

IN THE LABOUR APPEAL COURT OF SOUTH AFRICAHELD AT:

JOHANNESBURG

CASE NO: DA 21/08DATE: 2010-02-26

10 In the matter between

RUSSELS FURNITURES (PTY) LIMITED**Appellant**

And

THE CCMA & OTHERS**Respondent**

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Coram: DAVIS JA, JAPPIE JA, REVELAS AJA

J U D G M E N T

DAVIS JA: The third respondent was employed by appellant as a business manager for the Russels Chatworth store. It appears from the papers to be one of the five most lucrative stores in the Russels division. He was dismissed on 13 December 2005, after failing to attend an incapacity hearing to which I shall refer later. He referred a dispute concerning the fairness of the dismissal to the first

respondent. Where the dispute was not resolved in conciliation, it was then referred to arbitration. The arbitration was conducted by the second respondent who dismissed the claim for unfair dismissal and made no order as to costs.

The third respondent then brought an application to review and set aside the award on 18 November 2006. In this, he proved to be successful before Cele J, who in a judgement on 27 August 2008, reviewed and set aside the award and remitted the matter to first respondent for a *de novo* arbitration hearing before a commissioner other than the second respondent.

It is against this judgement that the appellant sought to option leave to appeal.

Briefly the chronology the events giving rise to the dispute can be summarised thus:

On 1 July 2005, appellant (Russels) received a grievance against the third respondent from 11 employees employed at its Chatworth store. It appeared that their complaint focused on third respondent's conduct and behaviour. They considered that it was impossible to work with him. On the same day, he was suspended on full pay with immediate effect, on the basis that the conduct which was alleged was so serious that no other approach could be adopted. His suspension was made subject to the conclusion of investigations into these allegations of incompatibility.

On 5 July 2005, Mr Roets, the Russels Human Resources Manager held a discussion with third respondent concerning the

suspension. A notice to attend a grievance hearing was then handed by Mr Roets to third respondent on 7 July 2005. Third respondent refused to attend and then submitted his own grievance against Mr Roets. He referred the matter to first respondent alleging an unfair labour practice because of alleged victimisation by the employee together with the decision to suspend him on 6 July 2005. Third respondent consulted a psychiatrist specialist who declared that he was unfit to work from 6 July 2005 to 30 July 2005.

On the same day, Russels head office replied to third respondent and indicated that the company was in receipt of his grievance and intended to deal with the grievances from the staff of the Chatworth's store but that the grievance could not effectively be resolved in his absence.

On 7 July, third respondent did not attend the grievance hearing. During the period 28 July to 5 August, it appears the third respondent was a patient in Umhlanga Hospital. From 5 August to 30 September 2005, he was ill and did not work. On 30 September, he obtained a medical certificate from the same specialist, a psychiatrist reflecting that he was unfit for work from 1 September to 30 September 2005 due to depression.

On 30 September 2005, he received a notice to attend a consultation on 2 October 2005. A meeting was held between third respondent Mr Roets and Mr Kingsley who was another human resource manager at Russels. The minutes reflect that third respondent's incapacity was described as "depression, knee injury and

heart problems". It was agreed that an application was made for a temporary, medium term disability.

Mr Roets filled out an acknowledgement of disability claims procedure document, for submission to Russell's insurers in order to obtain a disability payment of 100 per cent of third respondent's salary for the first three months from his last date of active service and 75 percent for a maximum of an additional three months thereafter.

On 13 October 2005, third respondent was informed that he had been effectively off sick since 6 July until 13 October 2005 when serious operational problems have been generated at the branch because of his absence. He was removed as a manager of the branch and replaced with another manager. On 18 October 2005, third respondent's attorney wrote to Russels denying that he could not function at the branch and requested that the suspension be lifted on 1 November 2005. The parties met to consider an unfair labour practice dispute brought by third respondent. During the meeting, an offer was made to settle the dispute concerning outstanding leave pay and salary but this is not accepted.

On 3 November 2005, Russels notified third respondent to attend a grievance hearing in respect of the complaint that had been generated at the Chatworth branch. That meeting was to be held on 4 November. On the same day, third respondent's attorney wrote to Russels to inform the company that third respondent had suffered a relapse because of high blood pressure and depression. Again the question of an incapacity application was raised.

On 4 November 2005, Russels replied, informing third respondent that he remained on suspension until a grievance hearing could be completed and that respondent's own grievance hearing would stand over until after the termination of the so called Chatworth's grievance hearing. It appears that third respondent declined temporary disability and that company would make no application on his behalf to the insurers in this regard. Third respondent did not attend the grievance hearing scheduled for that day.

On 9 November, third respondent's attorney sent Russels two medical certificates which effectively booked him off from 2 November to 30 November. On 14 November, Russels replied to the third respondent's attorney's letter of 9 November. On 1 December 2005, third respondent obtained a further medical certificate, booking him from 1 December to 15 December. On 7 December, third respondent received a notice to attend a grievance hearing on the following day, that was 8 December, to deal with the so called Chatworth grievances. Third respondent's attorney replied to the effect that a CCMA hearing concerning the unfair labour practices had been postponed to 25 January 2006 and for that reason he would not attend the grievance hearing. Mention was also made of the medical certificate report, booking the respondent off until 15 December 2005.

On 9 December, third respondent's attorney wrote saying that third respondent could not attend the incapacity consultation which had been scheduled for 12 December, as he had a visit scheduled with the psychiatrist on that day. On 12 December he did not attend the

incapacity consultation. On 13 December, third respondent again did not attend the incapacity hearing and he was then dismissed.

It is also relevant to the chronology of events, to refer to a letter which was generated by Mr Roets on 13 December 2005, written to third respondent regarding the incapacity consultation. The letter reads, *inter alia*, as follows:

“On 13-12-2005, you again failed
to attend this consultation.

The Chairman of the proceeded with
the consultation in your absence.

This consultation consisted of two
categories of concern:

1. Your inability to relate to your
employer and your fellow
Colleagues, thereby rendering
you incompatible for a position,
as an employee of Russels.

Your absence from your place
of work over an extended period
of time, rendering you unable to
fulfil your contractual obligations
for which you were appointed.

After considering all the available
facts relating to the above, the
Chairman found in terms of the outcome

of this hearing that the Company is left
with no other option, other than to terminate
your serviced with effect from 13-12-2005
with one month's salary in lieu of notice"

As Mr Redding who appeared on behalf of the appellant observed, there had been four attempts to hold a grievance hearing on 7 July when third respondent was too ill to attend, on 1 September when he again failed to attend because he was ill, on 4 November where it was alleged that he suffered a relapse of depression, on 8 December where he refused to attend because he was too ill. There was also a hearing of the first respondent which was pending on 25 January 2006, to deal with his unfair labour practices.

In short, the entire saga had taken over six months and serious questions relating to third respondent had remained unresolved during this period.

When the decision of Russels was taken to the second respondent on review, the latter made a point in the introduction to her award that the notice of the incapacity consultation had raised the question of the extended absence from work, the ability to perform according to a required standard that could determine the dispute. However, she also noted that the letter which had been sent to the third respondent, to which I have already made reference, that is the letter of 13 December 2005, had raised two categories of concern, incompatibility and an absence from work. Having heard evidence from

both the representatives of Russels and third respondent, the second respondent said the following:

“Applying these tests to the current facts concerning incapacity, what is clear is that Applicant’s incapacity was of a recurrent nature. The recurrence was frequent to the point of the extent that it continued over a period of some six months. The effect was serious on the operations of the Chatworth branch of the Respondent. The Applicant was off for some 159 days in the context where, whatever the rights and wrongs of the grievance may have been there was clearly a serious problem between him a significant body of the staff at the store that had to be dealt with and resolved.”

She then went on:

“It is in this context, I have to assess whether the decision to dismiss was reasonable. It does not have to be a decision I would have made in the situation or even the only reasonable decision. It merely has to be a reasonable

response to the situation....

I am not satisfied the decision
by the employer to terminate the
employment contract was not reasonable
and in the result cannot interfere
with or uphold the decision.”

At this stage of the award, the second respondent had dealt exclusively with what she categorised as “his frequent and erratic periods of absence from work.”

Having made the decision that the termination of the employment contract was not unreasonable, she then turned to the further issue regarding the alleged confrontational and aggressive approach of the third respondent which Russels had alleged resulted in incompatibility between him and his colleagues. Thereafter she went on to say, “I accordingly find the dismissal to be fair”.

I mention this treatment of the second of the two categories of complaint, being incompatibility because when the matter was heard by Cele AJ, (as he then was) this question played a crucial role in the reasoning of the learned judge.

The court *a quo* was faced in effect, with an application to review the decision of second respondent.

In coming to the conclusion that it should be set aside, Cele AJ said the following:

“Today I have to ask myself whether
the decision reached by Commissioner

is the one that a reasonable decision maker could not have reached. If I say yes, it is the one that a reasonable decision maker could not have reached, I should review the award. If I say it falls within the range of reasonableness, it is one of those decisions that could have been reached by a reasonable decision maker, I should then sustain it.

What worries me in this matter which favours me granting the application for review, is firstly the Notice of Incapacity Consultation....

It relates to the issues that would be dealt with at such incapacity as extended absence on leave and incapacity to perform according to a required standard or standards due to ill health or injury”.

That is the notice that had been given to appellant. If he attended that hearing he should have prepared for only that but the outcome of that hearing as I see it, reads:

“This consultation consists of two categories are concerned.”

The learned judge then goes on to set out two concerns to which I have made reference earlier. He then continues:

“The first one would have related to

an inquiry which the company intended to hold against the applicant, it should have, in my view, featured in this hearing. It is difficult to test how far the mind of the Commissioner was contaminated by this matter, which in my view, should not have featured. If you look at the award itself, she continues to add and she looks at a combination of the two issues.”

It is important before examining this reasoning, to again refer to the approach which is now determinative of these hearings as laid out in *Navsa AJ, in Sidumo & Another v Rustenburg Platinum Mines & others*, (2007) 28 ILJ 2405 (CC). Briefly the learned Judge says, paragraph 109-110:

“Review for reasonableness does not threaten the distinction between review and appeal. The Labour Court in reviewing awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between an appeal and review.”

To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by

the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*:

“Is the decision reached by the commissioner, one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices but also to the right administrative action which is lawful, reasonable and procedurally fair.”

In short, the test of reasonableness is designed to ensure that the labour courts not to conflate the tests of review and appeal, and not to substitute their own decisions for that of the decision maker but merely, on the conspectus of facts, to interrogate whether the decision reached was one that a reasonable decision maker could reach on the facts.

To some extent this court has added a coda to the dictum of Navsa AJ, in the *Fidelity Cash Management Services CC v CCMA & others*, (2008) 29 ILJ 964 (LAC) in which Zondo JP, emphasised that an arbitration award cannot be set aside simply because the reviewing court would arrive at a different decision to that of the commissioner. The learned Judge President went on to say at Para 102:

“However other reasons upon which the Commissioner did not rely to

support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the Commissioner gives reasons A, B and C in his or award, but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E, and F upon which he did not rely but could have relied, which are enough to sustain the decision.”

In other words, when a court reviews a decision of second respondent, it tests not on the basis of its own decision but in terms of a decision of a reasonable decision maker. The conspectus of facts which can be taken into account to answer this question, are those before the reviewing court, which would then allow the reviewing court to say, in the words of Zondo JP, there are also reasons D, E and F which were not relied upon by the decision maker but which could have been relied upon, given the facts which are established. Therefore this justifies a conclusion that this is a decision that a reasonable decision maker would have made.

Unless this approach is adopted carefully, far too many review applications will come before this Court, thereby subverting the expeditious process of dispute Resolution. In this case, it is clear, on

the facts before the second respondent, that third respondent was absent from work for 159 days, that he held a responsible position and that this absence clearly caused considerable difficulty, to the operational enterprise of Russels.

The second respondent, in her decision, took account of these facts and came to a conclusion, that based, on the law as she had set it out, this lengthy absence which had a serious effect on the operations of the Chatworth's branch of the respondent, justified the dismissal of the third respondent. That is a decision to which a reasonable decision maker could surely arrive.

Accordingly, I would set aside the decision of the court a quo and replace it with the following order:

The application for review is dismissed with costs.

There is no award for costs in respect of this appeal.

JAPPIE, JA)

REVELAS, AJA) Concur.

