



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Not Reportable

Case no: CA 19/2015

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD

Appellant

and

SOUTH AFRICAN CATERING COMMERCIAL AND

ALLIED WORKERS' UNION obo L MZAZI

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

S GOLDSCHMIDT N.O.

Third Respondent

Heard: 8 September 2016

Delivered: 25 November 2016

Summary: Employee dismissed in absentia for absconding from work. At arbitration dismissal of employee found substantively fair but procedurally unfair in that no hearing convened on his return to work and two months' compensation awarded for procedural unfairness. On review the Labour Court found award unreasonable and set it aside, substituting it with a finding that the employee's dismissal was procedurally and substantively unfair and ordering retrospective reinstatement within 14 days. On appeal: judgment of Labour Court upheld with no order as to costs subject to substitution of order

of retrospective reinstatement with an order of reinstatement without retrospective effect and a written warning valid for 12 months for unauthorised absence from work.

Coram: Waglay JP, Landman JA et Savage AJA

JUDGMENT

SAVAGE AJA:

- [1] This is an appeal, with leave of the Court *a quo*, against the judgment and orders of the Labour Court (Rabkin-Naicker J) in which the award of the third respondent (the commissioner) was reviewed, set aside and substituted with a finding that the dismissal of the employee, Mr Luyanda Mzazi, was procedurally and substantively unfair and his retrospective reinstatement within 14 days ordered. This followed the commissioner finding at arbitration that the dismissal of the employee was substantively fair but procedurally unfair with two months' compensation awarded to him.
- [2] At the outset of the hearing, the appellant sought that the appeal be reinstated in terms of the Rule 5(17) of the Rules that govern proceedings in the Labour Appeal Court ('the Rules'). This followed the appellant's late receipt of the judgment of the Labour Court dated 13 March 2015 granting the appellant leave to appeal and the appellant's subsequent delay in filing the notice of appeal and the appeal record. The application was not opposed and having regard to the merits of the application, the appeal was duly reinstated and condonation for the late filing of the notice of appeal granted.
- [3] The employee was employed by the appellant, Pick 'n Pay Retailers (Pty) Ltd, in June 2004. At the time of his dismissal, he was a storeman at the appellant's Middestad branch in Cape Town. The appellant's leave policy, requires that annual leave be taken –

'subject to...trading requirements and business needs ...[and] the joint agreement of both management and the employee. If agreement cannot be reached, then management will get together with the employee and his/her representative for [purposes of] reaching an amicable solution'.

- [4] Leave once agreed is recorded in a written document signed by both parties.
- [5] From 22 December 2012 until 4 February 2013 the employee was absent from his work without the permission of the appellant. The appellant sent two telegrams to the employee: on 28 December 2012 and 2 January 2013. Both were sent to an incorrect address in Mfuleni, Cape Town. In these telegrams the employee was informed that he had been absent without authorisation and had not communicated the reasons for his absence. He was asked to contact the appellant regarding his absence from work and informed that a failure to do so may lead to disciplinary action. On 11 January 2013 a third telegram sent to the same incorrect address recorded that a disciplinary hearing would be held on 15 January 2013 and that the hearing may proceed in his absence if the employee failed to attend. The employee did not receive any of the three telegrams.
- [6] On 15 January 2013 the disciplinary hearing was held in the absence of the employee. The written notice to attend the disciplinary enquiry recorded that the notice had been "*issued in absentia*" to the employee. It stated that the hearing related to "*absconding from your workplace since 22/12/12 without authorisation*". Mr Yusuf Oyekunle, the assistant store manager at the Middestad branch, acted as initiator and presented the case of the appellant at the hearing. He relied on the three telegrams sent to the employee, an absenteeism report and the appellant's attendance register. The minutes recorded that the employee had waived his rights to lead evidence at the hearing.
- [7] In his closing argument Mr Oyekunle reiterated that the telegrams had been sent to the employee who had been absent from work and who "*...clearly has no interest to work and should be found guilty*". The chairperson proceeded to find the employee "*guilty of absconding from the workplace*".
- [8] The aggravating factors relevant to sanction put up by Mr Oyekunle were the severe negative impact that absconding from the workplace has on the appellant's business, the shortage of staff causing poor service delivery and the employee's failure to respond to the telegrams sent to him. He stated that

the employee's behaviour could not be condoned and indicated that the employee "*is not interested in his work*". The employee was dismissed from his employment with immediate effect.

- [9] On his return to work on 4 February 2013, the employee was informed of his dismissal. Aggrieved with the decision to dismiss him, he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Arbitration award

- [10] When the dispute was not resolved at conciliation, the matter was referred to arbitration. The evidence at arbitration was that the employee approached Mr Oyekunle on 21 December 2012, at a time when the store manager was with him in the office, with a request to take leave from 27 December 2012. When the employee told him that he had been granted leave, Mr Oyekunle indicated that he was not aware of this:

'...he said "I have to take my leave and I've got leave." I said, "Well, yes you've got leave, we can talk about when you need to take leave but I think it's not fair for you to just come to me now and you're telling me you're taking leave from the 27th or whenever...the store manager was in the office at that point in time, so then I said okay, fine, I will give you leave not now because one, I need to make [a] plan to get someone in your position. Secondly, it's just [a] bit of a short notice for me considering the time of the season.'

- [11] Mr Oyekunle told the employee that he could take leave in the first week of January; that he should come to him so that the paperwork could be completed; and that the employee should ensure that someone was available to work in his place. The employee indicated that he had always taken his leave in December and Mr Oyekunle replied that it was not about whether he took leave then but that he had not given enough time to allow other arrangements to be made when an agreement had to be reached on when leave was taken. When the employee then told Mr Oyekunle that there was a crisis in his family related to someone passing away, Mr Oyekunle asked him for the necessary documentation as "*proof then I can book you off as an*

occasional leave pending the time I approve a leave for you". The employee did not provide the documentation, no leave was authorised and Mr Oyekunle was adamant there was no misunderstanding between them. The employee, who was the only person working in the stock room at the time, did not report for duty thereafter and was absent from work from 22 December 2012, until 4 February 2013, the same number of working days as the annual leave days due to him.

[12] Mr Oyekunle stated that the trust relationship had broken down as a result of the employee not respecting the appellant's rules in circumstances in which absenteeism has a huge impact on the business over the festive season. He stated that he had expected the employee to return to him to reach agreement before proceeding on leave and that he would not be able to work with the employee or trust him again. Mr Oyekunle stated that when he took over from Mr Bradley Jantjies as assistant manager in June 2012, he was given a leave planner for the grocery department but not one person had been scheduled on the planner to take leave from June to December of that year.

[13] Mr Oyekunle reiterated the appellant's leave policy, in which leave is approved subject to the employer's trading requirements and business needs. A leave form is completed once leave is granted, which is signed by both the manager and employee and is entered into the relevant computer system and a copy of the approved form is provided to the employee. He stated that Ms Joseline Gertse had received a written warning on 11 January 2013 for unauthorised absenteeism in that she took leave from 27 December 2012 to 10 January 2013 when her leave had been approved but she had not completed a leave form.

[14] The evidence of Mr Bradley Jantjies was that he had not approved leave for the employee commencing in December 2012. At a staff meeting on 1 February 2012, he made it clear that if leave had been taken in December 2011, there would be no entitlement to leave in December 2012. Only one person gave dates for leave at the meeting but her name could only be inserted onto the leave planner once approved.

- [15] The employee's evidence was that he had been authorised to take leave in that after the February 2012 meeting, he had completed a leave form for leave from 27 December 2012. He said he had explained that he needed to attend the unveiling of a tombstone for his parents. He did not receive a copy of this form from the appellant. Neither the employee's version that he had signed a leave form, nor that he had told Mr Jantjies the reason he wanted to take leave was put to Mr Jantjies in cross-examination. The employee stated that when he spoke to Mr Oyekunle on 21 December 2012, it was to remind him that he was taking leave from 27 December and to seek leave from 24 December 2012 to attend a family funeral. He stated that Mr Oyekunle was dismissive of him and he denied that the possibility of leave in January had been discussed. The employee's evidence was that he did not receive any telegrams or telephone calls from the appellant and that he had never lived at the address used by the appellant in the three telegrams.
- [16] A storeman named Mbulelo was, accordingly to the employee, prepared to swap his December leave with the employee, a fact of which Ms Veronica Pieterse testified she was aware. This evidence was not confirmed by Mbulelo. Ms Gertse had also submitted a leave form at the February 2012 meeting but had not received a copy of it from the appellant. She received a written warning in January 2013 for unauthorised absenteeism.
- [17] In the arbitration award, the commissioner rejected the employee's version, finding that he had taken leave without authorisation and that he had committed misconduct. The commissioner took account of the employee's key position, his lengthy period of unauthorised leave, the fact that it was taken at the busiest retail time of the year and his failure to reach an agreement with Mr Oyekunle regarding leave in January or occasional leave. This led the commissioner to conclude that the misconduct committed was serious, had implications for the appellant's operations and undermined the trust relationship. Although the commissioner found that the employee had no intention to abscond which "*placed his conduct in a different light*" to what was found at the disciplinary hearing, given his lengthy absence from work and his lack of contact with his employer, the appellant "*had no choice*" but to assume

that he was not returning to work. The dismissal of the employee was accordingly found to be substantively fair.

- [18] Turning to the procedural fairness of the dismissal, the commissioner found that the appellant *"should have dealt with the situation differently when the applicant eventually returned to work"* and given him a hearing on his return to work:

'The fact that the applicant did return to work, and reported for duty, meant that there was no intention to abscond. This placed his conduct in a different light. While the absence of the applicant was lengthy, the applicant also had a long service history with the respondent. The respondent is a large employer with a sophisticated and well resources HR department. The applicant was entitled to the very basic principle of fairness...to state [his] side of the matter, and to defend himself against allegations of misconduct.'

- [19] The employee was awarded two months' compensation for procedural unfairness.

Judgment of Labour Court

- [20] On review, the Labour Court took account of the fact that the commissioner found that the employee had not absconded from work, which was the offence he had been charged with, as well as the commissioner's finding that this placed the employee's conduct *"in a different light"*. The Court found that *"it can be assumed"* that the commissioner's finding that the employee should have been provided with a proper opportunity to explain his conduct on his return meant that had such opportunity been provided *"this may have prevented his dismissal"*. Furthermore -

'The issue of [the employee's] clean disciplinary record, the reason for his need to return to the Eastern Cape to unveil tombstones for his parents and [his] relatively long employment history with the company were all considerations that should have been addressed by the Commissioner in the process of coming to a decision regarding the substantive fairness of the dismissal. They were not. Further, the reasoning that a disciplinary hearing

may have put [his] absence in a different light, highlights the flaw in this approach.'

[21] The Court found that the decision that the dismissal was substantively fair was one that a reasonable decision-maker could not reach. No issue was taken with the commissioner's finding that the dismissal had been procedurally unfair. As a result the order made was that:

- '(1) The award under case number WDC T2454 – 13 is hereby reviewed and set aside and substituted as follows:*
- '(a) The dismissal of Mr L. Mzazi was procedurally and substantively unfair;*
- (b) The third respondent is ordered to retrospectively reinstate Mr Mzizi within 14 days of this order. "*
- (2) There is no order as to costs.'*

Grounds of appeal

[22] In its notice of appeal, the appellant raised the following broad grounds of appeal:

- 22.1 that the Labour Court erred in finding that the commissioner's decision that the dismissal of the employee was substantively fair was not one that a reasonable decision-maker could make;
- 22.2 that the Court erred in conflating procedural and substantive fairness;
- 22.3 that the Court erred in taking into account certain alleged errors in the commissioner's reasoning and in finding that the commissioner made an error of law in placing an *onus* on the employee to discover his leave form; alternatively that it erred in substituting its finding for that of the commissioner when it ought to have remitted the matter back for a re-hearing.

Evaluation

- [23] It is now trite that whether a commissioner's finding was one which a reasonable decision-maker could not reach on the material before him is to be determined in light of *Sidumo v Rustenburg Platinum Mines Ltd and Others* (*Sidumo*)¹ and with reference to *Herholdt v Nedbank Ltd*² and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*.³
- [24] While ordinary principles of contract permit a contracting party to terminate a contract if the other party is unable to perform, in an employment context, the question remains whether it was fair for the employer to exercise that election.⁴ The material before the commissioner clearly showed that there was no agreement that the employee could take leave in December. The appellant's leave policy expressly required such agreement in writing, of which policy the employee was aware, and in being absent from work without authorisation the employee conducted himself in breach of the appellant's rule.
- [25] In determining whether the appellant's decision to dismiss was fair in *Theewaterskloof Municipality v SALGBC and Others*,⁵ echoing the Constitutional Court in *Sidumo*, it was recognised that the commissioner must balance "*the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair.*"⁶ The relevant circumstances to be considered include the elements of the Code of Good Practice with the task of the commissioner being neither to consider sanction afresh nor to defer to the employer's decision.⁷

¹ 2008 (2) SA 24 (CC).

² (2013) 34 ILJ 2795 (SCA).

³ (2014) 35 ILJ 943 (LAC) at para 16.

⁴ *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] 11 BLLR 1041 (SCA); (2011) 32 ILJ 1618 (SCA) at para 12.

⁵ [2010] 10 BLLR 1216 (LC).

⁶ At para 1223.

⁷ *Sidumo (op cit)* at para 79 and 117; Item 3 Schedule 8 of LRA.

- [26] In considering the fairness of the employee's dismissal, the commissioner had regard to the employee's position and his lengthy period of unauthorised leave at a busy time of the year to find that the misconduct was serious and undermined the trust relationship with the appellant. The commissioner found that the appellant in dismissing the employee had "*no choice*" but to assume that the employee was not returning to work. This was so in spite of evidence that the appellant had failed to send notice to the employee at the address it had for him on record; and that Mr Oyekunle was aware that the employee had sought to take annual leave and then occasional leave yet made no reference made to this at the disciplinary hearing.
- [27] With an emphasis on corrective and progressive discipline, the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable. For leave without authorisation to justify summary dismissal for the first offence, the material before the commissioner must exist to show that the misconduct was of such a serious nature as to justify dismissal the imposition of the most severe of available sanctions.
- [28] Although it was suggested that the employee's absence caused operational strain over the busy festive period given his position as storeman, no evidence showed that it caused harm of such a serious nature that it warranted summary dismissal for the first offence.⁸ This was more so when the employee had a lengthy period of service and a clean disciplinary record. While he was clearly wilful and displayed disregard for the appellant's rules, the employee was not dishonest in his misconduct, which was shown to have caused inconvenience but no proven loss or damage to the employer. Regard was not had by the commissioner to the fact that as a large employer, the appellant had the resources to make contingency plans, that such plans were made and that the employee ultimately returned to work at the conclusion of what he considered to be the leave days due to him.⁹

⁸ Item 3(5).

⁹ *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at para 36; *Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at para 29.

- [29] The commissioner also had no regard to whether discipline for the same or similar disciplinary infractions had been applied consistently by the appellant.¹⁰ Ms Gertse received a written warning for taking leave without authorisation in circumstances in which it concerned the breach of the same rule, although her misconduct was distinguishable in severity in that her leave had been agreed but her leave form not authorised by signature. Furthermore, the commissioner did not have regard to the appellant's evidence of its failure to comply with its own procedure in sending telegrams calling on an employee to return to work to the incorrect address. The fact that the appellant did not comply with its own procedure made it irrelevant whether the employee would have complied with the instruction to return to work if the correct address had been used.
- [30] For these reasons, I am satisfied that the Labour Court's finding cannot be faulted that the commissioner's decision that the dismissal of the employee was substantively fair was not one that a reasonable decision-maker could reach on the material before him.
- [31] The commissioner failed to have appropriate regard to the material before him and the relevant circumstances as they applied to this matter. The breach of the employer's rule in the circumstances of this matter warranted the imposition of a sanction short of dismissal given the relevant facts, consistency in the manner of application of the rule and the response to its breach, the employee's clean disciplinary record and long service.
- [32] As a result, the award was unreasonable and permitted interference on review to the effect that the dismissal of the employee was too harsh and that the imposition of a sanction short of dismissal was both fair and appropriate in the circumstances. Given the nature of his misconduct, the employee should however receive a final written warning valid for 12 months from the date on which he is reinstated into his employment with the appellant for unauthorised absence from work.

¹⁰ Item 3(6).

- [33] The employee seeks reinstatement into his employment with the appellant. As was stated in *Equity Aviation Services (Pty) Ltd v CCMA and Others (Equity Aviation)*:¹¹

‘The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract.’¹² (footnotes omitted)

- [34] The court or arbitrator may in terms of s193(1)(a) of the Labour Relations Act 66 of 1995 “order the employer to reinstate the employee from any date not earlier than the date of dismissal”. A determination of the date of reinstatement requires the court or arbitrator to exercise a discretion judicially,¹³ with regard had to the relevant circumstances, so as determine what is fair and equitable. This requires a consideration of such factors as the nature and extent of the employee’s conduct, the reasons for the finding that dismissal was unfair, the effect of the reinstatement order on the employer,¹⁴ the reason for and impact of delays in the determination of the dispute and the extent of the employee’s loss of income.¹⁵

- [35] Having regard to the nature of the employee’s misconduct, the reasons for the finding that the sanction of dismissal was unfair, the disciplinary warning to be imposed on the employee and the effect of the reinstatement order on the appellant, the view I take of the matter is that an order of reinstatement without retrospective effect is fair in the circumstances of this matter.

- [36] The appellant does not appeal against the finding of procedural unfairness but contends that the Labour Court erred in conflating procedural and substantive fairness. I am not persuaded that there is merit in this ground of appeal. The

¹¹ 2009 (1) SA 390 (CC).

¹² At para 36.

¹³ *NUMSA and Others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR 631 (LAC); *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) at paras 61-64.

¹⁴ *Seardel Group Trading (Pty) Ltd t/a Cape Underwear Manufacturers v SACTWU and Others* [2009] 11 BLLR 1051 (LAC).

¹⁵ *NUMSA obo Maifo v Ulrich Seats (Pty) Ltd* (2012) 33 ILJ 2918 (LC) at 2929.

commissioner noted that the fact that the employee returned to work placed his conduct “*in a different light*”. This indicated a recognition that, while the employee had been dismissed on the basis that he “*is not interested in his work*”, his return to work did not bear this finding out. The Labour Court, in finding that the employee may have prevented his dismissal had he been provided with an opportunity to explain his conduct on his return, did not conflate procedural and substantive fairness in this or any other manner such as to justify the appeal being upheld.

[37] Furthermore, even if an erroneous finding was made regarding where the *onus* lay in the discovery of the leave form, this is of no moment having regard to the dispute as a whole and the manner in which the Court *a quo* approached the matter and does not warrant the setting aside of the Labour Court’s judgment on appeal. The Labour Court can also not be faulted for substituting its finding for that of the commissioner in circumstances in which a full record was before the Court and there was no reason to justify the remittal of the matter back to the CCMA. For all of these reasons, the appeal must fail.

[38] No order as to costs is either sought or made.

Order

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

1. The appeal is dismissed with no order as to costs, subject to the substitution of paragraph 1 (b) of order of the Court *a quo* as follows:

“(b) The third respondent is ordered within 14 days of this order to reinstate Mr Mzizi without retrospective effect into the same or similar position, subject to a final written warning for unauthorised absence from work valid for 12 months from the date of reinstatement.”

SAVAGE AJA

Waglay JP and Landman JA agree.

APPEARANCES:

FOR THE APPELLANT:

Mr G A Leslie

Instructed by Bowman Gilfillan

FOR THE FIRST RESPONDENT:

Mr Mbana

SACCAWU