



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA13 /14

In the matter between:

CITY OF CAPE TOWN

Appellant

and

SIPHIWE FREDDIE

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

MELWYN NASH N.O

Third Respondent

Heard: 7 May 2015

Delivered: 15 March 2016

Summary: Racism and racial abuse in the workplace cannot be tolerated.

Coram: Tlaetsi DJP, Davis et Ndlovu JJA

JUDGMENT

NDLOVU JA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Rabkin-Naicker J) handed down on 15 February 2014 in which the Court *a quo* dismissed the review application launched by the appellant against the arbitration award issued by the third respondent (the arbitrator) operating under the auspices of the second respondent, the South African Local Government Bargaining Council (the bargaining council).

[2] In terms of the award, the arbitrator held that the dismissal of the first respondent, Mr Sphiwe Freddie (Freddie) was substantively unfair and ordered the appellant to reinstate him to its employ with retrospective effect from the date of his dismissal, plus further ancillary relief. The Court *a quo* granted the appellant leave to appeal to this Court.

[3] The appellant is the City of Cape Town Metropolitan Municipality, constituted in terms of Section 12 of the Local Government: Municipal Structures Act 117 of 1998 (the Municipality). Freddie was formerly employed by the Municipality with effect from 22 November 1993 as an assistant professional officer until his dismissal on 5 March 2012 consequent upon his conviction for misconduct by the Municipality's disciplinary enquiry. At the time of his dismissal, he was earning R205 140-00 per annum.

[4] The issue between the parties was whether Freddie's dismissal was the appropriate sanction in the circumstances of this case.

The factual matrix

[5] On 6 June 2011, Freddie was summoned to appear before the appellant's disciplinary enquiry in respect of misconduct charges which were formulated as follows:

- '1. You misconducted yourself in that between 25 February 2011 and 15 April 2011, in various email communications and in a one-on-one situation you were grossly insubordinate/insubordinate in that you acted in an insolent, provocative, aggressive and intimidatory manner towards your management team.
2. You misconducted yourself in that on or about 16 March 2011 at approximately 12:01 pm you behaved in an unacceptable manner when you abruptly ended the phone call with your colleague by "putting the phone down in his ear whilst he was still talking."
3. You committed serious misconduct on or about 02 June 2011 when you e-mailed your Line Manager (Mr. I Robson), a derogatory, insolent, racist, provocative and offensive e-mail.'

[6] He was found guilty on counts 1 and 3 and acquitted on count 2. As stated, he was dismissed on 5 March 2012. His internal appeal was unsuccessful. Hence, he referred a dispute of unfair dismissal to the bargaining council for conciliation. After the conciliation process failed, the matter proceeded to arbitration before the arbitrator.

The arbitration proceedings

[7] As stated already, the issue for determination by the arbitrator was whether Freddie's dismissal was substantively fair, in the sense of whether the sanction of dismissal was the appropriate remedy in the circumstances of this case. The aspect of procedural fairness was not in dispute.

[8] Witnesses for the appellant were Mr Irvin Robson (Manager: Public Participation Unit) and Mr Frederick Venter (Professional Officer: Public Participation Unit). Freddie gave evidence and was represented by Mr Brendan Guy, his attorney of record. The appellant was represented by Mr Ashley Lawrence.

- [9] It was common cause that Robson was in overall charge of the public participation unit (the PPU). Both Venter and Freddie worked under him. The PPU was directly responsible to the Office of the Speaker of the appellant's Council and the Executive Mayor.

The appellant's case

- [10] Robson testified that the PPU received a directive from the Office of the Speaker to account on how the PPU staff utilised their official time. As a result of this directive, Robson instructed the staff concerned, including Venter and Freddie, to submit reports showing a detailed breakdown of their projects. A report would need to reflect, among other things, the nature of the project, what gave rise to it and the current progress. According to Robson, Freddie's report did not meet these requirements. Freddie simply forwarded an e-mail with attachments, without any explanation.

- [11] Robson further testified that Venter had compiled his report in accordance with the correct format; and he then called both Venter and Freddie to a meeting at which he instructed Venter to guide Freddie in compiling his report in accordance with the correct format. This sparked the altercation. Robson testified that Freddie, in an aggressive and intimidating manner, confronted him, questioning why he was expected to take instructions from Venter. During the altercation, Freddie threatened Robson, saying: "*I will deal with you Irvin*" (addressing Robson by his first name).

- [12] Freddie simply refused to work with Venter on the compilation of his report in accordance with the correct format. Instead, as Robson put it, Freddie "*embarked on a bombardment of emails*", which he copied to certain employees within the appellant's organization (including Robson himself), accusing Robson of management incompetency and of being a dismal failure.

- [13] Given the fact that the gravamen of Freddie's alleged misconduct (referred to in counts 1 and 2 of the misconduct charge) was founded mostly on the said e-mails; and as much as I would be loath to have this judgment "littered" with so

many emails, I nevertheless deem it apposite and fair to refer to most of the e-mails, to the extent relevant:

13.1 Email dated 10/3/11 at 01:07 pm: addressed to Robson, Mr Trevor Hollis-Turner (Acting Director: Governance and Interface) and copied to Mr Johan Appels (the union representative):¹

(For the sake of averting confusion, it should be noted that, in the e-mail below, the name Freddie does not refer to the third respondent but to Venter, as Venter's first name was 'Frederick').

'As per your invitation to Freddie's office and what you stated to me can you please give me some[thing] in writing that says my job is redundant. Secondly I find it an insult for you to discuss my work report to with (sic) Freddie. The fact that you are not happy with my report has nothing to do with Freddie. I have my own office or you should have called me in your office and discuss the matter with me. In fact you were trying to show Freddie that I am worth nothing to your (sic) other than your intentions of making my job redundant.

This boils down to what I have been saying that Mr Robson is victimizing me the worse thing is that showing off with my colleagues whenever he intends addressing a matter with me. He is belittling me and that amounts to discrimination.

[Mr] Apples (sic) please ensure that you take up this matter with management of Governance and Interface.'

13.2 Email dated 10/3/11 at 01:28 pm: addressed to Robson, Hollis-Turner and Appels):²

'Firstly let me correct you in this regard may be you thought you were going to tell her (him, Venter?) that he is acting on Tessa's (presumably the former SPO's) position that never happen (sic), all you said was that

¹ Record, vol 4 at 288.

² Record, vol 4 at 289.

he will be doing some of his and that[s] all, you never made mention of the fact that he is in charge of me.

Secondly stop belittling me Irwin, I am not your son. If my job is redundant do what is required of you as manager.'

13.3 Email dated 22/3/11 addressed to Robson and copied to Venter and Appels:³

'Secondly stop irritating me, if you want anything from me stop copying Freddie, he has nothing to do with my work, I don't report to him, he has his own job description I have mine, he can be a Professional Office while I am an assistant, for me I don't recognise him in that position simply because he was appointed in that position due to his colour if his skin, he has only four years of service while I have seventeen years of service and earning more than me, even with skills, the type of work that I am doing he can't do it, but I can perform all what is doing, so stop insulting me Irwin. Secondly for your letting of him to act in that position is flouting of the council policies being an advocate. What is going to do after he has acted in the position other than for you to give a chance to black people to act in that position per the City of Cape Town policy and may be you want to tell me that you don't have confidence on me, due to having a wrong colour.

I will not listen to him at all Irwin.'

- [14] However, Robson did point out that, in terms of a recommendation by a relevant committee of the appellant, Freddie had been recommended for translation to the designation of full PO and, according to Robson, it was not clear why that recommendation had not been implemented. Robson also pointed out that it appeared that Freddie was further infuriated by the fact that, after the resignation of a senior PO (SPO) Robson had, as an interim measure, allocated some of the SPO's functions to be performed by Venter.

³ Record, vol 4 at 300.

[15] During March 2011, Freddie was absent from work for four days, on sick leave. It was the appellant's policy that on return from sick leave, an employee should attend an interview known as a "return to work interview", with such employee's manager. Robson testified that Freddie refused to attend the interview unless he was accompanied by his union representative. Robson explained to him that, as the interview was only an internal process, the appellant's policy did not allow an outsider to participate. However, Freddie insisted that his union representative be present at the interview. Seeing that he was not having things his way, he addressed the email below (dated 17/3/11 at 12:08 pm) to Robson, which he copied to Appels:⁴

'I was in the office yesterday to submit my sick certificate. I don't have a problem for Adv Robson to question the doctor because for me I did not feel well as a diabetic and I went to the doctor.

Mr Robson for any question you can phone the doctor in my medical certificate because **I don't have answers for your interview** even when I am back at work, the answers are in my medical certificate.

This man [referring to Robson] told me last week that my job is redundant I have no job at PPU.

Mr Appels as my union rep please take not (sic) of this, I'm being dismissed by Mr Robson. ...'

[16] On the same day (17/3/11 at 11:33 am), Robson addressed another e-mail to Hollis-Turner, discussing Freddie's conduct (the email was copied to Freddie):

'... Might I state that this official [Freddie] if (sic) officially on sick leave from Monday this week until Today, though he has been in the office on at least two occasions to my knowledge. I am awaiting his official return to work (tomorrow) in order to conduct the return to work interview with him. Further to this he has now on at least **three** occasions wilfully refused or failed to provide me with a summary of work done during the months from November to February of this year as has been requested by the office of the Speaker. He continues to refuse

⁴ Record, vol 4 at 294.

to comply with my instruction in this regard. Every other staff member in the unit has done so at least two weeks ago.

As you are aware I have most recently retracted a verbal warning which I issued to the staff member concerned for his failure to attend staff meetings timeously. This issue was resolved after it was agreed that (only in respect of this official) he would be “reminded” about the need for him attend in advance by other staff. Again, [this is] an arrangement which applies to no other official in this unit.

I would be failing in my functions as a manager of this unit if I were to arbitrarily waive rules in respect of one staff member, where all staff are expected to comply.

Finally I must inform you that I have signed and approved sick leave for 4 days in respect of this official who has apparently now been in the office. I am now obliged to make further enquiries as to the exact nature and extent of the sick leave which he has taken, and will follow this up with the appropriate officials at IR.

[17] Before Hollis-Turner could respond to Robson’s e-mail above (dated 17/3/11 at 11:33 am), it was Freddie who sent the following e-mail to Hollis-Turner, 27 minutes later (at 12:00 pm) which was copied to Robson and Appels: ⁵

‘Irwin is continuing with humiliation, whatever you may call and the reason why I am coming to you is the fact that, I don’t want you to say I have never inform (sic) your office about this problem, how many times have I requested your office to intervene. The last time I approached your office I was told that I would be disciplined and all these problems started in 2008, up until today no solution has been found, while victimization by Irwin is the norm in that office. **This man is abusing me Trevor.**’

[18] Trevor Hollis-Turner responded to Freddie via an undated e-mail (presumably still on 17/3/11):⁶

‘The content of your emails are noted with concern.

⁵ Record, vol 4 at 293.

⁶ Record, vol 4 at 296. Based on the subsequent prompt response to this email by Freddie (on 17/3/11), it is clear that this Hollis-Turner’s email was also sent on 17/3/11 before 01:32 pm).

Upon your return to work I would suggest that you meet with your Manager [Robson] in an attempt to resolve your unhappiness. If after such meeting, you remain distressed, then I would be prepared to meet with you and Adv Robson in a further attempt to find a way forward. I do not, however, believe that this matter will be resolved by email and I will accordingly not be responding to further emails in this regard until such time as I receive (hopefully positive) feedback following your meeting with your Manager.'

- [19] Freddie reacted on the same day (17/3/11) to Hollis-Turner's e-mail above. At 13h32 on that day, he addressed the following e-mail to Appels, which he copied to Robson and Hollis-Turner:⁷

'For your information, just because you were not copied in this e-mail, **Trevor is referring us back to a man who failed us before and is going to continue to fail us, you can negotiate and negotiate, if a person hates, that person will never be changed by the fact that you are engaged in negotiation with him/her. For us to go back to table with this manager is a waste of time** and as my union rep if you share sentiments as per my update whenever this victimization takes place, the only thing we need to do, is to follow whatever process **the city has to ensure this man faces the consequences of his action/utterances.** The office of the City Manager is aware about this problem. For me whether this matter can end up in the court of law I am prepared to face it. This man is an advocate by profession and he should know better than anyone of us, that **his behavior as a manager is not acceptable.** He even humiliated me so many times in front of his staff. The reason for him to have an office is to give privacy to his staff when dealing with matter affecting them. The meeting he was talking about in one of the e-mails, **the man came up to me gun blazing and I never saw him so furious, there is not a single thing he left in humiliating me** and I kept quiet, I got to his office, then he chased me like a dog while trying to engage him. If we can look at this from a constitution perspective, this man being an advocate has violated my right to dignity, privacy etc, the 2008 ORP, him and the city have violated my right to (sic) unfair discrimination (Elimination of Unfair Discrimination Act of 2000), because in that process, **I was totally discriminated against being an individual who is from a**

⁷ Record, vol 4 at 296.

disadvantaged background. All these issue we must be taken (sic) to those who are relevant in terms of dealing with them.

Mr Appels, please forward this e-mail to Mario, the SAMWU Advocate, he told me to lodge a complaint with him the other day when I was in his office.'

- [20] In the meantime, Freddie continued with his failure to comply with the instruction to submit his report and to attend the "return to work interview". In one of the e-mails (dated 22/3/11 at 14:56),⁸ Robson reminded Freddie about the report. Freddie promptly responded - only 10 minutes later (at 15h06):⁹

'I am not going to say this again unless you are still with the campaign in terms of humiliating me, and stop irritating me in doing my work, you are making me lose my focus, I have given you all my reports Irwin.'

- [21] It was clear that Freddie was not prepared to accept Venter as his senior, despite it being common cause that Venter was designated as full professional officer (PO) whilst Freddie was placed as assistant PO (APO). This attitude on the part of Freddie is evident from his e-mail (dated 22/3/11 at 15:39) below which he addressed to Robson (Again – for the reason stated above - he refers to Venter as Freddie):

'Secondly stop irritating me, if you want anything from me **stop copying Freddie, he has nothing to do with my work, I don't report to him**, he has his own job description I have mine, he can be a Professional Office while I am an assistant, for me **I don't recognise him in that position simply because he was appointed in that position due to his colour of his skin**, he has only four years of service while I have seventeen years of service and earning more than me, even with skills, the type of work that I am doing he can't do it, but I can perform all what is doing, so stop insulting me Irwin. Secondly for your letting of him to act in that position is flouting of the council policies being an advocate. What is going to do after he has acted in the position other than for you to give a chance to black people to act in that position per the City of Cape Town

⁸ Record, vol 4 at 300.

⁹ Record, vol 4 at 300.

policy and may be you want to tell me that you don't have confidence on me, due to having a wrong colour.

I will not listen to him at all Irwin.'

- [22] On his insistence not to attend the "return to work interview" with Robson in the absence of his union representative, Freddie, on 28 March 2011 (at 09:58 am), sent the following e-mail to Robson, in which he further confirmed that he was aware of the respondent's policy in this regard.:

'Let me confirm with you that, **I will not meet with you without my shop steward, I fully understand that it is the council policy**, but in you (sic) instance I am of the opinion that it will not be used to serve the spirit/purpose in which it was developed, but you (sic) own agenda of getting rid of me. Remember that, **there is a complete breakdown of trust between you and me and I doubt very much, it can be retrievable**. The very same return to work interview can be used against me, in fact last week, I made it clear if you want to know more about my sickness, you can phone Dr Parker who will give you more details about the status of my sickness. I am not a medical doctor I won't be able to answer some of you (sic) question. In the mean time you can sent (sic) me you (sic) questions so as to prepare myself for the interview. ..."

- [23] On 15 April 2011, at a staff meeting, Freddie raised an issue around Venter's management of a particular project. This culminated in a confrontation between him and Robson. According to Robson, the situation had reached the end of his tether and he considered Freddie an ingrate. He said, at that stage, Freddie got up and walked over to him and pointed his finger in his (Robson's) face, saying that he had "an attitude". Thereafter Robson approached the City Manager and asked that Freddie be suspended with immediate effect, which was done.
- [24] On 2 June 2011, Freddie sent to Robson an e-mail in which he labelled Robson a racist and comparing him to Verwoerd. This e-mail seemed to have served as a final straw to Robson:

You can fool everybody in that office, pretending as if you care about black people, I have been with you for a long time Irwin, I know you back and

front, you are a racist of the highest order, the way I look at you are even more than Verwoerd. I was born at the height of apartheid, you cannot fool me about racism. You are a racist Irwin, if you have never been told who you are, today you are getting it from me. I am telling you your true colours and I am wondering as to how did you chose to be an advocate, while at the same time being a party to oppression by the imperialists, it's just contradictions, maybe you should attempt to practice your profession, so that you know exactly what it means. (my emphasis) (Bold for emphasis)

[25] Robson testified that he did not feel that he could ever work with Freddie again. He further stated that there was evidence to the effect that Freddie was disciplined previously for insubordination whilst working in the Solid Waste department. Accordingly, Robson testified, Freddie's employment relationship with the appellant was then non-existent.

[26] In his testimony at the arbitration hearing, Venter confirmed the evidence of Robson that Freddie did not comply with Robson's repeated instructions to submit the report in the desired format. However, he said that he managed to explain to Freddie what was required in the report. He said their meeting was amicable and he had thought that Freddie would comply and submit the report, which however he did not. Venter further confirmed the incident when Freddie, in an angry and aggressive manner, pointed his finger on Robson's face during a staff meeting on 15 April 2011.

Freddie's case

[27] In his evidence, Freddie pointed out that he commenced employment with the appellant on 22 November 1993 as a general worker in the Solid Waste department where he worked on [refuse] trucks and sweeping streets. In the following year, he was appointed as a clerk in the Solid Waste department. He occupied that position for nine years before being appointed to the PPU. In the meantime, he was furthering his studies and in 2011 he obtained a B-Tech degree in Public Relations.

[28] He conceded that in about the year 2000, he was issued with a written warning, whilst in the Solid Waste department, after he was involved in an argument with a colleague whom he said had called him a “kaffir”. He said, in reaction, that he had made derogatory utterances towards the said colleague. As a result, they were both disciplined by the appellant for misconduct.

[29] He confirmed his unhappiness about the appellant’s failure to place him properly as a full professional officer. He felt that it showed a lack of acknowledgement by the appellant that he was the first person in the public participation unit responsible for training new people in the Unit. He pointed out that after the implementation of the so-called Organizational Realignment and Parity (ORP) process in 2008, he had expected that his designation and salary would be properly adjusted, but it did not happen. His designation as APO did not change whilst all other staff members were placed higher. He had objected to the placement and felt frustrated because he said the reasons advanced for non-adjustment were unreasonable.

[30] Freddie further testified that one day he arrived late for a meeting and Robson chased him out of the office. He said he explained to Robson that he had delayed because he was attending to community members and had forgotten about the meeting. He said Robson did not want to listen to him but, instead, ridiculed him in front of his colleagues and chased him out of his office. He felt that Robson did not respect him precisely because he was Black. This happened despite the fact that he was the most sacrificing employee in the unit. He also introduced the issue about being given old office furnisher compared to his colleagues; and further that he was the only official in the unit who was required to use a printer that was not located in his office.

[31] Freddie stated that when he thought the situation was getting worse, he then resorted to writing e-mails to Mr Hollis-Turner who, however, referred him back to Robson. When he consulted with his union, it was suggested that he should meet with Robson. An invitation was extended to Robson for their meeting, but Robson declined it.

- [32] He conceded, however, that for him to compare Robson to Verwoed was uncalled for. He said this was out of frustration as he worked in a hostile environment.
- [33] On the report issue, his version was that the appellant erred in not supplying to the arbitration hearing the report that he had submitted to Robson. He confirmed that Venter gave him his report as a guide and he took it to his office. However, a short while later Venter returned and requested his report. He did not regard his conduct in this regard as insubordination, but rather at best, as failing to comply with the format.
- [34] The one-on-one meeting with Robson on 15 April 2011 had started in a cordial fashion. However, Robson subsequently started to confront him as to why he was doing so little work. His response was that Robson should ask himself because he was the one responsible for allocating work. Robson then remarked that he (Freddie) was pathetic and a destruction to the unit. He said an argument ensued and Robson ended up pointing a finger at him and he pointed his finger back.
- [35] Freddie further testified that he did not consider that his relationship with the appellant was destroyed. However, he conceded that his relationship with certain individuals in the appellant's employ was probably broken down, but that was not the case with the appellant. On hindsight, he conceded that he should probably have done things differently as people learnt from their mistakes. He took responsibility for his actions where he made certain bad comments. He felt he had legitimate issues but only that he adopted a wrong approach.
- [36] He further said that despite his broken relationship with Robson he could still work with him. He was then prepared to submit to Robson's authority. He denied the suggestion that he did not show any remorse at the arbitration hearing. He said his remorse was genuine and he had since been guided by certain people in that regard. He accepted that comparing Robson with Verwoed was wrong and uncalled for. However, he pointed out that, had there been earlier intervention by the appellant, the confrontation would not have escalated.

The arbitrator's findings

[37] In his analysis of the evidence, the arbitrator pointed out that Venter had conceded that he had given Freddie limited access to his (Venter's) report and that this supported Freddie's version as regards his allegation that he did not receive adequate support from Robson and Venter in relation to compiling the report. In this regard, Venter testified that he feared that Freddie would plagiarise his (Venter) report. The arbitrator found it difficult to sustain this argument because each report required details relating to an individual's specific project. There was therefore no chance that Freddie could plagiarise Venter's project since they had different projects. If anything, Freddie would probably only be able to "plagiarise" Venter's format of the report which, in any event, was what Robson wanted to be done. Venter had also not consulted with Robson on that issue, which he could and should have done.

[38] However, the arbitrator further found that Freddie gave contradictory evidence on the issue of the report. Whilst Freddie alleged that he was not assisted by Venter, he also stated that he actually submitted a report which was compliant with the requirements and that he did so after he had discussed it with Venter. Indeed, it meant that if the report was compliant, it was because Venter had assisted him. The arbitrator further found no substance in Freddie's contention that the appellant failed to submit his report at the arbitration hearing. The arbitrator held that it was incumbent on Freddie to have done so, not to the appellant.

[39] In an attempt to justify his accusations that Robson was a racist, Freddie referred to issues such as Robson having allegedly humiliated him in front of the staff; that he was discriminated against by the appellant in relation to his placement; that he was required to use a different printer and that he was the recipient of the old furniture. However, the arbitrator found that all these accusations were either unfounded or unsubstantiated. Significantly, the arbitrator found that there was no evidence of racism or racist attitude on the part of Robson towards Freddie. This was only Freddie's subjective view, not supported by facts. As a matter of fact, Freddie admitted that the e-mails he sent (to his superiors) were uncalled for

and had a bad taste; and that he accepted responsibility for his actions. Accordingly, the arbitrator found that the appellant's version was more probable than that of Freddie.

[40] However, the Arbitrator noted that Freddie acknowledged his mistakes after receiving advice from his attorney and other people. The arbitrator further believed that Freddie showed genuine remorse for his conduct at the arbitration hearing and that he had since understood that he was subservient to the authority of the employer.

[41] The arbitrator also considered that Freddie had long years of service with the appellant. He had started work with the appellant as a cleaner in the Solid Waste department. He furthered his studies until he obtained a B Tech degree whilst in the appellant's employ. This, according to the arbitrator, showed that Freddie enjoyed some measure of satisfaction in being of service to the appellant.

[42] On the issue of whether the employment relationship between Freddie and the appellant had irretrievably broken down, the arbitrator felt that there were never any constructive attempts by the parties to try to resolve their dispute. On this basis, the arbitrator held that dismissal was not an appropriate sanction. Hence, the arbitrator concluded that Freddie's dismissal was substantively unfair and ordered his reinstatement.

[43] The appellant was not satisfied with the outcome of the arbitration process and thus took the matter up on review with the Labour Court, in terms of section 145 of the Labour Relations Act.¹⁰

The Labour Court

[44] In its grounds of review, the appellant submitted that the arbitrator's award constituted a decision which no reasonable decision-maker could make, given the material presented to the arbitrator. The arbitrator failed to apply his mind to the factual and legal issues before him. It was further submitted that the arbitrator's finding that the employment relationship between the appellant and

¹⁰ Act 66 of 1995.

Freddie had not broken down irretrievably reflected a disregard of the evidence adduced at the arbitration hearing.

[45] The Court *a quo* took into account factors which the Court obviously regarded as strong mitigating circumstances in favour of Freddie as to have rendered his dismissal substantively unfair. These included the following: Freddie's length of service; his display of remorse; the fact that his written warning pertained to an incident where Freddie had used derogatory and disrespectful remarks to a colleague after he had been called a "kaffir"; the fact that the appellant was a large entity which could accommodate Freddie elsewhere where he would not work with people like Robson and Venter; and that Freddie had already served a three month suspension in respect of the misconduct in count 3.

[46] On this basis, the Court *a quo* found that the arbitrator's conclusion that Freddie's dismissal was substantively unfair and that he must be reinstated was "well-reasoned" and did not constitute a decision which a reasonable decision-maker could not reach on the available evidence. The Court noted, however, that given the serious nature of the misconduct of which Freddie was guilty, he was not entitled to full back-pay and that his retrospective reinstatement must be subject to a final written warning operative for a period of 12 months calculated from the date that Freddie resumed his duties.

[47] It is against this judgment and order of the Court *a quo* that the appellant now appeals to this Court.

The appeal

[48] The grounds of appeal can be summarised as follows:

1. The Court *a quo* erred in assuming that Robson is a white man. There was nothing before the Court indicating that he was white; there could not be as he is coloured. The fact that Robson is coloured would have been apparent to the arbitrator as Robson testified before him at the arbitration.

2. The Court *a quo* erred in not finding that Third Respondent's allegations of racism constitute a fair ground for dismissal.
3. The Court *a quo* erred in finding that the arbitrator "properly" dealt with the remorse shown by Freddie at the arbitration hearing. In this regard, the Court *a quo* did not consider the argument and evidence indicating that Freddie's remorse was qualified; shown long after he was dismissed; shown only on the advice of others; and appeared to be no more than a tactical concession for the benefit of the arbitrator.
4. The Court *a quo* erred in its finding that the appellant's scale of operations was a reason for holding that the employment relationship had not broken down irretrievably, in that Freddie could be employed in a different department.
5. The Court *a quo* also disregarded the fact that the arbitrator reinstated Freddie into the position from which he had been dismissed, while at the same time the arbitrator acknowledging that such reinstatement could be "problematic."

Evaluation

[49] It is settled law that, in order to pass muster of judicial review for reasonableness under section 145 of the LRA, an arbitration award must be one falling within the range of decisions which a reasonable decision-maker could have made in the circumstances.¹¹ The Supreme Court of Appeal, in *Herholdt v Nedbank (Cosatu as amicus curiae)*,¹² restated the *Sidumo* test in the following terms:

'...[W]hile the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions". ...A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the

¹¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110 (*Sidumo*).

¹² 2013 (6) SA 224 (SCA).

material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.¹³ [Footnote omitted]

- [50] With the advent of our constitutional democracy, the racial attitudes and practice of discrimination amongst persons on the basis of race, colour, culture or creed is something that ought now to belong in the past. However, it cannot be denied that it constitutes the saddest part of the history of this country. Sadly, it remained a common cause feature in our society. Significantly, our Courts have expressed strong views against racism, particularly in the workplace. In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*¹⁴ Zondo JP stated the following:

'Within the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will show not only this Court's and the Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly. This approach will also contribute to the fight for the elimination of racism in general and racism in the workplace in particular and will help to promote the constitutional values which form the foundation of our society.'¹⁵

Sustaining Zondo JP's approach in the same case (above), Nicholson JA, said the following:

'It was never contended that the use of the racist epithets in question should not be visited by the sanction of dismissal. Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question. The Judge President has dealt

¹³ At paras 13 and 25.

¹⁴ [2002] 6 BLLR 493 (LAC).

¹⁵ At para 38.

comprehensively with this matter in his judgment and I wholeheartedly endorse everything that he says in this regard.’¹⁶

[51] Not long ago, the Labour Court in *SACWU and Another v NCP Chlorchem (Pty) Ltd and Others*,¹⁷ remarked, correctly so in my view, as follows:

‘To accuse a person of being racist or to say to a person that he is displaying a racist attitude is racially offensive. I am equally satisfied that these words, objectively viewed, can be regarded as insulting and abusive [It is difficult] to imagine under what circumstances an employee who without just cause or a reasonable basis therefor, and accordingly unjustifiably, accuses another employee of being a racist, or that he or she was displaying a racist attitude, would easily escape dismissal.’¹⁸

[52] The factual basis on which the appellant relied in relation to the acts of misconduct referred to in counts 1 and 3 of the misconduct charge are largely common cause. The fact that Freddie was guilty of the misconduct charged was also not in dispute. The issue is whether his dismissal was an appropriate sanction and, therefore, substantively fair, given the particular circumstances of this case. In my view, the appellant’s case against Freddie in relation to both counts 1 and 3 is well-founded.

[53] *Concerning the several offensive emails generally:* The deliberate and sustained refusal or failure by Freddie to carry out a lawful and reasonable instruction given to him by Robson, to submit a report in terms of the required format, rendered him guilty of insubordination. This was a public display of insubordination in that Freddie always sought to ensure that every such offensive or racist e-mail addressed to Robson would be copied for the information of other people, such as Appels, Hollis-Turner and Venter. Indeed, his conduct constituted gross insubordination. A reasonable portion of this appeal record is virtually filled or littered with Freddie’s offensive and abusive e-mails, mostly directed at Robson.

¹⁶ At para 63.

¹⁷ (2007) 28 ILJ 1308 (LC) at para 31; [2007] JOL 19526 (LC)

¹⁸ At paras 12 and 31.

[54] *Concerning the Verwoerd racist slur e-mail*: The former South African Prime Minister Dr Hendrik Frederick Verwoerd is notoriously known, from the perspective of the Black majority¹⁹ in this country, as the architect of apartheid. It is also common knowledge that during the apartheid era, the willy-nilly use of a variety of offensive racial slurs by certain racist white supremacists against Black people (whether it be African, Coloured or Indian) in this country was the order of the day; and this was done without impunity. Some of these racial slurs were within public knowledge in the workplace and I do not intend to list them here. They would better slide into oblivion as a social taboo.

[55] However, it seems to me, given the painful and shameful atrocities perpetrated against the Black people in this country during the so-called Verwoerdian period, one should expect to see all right-minded and peace-loving people not to dare to be even perceived as associating themselves with anything to do with Verwoerd and his lieutenants, as well as his similarly-minded successors. Therefore, for Freddie to describe Robson, without any justifiable cause, as being “*even [worse] than Verwoerd*” was an offensive racial insult, absolutely unacceptable for any employee to use against any other employee in the workplace, irrespective of whether the accuser is white or black. Besides, it ought to be recalled that the use of racist language against a person or class of persons also constitutes hate speech and is prohibited and outlawed under the Constitution and the law.²⁰

[56] In the present instance, there was not the slightest shred of evidence that Robson exhibited a racist attitude toward Freddie or did anything to Freddie which could justifiably be described as racist. In fact, the opposite conduct on the part of Robson was evident. There was unchallenged evidence that Robson was empathetic toward Freddie for not having been appropriately translated in his rank or designation. This was not the attitude of a racist person. Further, in Freddie’s e-mails, it appears as if he was dealing with a white man whereas Robson was in fact a Coloured man. It is common knowledge that Coloured

¹⁹ The word “Black” is used in the wider context as to include Coloureds and Indians.

²⁰ Section 16(2)(c) of the Constitution of the Republic of South Africa, 1996. See also section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 against hate speech.

people were also oppressed under apartheid, albeit to a lesser degree than African people. Significantly, Venter was the only white man in the Public Participation Unit, headed by Robson, who was coloured. In my consideration of the matter, I am unable to justify the basis on which an employee who conducts himself/herself toward his/her employer in the manner that Freddie did here can escape dismissal.

- [57] The aggravating features of this case far outweighed whatever mitigating factors in favour of Freddie. For instance, it has always been said that where the insubordination was gross, to the extent that it was persistent, deliberate and public, a sanction of dismissal would normally be justified. In *Slagment (Pty) Ltd v Building Construction & Allied Workers Union and Others*,²¹ two employees had persistently refused, without just cause, to carry out lawful instructions given to them by their newly appointed manager under whose supervision they were placed. Before holding that the employees' dismissals were "not substantively unfair" but that they were "fully justified", the Appellate Division (per Nicholas AJA) remarked as follows:

'The employees had been guilty of sustained disobedience. They had deliberately set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of relationship of employer and employee impossible.'²²

- [58] Indeed, even the fact of long service in employment does not always spare an employee, who committed a gross misconduct, from dismissal. This Court, in *Toyota SA Motors (Pty) Ltd v Radebe and Others*,²³ stated the following:

'...Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no

²¹ (1994) 15 ILJ 979 (A).

²² At 989H-I.

²³ [2000] 3BLLR 243 (LAC).

length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty...'²⁴

[59] It was argued on behalf of Freddie that he showed remorse for his misconduct. I do not believe so. The facts of the case do not bear testimony thereto. It is significant to note that even after his dismissal, he still wrote offensive e-mails about Robson. In any event, any remorse, genuine or otherwise, is only a factor to be considered together with other factors on sanction; and has never been decisive in terms of saving an employee, who is guilty of gross misconduct, from dismissal.²⁵

[60] In *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO and Others*,²⁶ this Court said the following:

*'...It was also significant that the third respondent elected not to own up to his misdemeanour. In other words, he showed a complete lack of remorse or contrition for what he did. Instead, he attempted to shift the blame to the site manager whom the third respondent apparently induced to signing the falsified time sheet. He had only 2½ years of service with the appellant. Even if he had a much longer service that would not (and should not) have spared him in the circumstances of this case.'*²⁷

[61] Accordingly, the arbitrator's award, to the extent that it found Freddie's dismissal to be substantively unfair, is not a decision which a reasonable decision-maker could have made, in light of the evidentiary material presented to the arbitrator. The award therefore falls to be reviewed and set aside. For this reason, there is no basis on which the judgment and order of the Court *a quo* can stand. The appeal must succeed.

[62] In the result, the following order is made:

1. The appeal succeeds with no order as to costs.

²⁴ At para 15.

²⁵ *Absa Bank Limited v Naidu and Others* [2015] 1 BLLR 1 (LAC); (2015) 36 ILJ 602 (LAC).

²⁶ [2010] 5 BLLR 513 (LAC).

²⁷ At para 37.

2. The order of the Court *a quo* is set aside and replaced with the following order:

“1. The review application is granted with no order as to costs.

2. The arbitration award is reviewed and set aside and substituted with the order that the dismissal of the applicant (Freddie) was substantively fair.”

Ndlovu JA

Tlaetsi DJP and Davis JA concur in the judgment of Ndlovu JA.

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