IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT:

JOHANNESBURG

CASE NO: DA22/08

DATE: 2010-03-17

In the matter between

GORDON TIMOTHY **Appellant**

And

NAMPAK CORRUGATED CONTAINERS (PTY) LTD **Respondent**

Coram: **DAVIS JA, JAPPIE JA, REVELAS AJA**

J U D G E M E N T

DAVIS JA: This is an appeal against the decision of the court *a quo* in upholding an application for a review of the finding of third respondent to the effect that the first respondent's dismissal of appellant was substantively unfair.

In summary, the facts of the case can be summarised thus:

Appellant was employed by first respondent on 1 September 1994, initially as a warehouse distribution controller, subsequently as the waste manager and finally he held a post of waste buster. It appears that, in January 2006, he generated

a telephone call to Ms Brisley who was employed by attorneys Beal Chaplin Hathorn as a collection clerk. In this telephone call, appellant raised a query about a Bradlows debtor and purported to represent that he was Gordon Timothy, an attorney. Ms Brisley advised appellant that she could not give the balance requested because of computer system problems with Bradlows. Many further questions were put by appellant but Ms Brisley informed him that she was not able to provide him with privileged information.

During this conversation, as I have noted, appellant claimed he was an attorney, acting on behalf of respondent and, further, on behalf of a Bradlows debtor, who too was an employee of first respondent. It appears that, according to the evidence of Ms Brisley, appellant became very aggressive during this telephone call and insisted that Ms Brisley was robbing his client. Notwithstanding her attempts of an explanation, he persisted with his abusive conduct.

During the telephone conversation, Ms Brisley asked for details of appellant's firm. He said that his firm was called Timothy and Associates. According to Ms Brisley, because of this abusive telephone conversation, the unreasonable conduct of appellant, and his inability to understand the most elementary principles relating to a garnishee order, which were relevant to the particular case and further, because she had never heard of a firm of attorneys called Timothy and Associates and that first

respondent would be unlikely to hire a new firm of attorneys, she telephoned the number which had been given to her by appellant. This number proved to be one of the telephone numbers of first respondent. She was then put through to appellant and again appellant became abusive, screamed over the telephone and resented the fact that he was being questioned by her. Again he repeated that he was an attorney based at first respondent's premises and that he was acting on behalf of employees.

As a result of these two telephone conversations, a letter was generated from Ms Brisley's employer, the attorneys Beall *et al,* on 5 April 2006. The relevant portion of that letter reads:

> "We confirm that Mr Gordon Timothy has contacted a number of our staff employed in our garnishee order department and had represented to our staff that he is an attorney acting on behalf of Nampak and representing various Nampak staff members. He has also represented to our staff that he is a supervisor of Nampak at HR department. On the strength of his representations, he has demanded statements of account and queried balances outstanding for Nampak an employee who was subject garnishee orders on behalf of our clients.

> We have no objection to supplying this information to the staff member concerned or any authorities and qualified HR employee. However, Mr Timothy is aggressive, unreasonable and has on occasion threatened court action on behalf of the person he represents.Please take action against Mr Timothy, failing which we will report him to the Law Society who will charge him for impersonating an attorney."

Subsequent thereto, a disciplinary hearing was conducted on 8 May 2006. Three charges were brought against appellant, that he misrepresented himself to be an attorney acting on behalf of Nampak, threatened legal action on behalf of Nampak and its employees in the event his demands for certain information have been met and brought first respondent into disrepute. He was found guilty on all three charges and subsequently dismissed.

The appellant referred a dispute relating to his unfair dismissal to the second respondent on 14 June 2006. A certificate of non resolution was issued by the second respondent on 11 July 2006. Arbitration proceedings eventually were heard before third respondent on 7 September and 6 November 2006.The award made by the third respondent was

to the effect that the dismissal have been substantively unfair and first respondent was thus ordered to reinstate appellant in its employment upon the same terms and conditions he was employed prior to his dismissal effected on 7 August 2006.

The application to which I have made reference earlier was then brought before Molahlehi J. The learned judge examined the reasoning of the third respondent and applied, as he was obliged to do, the test of a reasonable decision maker as set out by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines & Others,* (2007) 12 BLOR 2405 (C). He found:

> "In the present instance, my view is that the award of the commissioner is unreasonable because the commissioner failed to look properly evaluate and take into account the totality of evidence placed before him. The Commissioner misconstrued the principles applicable to the assessment and evaluation of the fairness of the sanction".

Molahlehi J, referred to the fact that the conduct of the appellant was in contravention of Section 83(1) of the Attorneys Act, 53 of 1997. The conduct did not only constitute a criminal

offence but it was committed by a person studying law, who should have known that his conduct was unlawful.

In the view of the learned Judge:

> "The evidence before the commissioner evidently shows that the third respondent was guilty of placing the name of the applicant in disrepute by projecting himself as an attorney retained by the applicant and furnishing the telephone number of the applicant in this regard. The applicant's disciplinary code specifically makes it an offence to wifully brings the name of the applicant in disrepute."

Molahlehi J, thus found that it was unreasonable for third respondent to have concluded that the dismissal was substantively unfair and further, given the nature of the conduct that a dismissal was too harsh a sanction.

In his view:

> "This is not a decision a reasonable Decision could have reached in the circumstances of this case".

I should add that, in evaluating the sanction Molahlehi J, also took into account a further fact that appellant showed no remorse with regard to his conduct.

On appeal to this court, Ms Bezuidenhout who appeared on behalf of the appellant, accepted, contrary to the approach which was adopted by the third respondent, that the test as to whether an employee brings an employer into disrepute is an objective test. In this correct concession, she brought into question the reasoning adopted by the third respondent. Third respondent, in addressing the charges, concluded that there was only one real charge against the appellant that is bringing the first respondent into disrepute. For the purposes of judgement, I do not propose to engage in an analysis of whether there are implications concerning the fact that the appellant had initially been found guilty on three charges by the disciplinary hearing. However, in dealing with the charge of bringing the company into disrepute, the third respondent said:

> "I am satisfied that he did not act wilfully.
> He had absolutely no intention
> whatsoever of bringing the company
> into disrepute and merely intended
> to obtain the balance of a debt
> from attorneys who had not provided
> this to a colleague of his. His sole intention
> was to use the weight of the company to

achieve this end. Again the applicant

should be re-instated".

Given that this is an incorrect approach, the award itself is susceptible to review. A reasonable decision maker would have engaged in an objective evaluation as to whether appellant brought the company into disrepute.

Ms Bezuidenhout sought to support her argument by reference to the letter to which I have already made reference from the attorneys to first respondent in which there was no indication that they considered the conduct of appellant to have brought first respondent into disrepute. In addition, she placed emphasis on the evidence of Ms Brisley to the effect that she did not think worse of first respondent as a result thereof. With regard to this latter piece of evidence , as Mr Vanas ,who appeared on behalf of the respondent, correctly pointed out, Ms Brisley's evidence is not as clear as suggested by appellant .There are indications in her evidence that she had thought the conduct of the appellant had jeopardised the reputation of first respondent.

That of course is not the end of the matter. Even assuming that the evidence of Ms Brisley is in favour of the appellant, an objective test means that a decision maker has to examine the entire context in which the conduct alleged, has taken place and the effect thereof.

In this case, the objective facts can be summarised thus:

Appellant purported to represent himself as an attorney acting on behalf of his employer and operating from the premises of his employer. Apart from the fact that that is a criminal offence for reasons that I have already articulated, his conduct represents a gross misrepresentation, whereby although not an attorney, he purported to represent that he conducted an attorney's practice. The appellant provided a telephone number of the first respondent to Ms Brisley which only compounds the misrepresentation. In addition, he became abusive when Ms Brisley questioned his status as an attorney.

Objectively this kind of dishonest conduct, which represents to the public at large that an employee is conducting a legal practice in circumstances where it is illegal, has the potential, at the very least, to call into question the reputation of the employer. The example only has to be compounded to a situation where an employer finds itself with many employees behaving in this fashion. On appellant's argument so long as customers or recipients did not consider that these employees have not brought the company into disrepute, the court would be powerless to come to the employers relief. The employer would effectively be without a remedy. That cannot be so on an objective test which must be applied in these cases. An objective test enjoins an examination, in all the circumstances, the nature of the conduct, evaluates the turpitude and the

seriousness thereof and then makes an evaluation as to whether the charges can be sustained.

Viewed in this way, had a reasonable decision maker adopted an objective test to the facts of this case, there is no doubt that a conclusion opposite to that reached by third respondent would have been sustained. Once it is accepted that the appellant had brought the company into disrepute, by virtue of his dishonesty, the further question arises as to the appropriate sanction.

Ms Bezuidenhout correctly pointed out that dismissal is tantamount to capital punishment in labour law. It should not be implemented nor imposed as a default position but rather only in cases which so justify a serious sanction.

Accordingly, she contended that, given the fact that the appellant had an uunblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave raise to this dispute, a form of progressive sanction would have been more appropriate. I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of his wrongdoing. By contrast, the appellant denied that any conversation or conversations had taken place with Ms Brisley. Throughout the disciplinary hearing and the hearing before third respondent appellant continued to take the view that the allegations brought against him were no

more than lies. Appellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial. That places this case into an order of different magnitude from those urged upon us by Ms Bezuidenhout.

Mr Vanas thought to elevate the issue to a more conceptual debate. He contended with justification that there are circumstances where an employee has committed an act of dishonesty. The decision maker who has to decide whether an arbitration or court must be cautious, before simply assuming that disciplinary sanctions must always and invariably be based on a progressive system. In other words, in a case such as the present, where there is an egregious act of dishonesty, and I use that word advisably because, as I have already indicated appellant‘s conduct throughout this dispute constituted a perpetuation of the dishonesty, by way of a denial, conversely complete a lack of acknowledgement of any wrongdoing, there is a formidable obstacle in the way of the implementation of a progressive sanction. Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer’s organisation, in

circumstances where the employment relationship can be restored to that which pertained prior to the misconduct.

In these circumstances, where there is nothing more than an aggressive denial and a perpetuation of dishonesty, it is extremely difficult to justify a progressive sanction, particularly in a case where the dishonesty is as serious as this dispute.

In the result, I would dismiss the appeal with costs.

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JAPPIE JA:)

REVELAS AJA:) Concurs

APPEARANCES

For the Appellant: R. Bezuidenhout

Instructed by: Umika Gopichundo Attorneys

For the Respondent: Adv. M. Vanas

Instructed by : Cliffe Dekker Inc.

20 Date of Judgment: 17 March 2010