



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 83/2015

In the matter between:

SYLVANIA METALS (PTY) LTD

Appellant

and

M C MELLO N.O.

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

ESWUSA obo MOFFAT MOSEHLE

Third Respondent

Heard: 15 September 2016

Delivered: 22 November 2016

Summary: Employee dismissed for insubordination in his behaviour directed at plant manager and breach of company rule in undertaking valve repair in the plant without authorisation. At the time of dismissal, the employee had a final written warning for insubordination which remained in force. At arbitration, commissioner found the employee's dismissal substantively unfair in that his behaviour constituted insolence and not insubordination while finding that no policy prevented his repair of the valve without authorisation and the employee was retrospectively reinstated. The Labour Court dismissed the appellant's subsequent review application in that the commissioner's decision

fell within the ambit of reasonableness required. Appeal upheld: Judgment of Labour Court set aside, arbitration award reviewed, set aside and substituted with order that dismissal was substantively fair. No order as to costs.

Coram: Waglay JP, Molemela JA et Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal is concerned with whether an employee's verbal altercation with his superior constituted insubordination of a sufficiently serious nature to warrant his dismissal, in circumstances in which a final written warning for insubordination remained in force against him.
- [2] The first respondent, (the commissioner) found the dismissal of the employee, Mr Moffat Mosehle, substantively unfair and retrospectively reinstated him into his employment with the appellant, Sylvania Metals (Pty) Ltd. The Labour Court (Molahlehi J) dismissed the appellant's review application with costs. With leave of the Court *a quo*, the appellant now appeals against the judgment and orders of the Labour Court.
- [3] At the outset of the hearing, the appellant sought an order that the appeal be reinstated in terms of Rule 5(17) of the Rules that govern proceedings in the Labour Appeal Court ('the Rules'), together with an application for condonation for the late filing of the notice of appeal and the appellant's heads of argument. The reinstatement of the appeal was sought on the basis that the appellant was unaware that its application for leave to appeal had been granted with the result that the notice of appeal was filed late. The application for condonation for the late filing of the heads of argument follows the appellant's failure to receive the Registrar's directive that required heads of argument to be filed. Both applications were not opposed and having regard to their merits, the appeal was duly reinstated and the late filing of the notice of appeal and heads of argument was condoned.

Relevant background

[4] The appellant conducts business in the mining sector. The employee was employed by the appellant from March 2009 as a mechanical fitter. On 15 November 2010, the employee was dismissed for:

1. *Serious breach of company rules and procedures, in that on 14 October 2010 [you] worked on Blower A without the required permit issued by the Shift Foreman; and*
2. *Gross insubordination and insolence in that on 14 October 2010 during a meeting held concerning the incident referred to [above you] walked out.*

[5] At the time of his dismissal, a final written warning for insubordination valid for six months remained in force against the employee.

[6] Aggrieved with his dismissal, the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). When the matter was not resolved at conciliation, the employee referred the dispute to arbitration. At arbitration, it was common cause that the employee, together with an engineering assistant, had undertaken the repair of a high-pressure valve in the appellant's plant without a permit. While the repair was underway, the employee's supervisor looked on.

[7] The appellant's plant manager, Mr Tshepo Malema, testified at the arbitration hearing that a written permit was required before repair work was undertaken in the plant to ensure that risk was properly assessed. He accepted however that no written policy existed at the time that the employee had undertaken the repair and that valve repairs had been undertaken by the employee in the past without a permit. After the repair had been undertaken, Mr Malema called a meeting at his office of "*all the team members...to explain why they went to do the job without having the permit*". He did so to find out what had happened given that a serious accident had occurred on the mine a few days before. During the meeting, the employee asked what standard was used. Mr Malema indicated that when he reiterated the company's legal standards the

employee engaged in an argument with him. The employee raised his voice, arguing about the standards the plant manager used, making reference to the Mine Health and Safety Act and refusing to explain what had happened. Mr Malema interjected to make his point but the employee stated that he was not working to the plant manager's standards and that he would only take instructions in writing from the plant manager from that point on. He then "*stormed out*" of the office leaving the meeting before it had concluded. Mr Malema stated that the employee's conduct showed that he "*doesn't care...what I was telling him*" and indicated that he was not willing to continue working with the employee, who had a final written warning in force against him at the time of this incident.

- [8] The employee's evidence was that he called an engineering assistant when he found a valve leaking and that he undertook the repair of the valve while communicating with the control room operator via two-way radio. At the meeting in Mr Malema's office, he was asked why he had worked on the machine without a permit. He disputed that a permit was required to undertake the repair and stated that Mr Malema kept interrupting him, told him not to talk about the Mine Health and Safety Act but about the company's rules and denied him a chance to explain what had happened. As a result, he stood up and left the meeting.
- [9] The commissioner found that the appellant's safety rules had not been breached by the employee in that no policy was produced by the appellant to show that a permit was required to adjust a valve; there was a recent change in the rule as to when permits were required; and the employee's supervisor had not instructed him to stop working without a permit, indicating that he had found nothing wrong with the employee's conduct. The employee was found not to have been grossly insubordinate in walking out of a meeting with the plant manager when a specific instruction had not been issued to him, although walking out of a meeting with the plant manager while he was still talking was disrespectful and this amounted to misconduct. The commissioner found that without gross insolence dismissal was unwarranted and the employee's continued employment was not intolerable. The employee's final

written warning for gross insubordination was found not to justify dismissal for insolence since insolence and insubordination were distinct offences, with the commissioner finding that:

'The applicant is only guilty of insolence, which is not serious enough to render continued employment intolerable.'

- [10] While the dismissal of the employee was found to be substantively unfair, no sanction was imposed for insolence. The commissioner retrospectively reinstated the employee into his position with the appellant on the terms and conditions which prevailed prior to his dismissal. Costs only in respect of the postponement of the arbitration on 10 August 2011 were awarded against the employee.

Judgment of the Labour Court

- [11] Although in the judgment of the Labour Court it was stated initially that there was no basis on which to interfere with the arbitration award "*except for the issue of the relief*" in that "*reinstatement is, with due respect unreasonable*", the judgment concluded differently by finding that "*applying the reasonable decision-maker test*" there was no basis to interfere with the commissioner's decision.
- [12] The Labour Court found that the commissioner's decision that the employee's conduct was not grossly insubordinate and his dismissal unfair was not unreasonable, nor was the finding that he had not breached a company safety rule. This was so given that the evidence was that the employee had previously undertaken a valve repair without a permit; and although the employee had misconducted himself in leaving the meeting, he was not given an opportunity to explain what had happened.
- [13] Turning to sanction, the Court approached the matter on the basis that dismissal does not automatically follow the existence of a valid final written warning but is a factor to consider in the application of progressive discipline. The employee was not instructed to remain at the meeting, was not warned of the consequences of leaving the meeting and there was no evidence that the

trust relationship had broken down due to his conduct. This led the Labour Court to conclude that, despite its earlier recordal that reinstatement was unreasonable, and in spite of the commissioner's failure to impose a sanction for insolence, in applying the reasonable decision-maker test, there was no basis on which to interfere with the arbitration award. The review application was accordingly dismissed with costs.

Submissions of the parties

[14] Mr Posthuma contended for the appellant that the Labour Court had erred in finding that the commissioner's decision fell within the bounds of reasonableness required. The appellant took no issue with the commissioner's finding that the employee had not breached a workplace rule in failing to obtain a permit before undertaking the valve repair given that the appellant's policy had recently changed and no written rule existed at the time of the repair. However, given the employee's grossly insubordinate behaviour, it was contended for the appellant that the dismissal of the employee was fair. This was so given that the evidence showed that there was no prospect of any working relationship between the employee and Mr Malema as the plant manager; the employee stated that he would fight with anything that did not have the plant manager's signature on it and would only comply with instructions which were in line with his understanding of the Mine Health and Safety Act. Furthermore, the employee had admitted that he would do the same again if faced with the same situation while accepting that the instruction given to him at the meeting was not unlawful. Mr Malema had made it clear that he would not work with the employee, who had limited years of service and was required to work with the plant manager as his superior.

[15] Mr Goldberg submitted for the employee that having regard to the circumstances in which the misconduct occurred, the employee's insolence was not gross, was specific to the incident in question and did not amount to insubordination, for which he had received a final written warning. There was no proof of continuous disrespect for Mr Malema, who was in any event, not the employee's immediate superior, and no reason as to why progressive discipline was not appropriate when the employee had one and half years'

service. It was relevant that the employee was trying to explain what had happened when Mr Malema cut him short and progressive discipline remained possible when the employee was well trained, with expertise, was a shop steward with a good relationship with his colleagues and willing to make amends.

Evaluation

- [16] The contract of employment between employer and employee is one to be interpreted subject to the constitutional right to fair labour practices and the national legislation which gives effect to that right.¹ Our courts have traditionally viewed respect and obedience as implied duties of an employee under the employment contract,² with the outdated reliance on obedience intended to refer to the employee's duty to adhere to the lawful and reasonable instructions of the employer. Any repudiation of such duties constitutes a fundamental and calculated breach of the employer's lawful authority³ given that an appropriate degree of mutual trust, respect and courtesy is to be shown by both employer and employee towards the other in the context of an employment relationship.⁴
- [17] Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions.⁵ It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority.⁶ It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer,

¹ Section 23 of the Constitution.

² *Mqhayi v Van Leer SA (Pty) Ltd* 1984 (5) ILJ 179 (IC) at 182A-D, citing *London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287F and 288A.

³ *Ibid.*

⁴ *NUMSA obo Mkhwanazi v Ellies Holdings (Pty) Ltd* (2012) 33 ILJ 516 (BCA); *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd* (2013) 34 ILJ 1440 (LAC) at para 47.

⁵ *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) at para 57 (minority judgment of Froneman J).

⁶ See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (Juta & Co Ltd, Cape Town 2007) at 307.

as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given.⁷

[18] This Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,⁸ discussed the “*fine line*” between insubordination and insolence, with the latter being conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous. While the Court noted that insolence may become insubordination where there is an outright challenge to the employer's authority, “*acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful*”.⁹ The sanction of dismissal is reserved for instances of gross insolence and gross insubordination¹⁰ or the wilful flouting of the instructions of the employer.¹¹

[19] The evidence before the commissioner showed that during the course of the conflictual meeting held with the employee, he indicated that he was unwilling to work with Mr Malema as his senior in the manner of a normal working relationship. He adopted an argumentative and hostile approach to Mr Malema during the meeting, refused to answer questions put to him, indicated that he would not work according to Mr Malema's standards and that he required his instructions to him to be put in writing in future. Thereafter, the employee left the meeting before it was concluded and in evidence was unrepentant when he stated that he would behave in the same manner in the future were the situation to arise again. His wilful conduct in this regard was to be considered against Mr Malema's evidence that given the employee's behaviour he was not prepared to work with the employee in future.

[20] The evidence before the commissioner showed that the employee's behaviour went well beyond a reasonable or legitimate difference of opinion between employer and employee. The employee was aggressive, rude and disrespectful in his speech and behaviour towards Mr Malema during the course of the meeting. His refusal to adhere to a reasonable instruction given

⁷ *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 314H-J.

⁸ (2015) 36 ILJ 1511 (L).

⁹ At para 22.

¹⁰ At para 22.

¹¹ *National Trading Co v Hiazo* (1994) 15 ILJ 1304 (LAC); [1994] 12 BLLR 53 (LAC) at 1308H-J.

to him to explain the circumstances of the valve repair was both wilful and serious. His insistence that all future instructions to him to be signed by the plant manager, that he would not work according to Mr Malema's standards and his decision to leave the meeting before it had concluded posed a deliberate and serious challenge to the employer's authority. His conduct indicated a refusal to respect the authority of Mr Malema as his superior. It also indicated an approach which was impractical insofar as it sought to require Mr Malema to place all instructions to him in writing. The employee's chosen course of behaviour constituted serious misconduct. It was not merely insolent but also insubordinate in the refusal to respect and adhere to the line of authority in the workplace.

[21] For these reasons, the commissioner's finding is unreasonable and unsustainable that, while the employee had committed misconduct this was not sufficiently serious to constitute gross insubordination or gross insolence. The employee was grossly insubordinate in his behaviour directed at Mr Malema and his conduct was sufficiently serious and deliberate to amount to a gross misconduct.¹²

[22] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹³ it was emphasised that:

'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'¹⁴

[23] The relevant circumstances in this matter include the nature of the misconduct; the fact that a final written warning remained in force against the employee for insubordination; that he is the sole breadwinner with five

¹² See *National Union of Mineworkers on behalf of Selemela v Northam Platinum Ltd* (2013) 34 ILJ 3118 (LAC) at para 39.

¹³ [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

¹⁴ At para 79.

dependents; he was 42 years old at the date of commission of the offence; Mr Malema's testimony that he was unwilling to continue to work with the employee; the employee's limited service with the appellant and the employee's lack of remorse shown for his misconduct.

[24] By its nature, the employee's misconduct had a serious impact on the employment relationship between the parties. It posed an appreciable operational risk to the appellant in the conduct of its business. This was so given the employee's clear refusal to accept the authority and reasonable instructions of his superior, his indication that he would only accept written instructions in the future and his unwarranted disrespect shown to his superior in leaving the meeting prematurely.

[25] The emphasis placed by the LRA on progressive discipline does not assist the employee. In *Transnet Freight Rail v Transnet Bargaining Council and others*,¹⁵ it was stated that:

*'An employee on a final warning for the same offence will normally be regarded as irredeemable, and dismissal will be justified if the employee commits a similar offence during the currency of the warning... Usually, the presence of a valid final written warning at the time the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable... I accept that the purpose of the warning is to impress upon the employee seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again....'*¹⁶

[26] As this Court recognised in *Gcwensha v CCMA and Others*¹⁷ "(a)n employee who continuously and repeatedly breaches ... his obligations in terms of his employment contract ...can be dismissed in appropriate circumstances."¹⁸

This is so in that, as in *Timothy v Nampak Corrugated Containers (Pty) Ltd*:¹⁹

¹⁵ (2011) 32 ILJ 1766 (LC).

¹⁶ At paras 39-43.

¹⁷ (2006) 27 ILJ 927 (LAC).

¹⁸ At para 24.

¹⁹ (2010) 31 ILJ 1844 (LAC).

*'... 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 employers organisation, in circumstances where the employment relationship can be restored to that which pertains prior to the misconduct...'*²⁰.

- [27] The Labour Court in *Theewaterskloof Municipality v SALGBC and Others*²¹ recognised that the general principle is whether the conduct of the employee is incompatible with the trust and confidence necessary for the continuation of the employment relationship; and that where an employee has been afforded an opportunity to correct his or her behaviour and nevertheless persists in taking a confrontational course *"there can be very little room for the notion of corrective discipline"*.²²
- [28] The employee's behaviour constituted serious misconduct. It had a serious impact on the employment relationship in circumstances in which the employee had been given the opportunity, but had failed, to remedy his behaviour while on final written warning. The circumstances under which that final written warning had arisen are of direct relevance since it was imposed following the employee's failure to comply with a lawful instruction issued to him by his superior.
- [29] I am satisfied in the circumstances of this matter that the sanction of dismissal was fair. There is no merit in the contention that the employee's conduct did not display disrespect of Mr Malema when the facts clearly show otherwise, even in spite of Mr Malema not being the employee's immediate supervisor but the plant manager. The employee refused to accept or respect the authority of his superior and attempted to direct the manner in which he would accept future work instructions. He displayed a lack of remorse for his behaviour, which he had failed to correct even while on a final written warning.

²⁰ At 1850A-C.

²¹ (2010) 31 ILJ 2475 (LC).

²² *Theewaterskloof (supra)* at para 37.

Having regard to all of these relevant circumstances, and in spite of mitigating personal considerations, I am satisfied that a continued working relationship was intolerable and that the dismissal of the employee was fair. The Labour Court erred, in my mind, in finding differently.

[30] It follows that the appeal must succeed. An order of costs would be neither just nor fair in the circumstances of this matter.

Order

[31] In the result the following order is made:

1. The appeal succeeds with no order as to costs.
2. The order of the Court *a quo* is set aside and replaced with the following order:
 - ‘(1) The arbitration award issued by the first respondent is reviewed and set aside; and replaced with the order that the dismissal of the applicant was substantively fair.
 - (2) There is no order as to costs.’

Savage AJA

Waglay JP and Molemela JA agree.

APPEARANCES:

FOR THE APPELLANT:

Mr A J Posthuma

Instructed by Snyman Attorneys

FOR THE THIRD RESPONDENT:

Mr A Goldberg

LABOUR APPEAL COURT