



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Court Case No: JR86/2011

Appeal Case no: JA8/2015

In the matter between:

DORRAIN BAILIFF INVESTMENTS (PTY) LTD

Appellant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER LANCE CILLIER N.O.

Second Respondent

EMMANUEL MUFUNWAINO

Third Respondent

Heard: 22 February 2016

Delivered: 26 May 2016

Summary: Review of arbitration award – employee on final written warnings dismissed for gross misconduct - commissioner finding that sanction of dismissal unappropriated and compensated employee – Appeal – commissioner failing to have regard to the cumulative effect of previous warning which employer stated would be taken into account for future transgression – commissioner duties are to determine the fairness of the sanction and not to impose a sanction afresh - commissioner imposing a sanction afresh thereby ignoring pertinently relevant facts that were before

him. Appeal upheld – Labour Court’s judgment set aside – dismissal of the employee substantively and procedurally fair.

Coram: Waglay JP, C J Musi JA, and Murphy AJA

JUDGMENT

C J MUSI JA

- [1] This appeal, which is with the leave of the court *a quo*, is against the judgment of the Labour Court (Manchu AJ) wherein it dismissed an application to review and set aside the decision of the second respondent (“the Commissioner”).
- [2] The appellant conducts business as a retail pharmacy. It delivers medication to the residences of some of its clients. The third respondent was employed by the appellant as a driver from 2003 until his dismissal on 12 August 2010. He referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Conciliation was unsuccessful and he referred the dispute to arbitration. The Commissioner found that his dismissal was unfair and ordered the appellant to pay him compensation in the amount of R34 098 which translated into six month’s salary. The appellant launched an unsuccessful review application. Dissatisfied with the outcome of the review application, the appellant now appeals to this Court.
- [3] The facts giving rise to this dispute can be summarised as follows. The appellant, in consultation with the third respondent, decided for operational reasons to replace the motor vehicle driven by the third respondent with a motorcycle. The third respondent did not have the requisite licence to drive a motorcycle. It was agreed that he would obtain same at the appellant’s costs. He failed at his first attempt at acquiring a learner’s licence. He paid the re-enrolment fee and passed the second time around on 22 July 2010. The car that he was driving was stolen on 31 March 2010 and he has not been working ever since because he did not have a motorcycle licence.

- [4] On 28 July 2010, the appellant gave the third respondent funds to pay a driving school for the driving lessons; which he did. He was requested to book all five lessons for the week of 28 to 31 July 2010. He was unable to do so and on 28 July 2010, he sent a "please call me" to Ms Bailiff of the appellant. She did not call him back. The reason for the "please call me" was to inform her that he could not book the lessons as discussed by them.
- [5] On 2 August 2010, Ms Bailiff contacted the third respondent to enquire why he had not reported for duty. He informed her that he had scheduled driving lessons for Monday 2 August 2010 and Tuesday 3 August 2010. Ms Bailiff testified that during July 2010 before he got his learner's licence, she told the third respondent that she would not be paying him for July 2010 because he failed and he did nothing. She did not pay him in full for July 2010. She testified that on 4 August 2010, she called the third respondent to enquire why he did not report for duty. He told her that he was at the municipality to make an arrangement so that his water and electricity should not be disconnected. He told her that she ruined his life and swore at her repeatedly using the "F" word. When she tried to speak to him, he shouted and spoke over her. She put the phone on the desk and left her office, when she came back he was still on the line shouting and swearing.
- [6] The third respondent denied swearing or shouting at Bailiff. He testified that he was at the municipal offices and due to the noise at the offices he had to speak loud so that she could hear him properly. He stated that his tone was not aggressive he only informed her about the problem that he had. He admitted that he was later paid for July 2010.
- [7] The Commissioner made the following finding:
- 'The applicant's telephone manner that Wednesday could indicate his repudiation of his duty to show respect to his employer. The gravity of this disrespect would surely reflect on factors which include the action of the employer prior to the outburst. Disrespect to an employer justifies termination of the employment relationship only when it is either too gross (i.e.: insulting and abusive) or so frequent as to suggest that the employee has repudiated the employer's lawful authority, I cannot and will not endeavour to justify the

applicant's outburst. However, I am compelled to consider the fact that the employer's unfair and unlawful behaviour of withholding month's salary from the applicant caused him severe financial duress and embarrassment and triggered his unacceptable conduct. Although guilty of gross misconduct, these mitigating factors ought to soften an instinctive reaction to dismiss an employee.

Despite the valid final warning on record, I must find that the applicant's conduct viewed holistically does not justify dismissal. I must thus find that the sanction of dismissal was too harsh under the circumstances.

The applicant has prayed for compensation for the unfair dismissal. I would have preferred to have reinstated him conditionally as I do believe that he was partially the architect of his own misfortune. However, he has submitted, and I do not believe that Bailiff would disagree, that the employment relationship is intolerable. I must therefore order compensation for the applicant.

I will order compensation equivalent to six months' wages which I believe is just and equitable and takes into consideration the applicant's not inconsiderable length of service, the circumstances of the dismissal, and the prospects of the applicant securing alternative employment. There is no obligation for the respondent to reemploy or reinstate the applicant.'

- [8] The court *a quo* found that the Commissioner considered the "totality of relevant factors", and the circumstances under which the outburst was made. The court *a quo* pointed out that the outburst was attributed to the third respondent's severe financial duress (sic) and embarrassment that was caused by the appellant withholding his salary. The court *a quo* further stated that the final warning was considered. The court *a quo* concluded by saying that "even if the second respondent did substitute the sanction with one that he deemed appropriate, this would not constitute a sufficient ground of review".
- [9] Mr Bekker, on behalf of the appellant, argued that the court *a quo* erred in not setting aside the award because the final written warning made it clear that future transgressions would not be tolerated. He contended that the court *a*

quo should have found that the decision of the Commissioner was unreasonable. Mr Lombard, for the third respondent, defended the decision of the Commissioner as one which a reasonable decision-maker could reach.

- [10] It is now trite that the task of a Commissioner is to objectively, impartially and fairly determine whether a dismissal is fair. He/she has no power to determine afresh what he/she would do but simply to decide whether what the employer did, given the totality of the facts and circumstances, was fair. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ it was said that:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal...'²

- [11] The Commissioner found that the third respondent was guilty of gross misconduct. The only issue was the sanction imposed. The appellant argued that the Commissioner did not consider the totality of the evidence - more specifically the previous transgressions of the third respondent.

- [12] The evidence presented to the Commissioner, relating to the third respondent's previous transgressions was as follows:

[12.1] On 7 June 2007, he was found guilty of using the company vehicle for private purposes without permission and transporting passengers without permission. He was involved in a collision after which it was determined that he was responsible for the accident. The sanction was a final written warning valid for 12 months "during which period any further instances that requiring (sic) disciplinary action could lead to your dismissal".

[12.2] On 26 January 2009, he was charged with and found guilty of leaving his place of employment without permission, arriving late at work 16

¹ 2008 (2) SA 24 (CC).

² At para 78.

times in 18 days and failing to collect a script from a Dr Levin for a patient. He requested to be given a final chance. He was given a final written warning on condition that there was an immediate and substantial improvement in his performance and attitude.

[12.3] During 2008, the third respondent and Bailiff agreed that he should be given a R200,00 weekly advance on his salary which he would pay back at the end of each month. This was done in order to alleviate his financial situation because at the end of each month after deductions were made from his salary he had no money left. Bailiff omitted to inform the person responsible for the payroll about the arrangement. The third respondent failed to pay back any of the money thereby increasing his salary by at least R800,00 per month. He was found guilty of misconduct on 20 August 2009. The sanction for this transgression was as follows:

'Final written warning. This serves to inform you that this is an extension of the final written warning. Any misdemeanours in the future will immediately result in a hearing which could lead to instant dismissal. Should this occur, all previous disciplinary actions and warnings accumulated against you will be used at that time.

Furthermore, you will re-imburse the pharmacy for over paid money at a rate of R800,00 per month until the debt is paid in full. The final amount will be presented to you in writing by the accountant as soon as it becomes available.'

[13] The swearing incident which is the subject matter in the review happened on 4 August 2010 whilst the last mentioned final written warning was still alive.

[14] Article 2(1) of the Code of Good Practice: Dismissal reads as follows:

'A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty...'

[15] In terms of article 3(5), the employer must in addition to the gravity of the misconduct consider factors such as the employee's circumstances including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself. In terms of article 5, employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

[16] The appellant kept all the records of the previous transgressions and it made the third respondent aware that those records would be considered if he were to be found guilty of misconduct in future. It is clear that the appellant kept and preserved the previous transgressions for future use. It took lapsed warnings into account when deciding on a penalty for later misconduct. In *Shoprite Checkers v Ramdaw*,³ Zondo JP, as he then was, said the following:

'In our law there is no statutory provision that deals with what the duration of a disciplinary warning is, nor is there a statutory provision that deals with what the effect is in law of the lapsing of a disciplinary warning. An employer and an employee may deal with these matters in their contract of employment. These matters may also be governed by an established practice in a particular workplace. Depending on what the contract of employment between the parties, or, the applicable collective agreement, provides or what the established practice is in a particular workplace, the fact that an employee's previous warning has lapsed or expired may well mean in a particular workplace that such employee must be treated as having a clean record when he is next found guilty of misconduct.'⁴

[17] More importantly, for purposes of this case, it has been said that:

'It is for the employer, if he wishes to rely on an employee's previous disciplinary record to prove which regime applies in the particular workplace.'⁵

³ See *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* 2001 (4) SA 1038 (LAC).

⁴ *Shoprite Checkers supra* at para 90.

⁵ See *Shoprite Checkers* at para 91.

- [18] In this matter, the last final written warning makes plain which regime applied in this workplace. The third respondent was told in no uncertain terms that his entire disciplinary record would be used against him.
- [19] The Commissioner did not give proper weight to the previous transgressions. He referred to the last final warning and said nothing about the first and second final warnings. He did not have regard to the total picture when it comes to the disciplinary record of the third respondent. It is clear that he limited his enquiry and reasons to “the valid final warning on record” in the process disregarding the other final warnings. In light of the clear indication to the third respondent during the last final warning that all previous transgressions would in future be considered, the Commissioner committed an irregularity by not considering those.
- [20] There is a separate but allied serious irregularity that the Commissioner committed. The third respondent categorically denied that he shouted or swore at Bailiff. The Commissioner however found that “I am compelled to consider the fact that the employer’s unfair and unlawful behaviour of withholding a month’s salary from the appellant caused him severe financial duress (sic) and embarrassment and triggered his unacceptable conduct.” The Commissioner conjured up a reason for the third respondent’s conduct without a factual basis therefor. If the third respondent’s financial position caused him to react in the manner that he did, one would have expected him to proffer such explanation and not to deny that he committed the misconduct charged. It is, in my view, irregular for a Commissioner to decide a matter based on speculation and exalt such speculation to immutable fact in order to achieve a desired outcome. The third respondent did not challenge the initial decision not to pay him for July. He had sufficient time to do so between the end of July and 4 August 2010.
- [21] The task of the Commissioner, as stated above, was to determine whether the sanction was fair and not to impose a sanction afresh. The Commissioner seems to have decided to impose a sanction afresh and to ignore pertinently relevant facts that were before him. He irregularly used presumptive reasons as justification for proven yet unexplained misconduct.

[22] The evidence before the Commissioner clearly showed that the appellant was very tolerant because final warnings were followed by final warnings. The effect of the appellant's leniency was unfortunately to cause the third respondent to continue undeterred on his path to self-destruction. The only thing that changed was his continuous disregard for workplace rules and the level of contempt that he had for his employer. His defence was based on a fabrication that was conceived in order to cast his employer as a liar. He deliberately lied when he testified that he signed the last final written warning because his employer coerced him, on pain of dismissal, to do so. The Commissioner allowed his maudlin sympathy for the third respondent to distract him from his true task. The gross irregularities in this matter had the effect of rendering the award unreasonable. In light of the totality of the evidence in this matter, it is clear that a reasonable decision-maker could not have come to the conclusion that the Commissioner reached.

[23] The court *a quo* unduly deferred too much to the Commissioner's reasons and did not properly review his decision.

[24] In the result, I make the following order:

- a) The appeal is upheld with no order as to costs.
- b) The order of the Labour Court is set aside and replaced with the following:

The award under case number GAEK1789/10 issued by Commissioner Cillier on 13 October 2010 is set aside and replaced with the following:

The dismissal of the third respondent was substantively and procedurally fair. There is no order as to costs.

C J Musi JA

Waglay JP and Murphy AJA agreed with C J Musi JA.

APPEARANCES

FOR THE APPELLANT:

Adv. Bekker

Instructed by Nothnagel Attorneys

FOR THE RESPONDENT:

Adv. Lombard

Instructed by Stan Fanaroff & Associates