

IN THE LABOUR COURT OF SOUTH AFRICA**HELD IN DURBAN****CASE NO. D 722/09***Not Reportable*

In the matter between:

TOTALGAZ SOUTHERN AFRICA (PTY) LTD

APPLICANT

And

THERESA NTOMBIFIKILE NGOBESE

FIRST RESPONDENT

B PILLEMER N.O

SECOND RESPONDENT

COMMISSION FOR CONCILIATION,**MEDIATION & ARBITRATION**

THIRD RESPONDENT

JUDGMENT

CELE J**Introduction**

[1] In this application it is sought to have an arbitration award dated 18 August 2009 issued by the second respondent, as the commissioner of the third respondent reviewed and set aside in terms of Section 145 of the Labour Relations Act 66 of 1995, hereafter referred to as the Act. In the event of the order sought being granted, the applicant simultaneously seeks to be granted an order that the dismissal of the first respondent by the applicant was both substantively and procedurally unfair. The first respondent opposed this

application in her capacity as the erstwhile employee of the applicant in whose favour the arbitration award sought to be assailed was issued.

Background facts

- [2] The first respondent, Miss Ngobese, commenced her employment with the applicant on 1 October 2005 as a sales representative in a gas selling business of the applicant. Her job was essentially that of finding new customers to whom gas would be sold. There were two types of customers. There were those that were on contract, contracted customers and those that were buying from the shelf without a contract. Once customers were found, they then had to be maintained by sales representatives. Miss Ngobese used her motor vehicle in the performance of her functions and had thereafter to fill a claim form so that she could be compensated for such use.
- [3] Miss Ngobese reported to Mr Gerrit Booysen who was a manager of the applicant. She also worked with a lady by the name of Miss Xoliswe Ntse who was the applicant's human capital manager. There are sales targets that were set by the applicant for its sales representatives to meet.
- [4] On 27 March 2008, Mr Booysen issued an email message instructing Miss Ngobese to spend all her time with L P Gas to investigate why the applicant's sales volumes had declined, that is they were very low. She had then to

spend time with sales representatives of the applicant to determine why they were losing sales volumes.

[5] On 9 May 2006, Miss Ngobese was subjected to a disciplinary hearing, facing charges of misconduct described as:

1. Non-performance/non-achieved objectives.
2. Excessive traffic fines/non-conformant with company policy, and
3. Non-adherence to submission of reports.

[6] She was found guilty of the charges and issued with a final written warning for the first two offences, and a written warning for the third offence.

[7] On 5 June 2006, the sales representatives of the applicant had a staff meeting. Minutes were captured for the meeting that was held. From that meeting a further instruction was issued by Mr Booysen, which is encapsulated in these proceedings in the following expression:

"The way forward: assist clients with added effort. Do not sign any new client with the current problem we are having with the shortage of LPG and cylinders."

[8] On 28 July 2006, Mr Booysen issued a further instruction through an email message which is encapsulated in the following manner:

"With expected shortages we will look after our contracted clients and see to it that they get product. We will not deliver to uncontracted clients and neglect the committed ones."(sic)

[9] The applicant was subsequently charged with acts of misconduct and she was placed on suspension and was subjected to a disciplinary hearing. This was on or about 18 September 2006. She was found to have committed those acts of misconduct with which she had been charged.

[10] At the commencement of these proceedings, I enquired from the representative of the applicant, Mr Bikwani, as to what period was covered for that misconduct, and the charges themselves, what charges they were. Initially he informed Court that the period for which she had been charged stretched from October 2005 to August 2006, October 2005 being the date on which she commenced her employment. I pointed out to him that it could not be because there was then another charge of Miss Ngobese which is the subject matter of paragraph 3.3 of the arbitration award. He subsequently indicated to me that the first charge, therefore, as contained in 3.3 of the award, covered the period October 2005 to May 2006, and that the misconduct for which we are here, stretched then from May 2006 to September 2006.

[11] It was my concern, as I raised it, to know what periods were covered because I could not find a charge sheet, as is normally the case, that would have been served onto Miss Ngobese. It has been conceded in these proceedings by Mr Bituane that no formal charge sheet was drawn. He then referred me to page

36 of the record Volume 1, that contains the notice of suspension. Paragraph 2 of that notice reads:

"You must at all times be available for the disciplinary enquiry that will be confirmed with you in writing. Reasons for suspension: non-performance, fraudulent kilometre report (company vehicle)."

And then what appears after that is, "suspension issued by."

[12] In this file I was unable to find a charge sheet as is commonly done which would inform the employee of the full allegations in the form of the dates during which the act complained of took place, the description or full descriptions to the best that one can of the acts of misconduct that are complained of, and the manner in which such misconduct was perpetrated. It would appear, therefore, that no formal charge sheet was drawn. Unfortunately this appears not to have been picked up by the second respondent as she did not even really list or identify the charges, as one would normally find it being done. But that is not her fault. She had to proceed with the matter as it was presented to her.

[13] As I have indicated Miss Ngobese was then found guilty of the charges which it would seem would, therefore, be those of non-performance, fraudulent kilometre report, as appear in the notice of suspension. It does not appear that any document was furnished to her which fully described charges. She was found guilty of these charges and was dismissed by the applicant. She

was aggrieved by the dismissal and then she referred an unfair dismissal dispute for conciliation. Conciliation failed to resolve the dispute. She then referred the dispute to arbitration in which instance the third respondent, Commissioner Vis Perumal, was appointed to arbitrate the dispute.

The chief findings by the third respondent

[14] It is apposite to read the paragraph entitled "Analysis and Argument" which begins at paragraph 8 of the award, and it reads:

"During 2006 there was a gas and cylinder shortage. Booysen had given an instruction to applicant not to pursue new clients and had given applicant alternative duties. There was no evidence that Booysen changed his instruction. Applicant testified that he had not done so. In the absence of Booysen's evidence to negate applicant's evidence, I accept the applicant's evidence and reasons she has given for not achieving targets during May 2006.

A disciplinary hearing was held on 9 May 2006 and applicant, amongst other charges, was found guilty of non-performance/non-achieved objectives. She was given a final written warning.

During June and July 2006, applicant was instructed not to recruit further clients and yet, as early as September 2006, she was again charged for not achieving her targets. This appears to be unfair to charge her so soon after the first hearing when there had been an instruction in between not to find further customers.

I accept applicant's version that she may have made some mistakes while using the computer. She said that she paid for any excessive mileage. There would be no reason for her to deliberately provide incorrect information.

In the circumstances the respondent has not proved misconduct. It follows that the dismissal of the applicant was substantively unfair.

The applicant asked for reinstatement, and in the circumstances is entitled to that remedy. The date of the dismissal was 18 September 2006. The applicant earned R8 000 per month at the time of her dismissal. She is entitled to arrear salary in the amount of R280 000, being R8 000 x 35 months' salary from 18 September 2006, the date of dismissal, until 18 August 2009, the date of the award."

- [15] The third respondent then found or declared the dismissal to be substantively unfair and ordered the applicant to compensate the first respondent in an amount of R280 000 within 21 days of being notified of the award. The applicant was directed to report to work within three days of being notified of the award. The applicant came to know of the award and was aggrieved thereby. It then initiated the present application.

Submissions

- [16] Essentially this application is based on an averment that the third respondent misdirected herself by relying incorrectly upon evidence submitted by the first respondent, stating that she had allegedly received an instruction from her superior, in terms of which she was not to secure new customers, whilst ignoring or taking inadequate consideration of the applicant's evidence that such instruction, had it been stated, was qualified in duration and was not applicable for the entire duration of the first respondent's employment with the applicant, which would have been approximately 12 months, to which the charge of non-performance related, and hence that first respondent's evidence

was challenged in this regard, and should thus not have been accepted nor relied upon by the third respondent.

[17] It was further submitted that the third respondent committed an irregularity while claiming that there was no evidence to the effect that Booysen changed the instruction. Evidence was led, under cross-examination, that it would have been improper to have charged the first respondent if instruction endured until August 2008, and deponent testified that the instruction lasted for two weeks only. It is further submitted in these proceedings that at application hearing, the version was put to deponent that it was the first respondent's version that instruction endured up to August 2006. The deponent, who was the witness, disputed that version, and under re-examination the witness confirmed that the instruction was lifted by 16 May 2006.

[18] It is further submitted by the applicant that the applicant was able to prove that the first respondent's misconduct provided the three examples of the first respondent's absence at work that were undisputed by the first respondent, but which third respondent failed to apply her mind to in arriving at a conclusion. And three instances in this regard were identified. Firstly, the first respondent went to run a marathon in Cape Town without taking authorised leave, and when asked, she told her manager that she had de-stressed—she de-stresses through road running. Secondly, she claimed to have gone to see a doctor, and when asked for a sick note, she told her manager that the

doctor did not want to give her a sick note, but she claimed to have had a breakdown with the company car and called the dealership to tow her car away, but when asked to produce documentation to prove the breakdown, she claimed that the documents were lost in her car.

[19] A further submission is that the third respondent, by her own statement, found that the third respondent's evidence was difficult to follow, notwithstanding the aforementioned, she accepted all of the evidence of the third respondent as unchallenged, including, but not limited to the third respondent's statements that she was not aware of the format of reporting or had difficulties with her computer, where there was no documentary evidence provided by the third respondent to corroborate same.

[20] There is a plea in the alternative, it relates to the sanction in the event it is found that there was proof that the dismissal was substantively and procedurally unfair, the submission being that the third respondent committed a gross irregularity in failing to appreciate that the remedy of reinstatement would not be the appropriate sanction where there are compelling reasons, as the first respondent was dismissed some three years previously, and it would thus be untenable for her to commence employment with the applicant where that position has been filled and is currently occupied, and that the applicant has no further positions available in the area. So much for the grounds of review, basically.

[21] The first respondent opposed the application to review the award. Essentially, in opposing this application, it is suggested that the third respondent properly approached this matter and properly assessed the evidential material that was before her. The case of the first respondent was that there was a shortage of the product and as a result the manager issued an instruction that they should not get any new clients as shown in the minutes of the staff of 5 June 2006. The instruction was reiterated in the email of 28 July sent by Mr Booysen.

Evaluation

[22] The Court is then referred to the record and the exchanges that took place. The Court has taken particular note of that. I return then to the submissions and the analysis. The first concern I raised at the beginning of this enquiry with Mr Bikwani is that an employee who is alleged to be failing to perform as is required by the employer is normally subjected to an incapacity hearing. This appears not to have been the case, on the contrary she was subjected to a disciplinary enquiry.

[23] An incapacity hearing takes a formal hearing where the line manager or the person in charge sits down with the employee, identifies the problems, put timeframes for compliance; where it is necessary, the employee is then subjected to training and re-training depending on a need and the position of

the employee. There would be further sessions of counselling or of sitting down with an employee, identifying progress, if any, that has been made; where none has been made, such is indicated to the employee and warnings are then issued of the likely drastic steps that might be taken.

[24] Various remedies are applicable when it comes to incapacity hearings. For instance, an employer might decide to place the employee in another position where one is suitable. It might even be necessary, where it is applicable, for instance, to demote the employee or to put certain conditions under which the employee has to work and perform.

[25] All of these have not been followed, or as has been suggested by Mr Bikwani, it is suggested that there were times when Mr Booysen sat down with that respondent, but as I have indicated these are formal sessions, there would be minutes kept for such sessions as counselling sessions, and progressively, from one meeting to another, one refers, or makes a cross-reference to what happened before, as a means of checking whether there was progress or not. That was not followed.

[26] Instead the third respondent was charged with an act of misconduct, to the extent that there is a suggestion that she was charged for a period of about a year, as I have just read in the founding affidavit containing the grounds for review. That would have been an anomaly because she had already been

charged as appears in the arbitration award, paragraph 3.3 thereof. Normally, she could not be charged twice for acts of misconduct for which she had been charged, found guilty and punished.

[27] It must, therefore, be clear that she could only be charged for any acts of misconduct that would happen subsequent to the charging, that would, therefore, in this instance be from May up to a period of August. That period coincides with the time when Mr Booysen issued instructions to scale down on recruiting new customers.

[28] Now the version of the applicant is that that instruction was meant to last for two weeks and was thereafter withdrawn. It is regrettable that Mr Booysen was not available to testify. Miss Ntse testified. I do not know in what position she features in an instruction that would have been issued by Mr Booysen to be carried out by the sales representatives, whether she had personal knowledge of what transpired, I do not know. However, it was incumbent on the applicant to produce proof, even at this stage of the withdrawal of the instruction.

[29] Miss Ntse's evidence was a mere bold statement made when she testified. One has to take note of the fact that the third respondent did not just speak of the issue of instruction for her to stop recruiting new customers, she produced documentary proof. It suggests from that document which is not contested,

that the applicant wanted to conduct its affairs through written instructions. One, therefore, would have expected that the withdrawal of a written instruction would have been in writing, or even if verbal, it could have been captured in a meeting, such as was the case in the minutes that were captured in this case in the meeting held on 5 June 2006.

[30] The evidence of Miss Ntse is unclear as to how the applicant went about withdrawing the instruction that was issued, firstly. Secondly, that evidence is unclear as to why she said the instruction was to last for two weeks, because the instruction does not say so. The basis on which she made this statement is just unfounded.

[31] I have entered the area of looking at the evidential material, not because I want to substitute the decision of the third respondent, but I did so with a view to investigate whether or not there was any defect in the award when the reasons for the award are seen against the evidence that was tendered during the arbitration hearing.

[32] The third respondent has also looked at the aspect of the recording of the claims and the ... [indistinct], she dealt with that. She applied her mind to it. This appears in paragraph 8.4 of the award.

[33] I am unable to find any defect as is alleged in these paper before me, having been committed by the third respondent. On the contrary, and within the ambit of Section 138 of the Act, she issued an award in a simple way that gave brief reasons, as expected of her. This award shows that she applied her mind to the evidential material that was before her. She did look at the evidence of Miss Ntse and she found it wanting, and as I have also looked at it and found it wanting. It must be remembered that making a bold statement without any support for it, when testifying, is a risk that a witness takes that that version may be found wanting in credence or in evidential weight, as was the case presently.

[34] This then brings me to the conclusion that, indeed, the applicant failed to prove that the dismissal of Miss Ngobese was substantively fair.

[35] The next aspect to look at relates to the sanction. I must remind myself that Miss Ngobese had been found to have been dismissed without any sound reasons, there was no substantive reason. The next question then relates to the remedy that was available to her. Section 193 of the Act then kicks in. It reads, to the extent that it is relevant in these proceedings, 193(2):

"The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee unless

(a) The employee does not wish to be reinstated or reemployed.

(b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

- (c) It is not reasonably practicable for the employer to reinstate or re-employ the employee, or
- (d) The dismissal is unfair only because the employer did not follow a fair procedure.”

[36] Very briefly, about this provision, one finds the decision in *Kroukamp v SA Link (Pty) Ltd* by ZONDO, JP, as he then was, [2005] 12 BLLR 1172 (LAC) at paragraph 116, the following appears:

“The absence of a discretion on the part of the Labour Court or an Arbitrator to deny reinstatement to an unfairly dismissed employee, in the absence of any one of the situations set out in Section 193(2) must be understood against the background that reinstatement was made a statutory primary remedy in unfair dismissal disputes, in return for Organised Labours agreement that there should be a capping of compensation that could be ordered to unfairly dismissed employees.”

[37] It is, therefore, clear that when the third respondent ordered reinstatement, she was giving Miss Ngobese a primary remedy available to her in terms of the Act. She had to check on whether or not anything stood in the way for the reinstatement of the employee. Miss Ngobese had not said that she did not want to be re-employed. On the contrary, she wanted that remedy.

[38] There was no evidence at the hearing that a continued employment relationship would be intolerable. It must be remembered that for that finding to be made, there had to be evidence led at the hearing. As to the question whether or not it was reasonably practicable for the employer to reinstate or

re-employ, again, there had to be evidence led during the hearing of this matter. Such was not led. At the moment, and even in review proceedings, I have the power to revisit that.

[39] The only submission made in this regard is that the post occupied by Miss Ngobese has now been filled. Now that is not a good enough reason. If it were a good enough reason, it would simply mean that each time an employer dismisses an employee, the post had to be filled quickly, so that even if the employee finds an order in his or her favour, already the post is filled. That is not good enough.

[40] The filling of a post when the employer knows very well that the dismissal is being challenged should, therefore, not be used as a tool in favour of the employer. It would mean that the employer is allowed to benefit from its own mistake.

[41] I consider the fact that the dismissal took place quite some years ago, the dismissal took place in 2006, we are now in 2010. This is the primary remedy. I see no reason why the employer should not welcome Miss Ngobese back. There are ways and means of dealing with a situation, for instance when an employer finds that it has excess employees. The Act is available, it must be complied with.

[42] In my view:

1. The application to have an arbitration award dated 18 August 2009 issued by the second respondent, reviewed and set aside, is dismissed.
2. The applicant to pay costs thereof.

CELE J

DATE OF HEARING : 17 November 2010

DATE OF JUDGMENT : 17 November 2010

APPEARANCES

FOR APPLICANT : Mr. M BIKWANI of TOTALGAZ
SOUTHERN AFRICA (PTY) LTD

FOR RESPONDENT : Mr. P.O Jafta of JAFTA INC.