respondent's conclusion that she could not see why the applicants Fountain and the 3rd respondent could not work together or why the employment relationship had broken down, demonstrates a misunderstanding of the consequences of the 3rd respondents conduct. Dishonesty goes to the root of the employment contract and the applicant was entitled to take the view it did. The question is not whether Fountain and the applicant can work together but rather whether the trust relationship between the applicant “the employer” and the 3rd respondent had been destroyed.”

- [15] Then in paragraphs 15 and 16 of his judgment Gush AJ said:

“[15] It appears as if the 2nd respondent sought to justify her imposition of a written warning, in place of

dismissal, by playing down the extent to which the third respondent had been dishonest. She refers to her as “not a good liar” and that “she chose to fib”. The evidence suggests the nature and extent of the dishonesty of the 3rd respondent was far more serious than merely a fib, by an incompetent liar.

[16] The 2nd respondent concludes that the sanction of dismissal induces a sense of shock. This conclusion however stands in stark contrast to the references in the record that the third respondent persistently maintained that the reason she continued to lie (and embellish the lie) was that she believed that she would lose her employment if she confessed to the original lie. It is clear therefore that both the applicant and the 3rd respondent understood the consequences of her action to be a probable dismissal. The 3rd respondent could not on her own evidence have been shocked by her dismissal. For the 2nd respondent then to be shocked, in these circumstances is neither warranted nor justified.”

As I have already indicated above, Gush AJ reviewed and set the arbitration award aside.

The appeal

[16] In the arbitration the first respondent led the evidence of Fountain. The appellant also gave evidence in support of her claim of unfair dismissal. The oral evidence was in addition to the statement of

agreed facts that the parties submitted to the commissioner. The commissioner concluded that dismissal as a sanction was inappropriate and unfair and ordered that the appellant be reinstated and paid compensation. She ordered that her award be deemed to be a written warning for the appellant's misconduct.

- [17] The commissioner said in her award that Fountain testified that, if the appellant had, on returning from leave, “**come clean**” and admitted her dishonesty, she would have given her a warning and docked two days' pay from her salary. The commissioner said that this was of great significance to her. She said:

“Of great significance to me is that fact that for the more serious misconduct of taking extra leave, when this was expressly refused, the [first] respondent did not consider that such warranted dismissal and intended to impose a written warning, irrespectively of the explanation. It is against that norm that the sanction for giving a false reason for taking leave must be assessed.”

The commissioner's reference to taking extra leave when this had been expressly refused is a reference to the 3rd and 4th April when the appellant was supposed to be back at work but did not return to work. The commissioner says that the misconduct of being absent from work when permission to be absent from work had been expressly refused is more serious than the act of dishonesty that the appellant committed. I take a different view. In my view an act of dishonesty is far more serious than absence from work despite an express refusal of authorisation for leave.

[18] The commissioner also said that she also took into account “**the Respondent’s disciplinary code and procedure which lists dishonesty largely as actions of fraud and misappropriation (certainly very different to fabricating reasons for leave and which also recommends that the Respondent implement a process of ‘progressive discipline’ when determining a sanction.**” I am not sure what the commissioner was referring to in this regard because the first respondent’s disciplinary code has got SD – which I think stands for summary dismissal - for all acts of dishonesty listed therein. The code makes it clear that the list of acts of misconduct is not exhaustive. Accordingly, the disciplinary Code does not support the commissioner’s decision not to confirm dismissal as a fair sanction for such misconduct.

[19] The commissioner also took into account the fact that the appellant had a clean disciplinary record over nine years of service at the time of her dismissal. In my view, where an employee is guilty of serious dishonesty or an act of “**gross**” dishonesty, then as a general rule his or her length of service or her clean record does not weigh much. There may be exceptions to this but, without any doubt, this case does not fall under any such exceptions. The appellant was dishonest to Vahed when she provided the false reason she advanced to her in order to obtain a longer leave. She was also dishonest when she said that her brother-in-law was her legal adviser. She was dishonest when she said that she had been in Court in Johannesburg.

[20] The appellant returned from leave and continued with her dishonesty in the disciplinary inquiry of the 8th April 2003.

Subsequently, in answering Slater's questions the appellant continued with her dishonesty. A second disciplinary inquiry was called and she persisted with her dishonest conduct. After the disciplinary inquiry she still did not "**come clean**". When she referred the dismissal dispute to the CCMA, she still did not "**come clean**". She only admitted her dishonesty at the arbitration.

[21] In my view, when regard is had to all the circumstances of this case, the appellant made herself guilty of extremely serious misconduct involving gross dishonesty. This was connected with her work because it was directed at her employer and was done so that she could obtain some employee benefit i.e. leave which she was otherwise not going to get at the time that she wanted it. She was employed as a cashier and, apparently, worked without supervision. This meant that the employer needed to trust her even more than may have needed to be the case if she worked under supervision.

[22] Counsel for the appellant sought to argue that it is a mitigating factor that the appellant took the step of having the company telephoned on the 3rd April 2003 to advise that she was not coming to work and this would have enabled the employer to take steps to get somebody in her place for the 3rd and 4th April. This may be so but, in the light of the seriousness of the misconduct and the fact that it was perpetuated over a long period, I do not think that that factor weighs much when regard is had to all of the other circumstances.

- [23] The commissioner also said that it was of “**considerable importance**” to her that Fountain had said that, if the appellant had “**come clean**” at the first disciplinary inquiry (i.e. on the 8th April 2003) she would have forgiven the appellant. The commissioner said that Fountain ought to have forgiven the appellant. It is not clear why Fountain ought to have forgiven the appellant when the latter did not “**come clean**” at the first disciplinary hearing but in fact perpetuated her dishonesty far beyond that time.
- [24] The commissioner gives other reasons for her decision that dismissal was not fair. I do not propose to deal with each and every one of them. However, I have taken them into account and am satisfied that they do not justify the conclusion to which the commissioner came. I simply want to make one or two observations. The commissioner said that in this case “**dismissal was wholly inappropriate as a sanction**”. She said that it “**induces in me a sense of shock**”.
- [25] The view that the commissioner took of the appellant’s dishonest conduct and the view I take of it are diametrically opposed. The commissioner said that the fact that the employer imposed the sanction of dismissal for the appellant’s dishonest conduct induced a sense of shock in her. What induces a sense of shock in me is the fact that the commissioner not only thought that dismissal was inappropriate in this case but that it induced a sense of shock in her. Indeed, later in her award the commissioner referred to factors that I would regard as aggravating factors but she did so as if she regarded them as mitigating factors. The commissioner said:

“[The appellant] gave a fabricated story to Vahed, about reason for her need for leave, and when once caught in the lie, was forced to perpetuate it at the disciplinary hearing and even after that. The lie grew and grew as the Respondent’s forensic department investigated her explanation and in my view created, out of all proportion to the misconduct, a mountain out of a molehill.”

[26] It seems that the commissioner had no appreciation of the seriousness of the appellant’s dishonest conduct. This was very serious misconduct involving dishonesty perpetrated by an employee employed in a position of trust involving working with the employer’s cash. The dishonesty was perpetuated over weeks and was persisted in over two disciplinary inquiries.

[27] It is true that the commissioner was the one who had the power to decide whether dismissal was a fair or appropriate sanction. It is also true that generally speaking the Labour Court would be required to defer to the CCMA when it comes to a decision as to what the appropriate sanction is. However, the Labour Court is entitled or even bound to intervene where the conclusion of the CCMA that dismissal as a sanction in a particular case is unfair is one that a reasonable decision-maker could not reach. In my view this is such a case. When regard is had to all the facts of this case a reasonable decision-maker could simply not conclude that dismissal as a sanction was unfair. Accordingly, the decision of the Labour Court to review the award and set it aside was correct. With regard to the costs I am of the view that the requirements of the law and fairness dictate that the appellant should pay the first

respondents' costs. In the premises the appeal is dismissed with costs.

ZONDO JP

I agree.

PATEL JA

I agree.

KRUGER AJA

Appearances

For the appellant : Mr T.E Sewy

Instructed by : Berkowitz Attorneys

For the respondent : Mr G.O Van Niekerk SC

Instructed by : Justin Dorkin Attorneys

Date of judgment : 12 February 2009