



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR86/2011

In the matter between:

**DORRAINN BAILIFF INVESTMENTS (PTY) LTD**

**t/a LINKSFIELD PHARMACY**

**Applicant**

and

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER LANCE CILLIER N.O**

**Second Respondent**

**EMMANUEL MUFUNWAINI**

**Third Respondent**

**Heard: 2 July 2013**

**Delivered: 6 May 2014**

**Summary: Adjudication of an Application in Terms of Section 145 of the Labour Relations Act, 66 of 1995.**

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JUDGMENT

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MANCHU AJ

## Introduction

- [1] In this review, the record of the proceedings of the CCMA is short and the facts involved are largely common cause. Briefly stated the facts are as follows.
- [2] The Third Respondent was employed by the Applicant as a driver of a motor vehicle since 2003.
- [3] In 2010, the Applicant's operational requirements dictated that the Third Respondent should move from driving a motor vehicle to riding a motorbike. The Third Respondent was instructed to learn to ride a motorbike and acquire a motorbike licence.
- [4] It appears that the Third Respondent took a period of almost six months before acquiring a learner licence to ride a motorbike. From my reading of the record, it is suggested that the Third Respondent was, after obtaining a learner licence, legally permitted to man a motorbike but he did not have the necessary skill and practical experience to ride a motorbike.
- [5] On Wednesday 28 July 2010, the Applicant handed the Third Respondent R800.00 and instructed him to attend five lessons over the period Thursday 29 July to Saturday 31 July. The Third Respondent would have to attend two lessons on at least two days for him to be able to attend the five lessons in the three days.
- [6] It is common cause that the Third Respondent was not able to secure five lessons over the three days. It is also common cause that the Third Respondent sought to advise the Applicant, by sending a "call back" test message, that he was unable to secure the five lessons in the three dates. The "call back" text was sent on Wednesday 28 July 2010.
- [7] The Applicant contacted the Third Respondent on Monday 2 August 2010 to enquire why he had not arrived at work, to which the Third Respondent responded that he was unable to attend work because he had scheduled 'riding' lessons for Monday 2 August to Tuesday 3 August.

- [8] At a disciplinary enquiry, the Applicant brought charges against the Third Respondent alleging that the Third Respondent had, *inter alia*, failed to follow company procedure by not informing his employer of his inability to attend work and that he had shouted and swore at his employer.
- [9] At a hearing before the First Respondent, the Second Respondent (the Commissioner), found that the Applicant's conduct viewed holistically did not justify dismissal.

#### The applicant's grounds of review

- [10] The grounds of review relied on by the Applicant are largely directed at the Second Respondent's findings on whether dismissal was an appropriate sanction in the circumstances.
- [11] The Applicant's heads of argument attack the Second Respondent's findings on the charge that the Third Respondent shouted and swore at his employer. The attack was mostly directed at paragraph 18 of the award.
- [12] In paragraph 18 of the award, the Second Respondent found as follows:

'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 includes the action of the employer prior to the outburst. Disrespect to an employer justifies termination of the employment relationship only when it is so gross (i.e; insulting and abusive) or so frequent as to suggest that the employee has repudiated the employers 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 a month's salary from the applicant caused him severe duress and embarrassment and triggerred his unacceptable conduct. Although guilty of misconduct these mitigating factors ought to soften an instinctive reaction to dismiss an employee.'

- [13] The Applicant argued that the decision of the Second Respondent that “the employees dismissal was too harsh is unreasonable in that he failed to properly consider the totality of relevant factors”. The Second Respondent’s task, so it is argued, was to assess whether the Applicant’s decision to dismiss was fair and not to substitute the sanction with one he deemed appropriate and to decide whether the misconduct was perpetrated, and then decide on the fairness of the sanction of the dismissal.
- [14] It appears from a reading of the award that the Second Respondent did follow this approach. The Second Respondent found that the misconduct had been committed, and that the Third Respondent had shouted and swore at his employer, but he found that dismissal for this reason, in the circumstances, was unfair.
- [15] Furthermore, the Second Respondent did consider the “totality of relevant factors”. Firstly, he noted that disrespect to an employer justifies termination of the employment relationship only when it is either so gross (i.e. insulting and abusive) or so frequent so as to suggest that the employee has repudiated the employer’s lawful authority.
- [16] Secondly, he considered the circumstances in which the outburst was made; that the outburst was attributed to the Third Respondent’s severe financial duress and embarrassment that had been brought by the Applicant withholding the Third Respondent’s salary.
- [17] In my view, the Second Respondent considered all the evidence before him prior to deciding that dismissal was in the circumstances unfair. The Second Respondent said this in paragraph 19 of his award, wherein he said that “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.”

- [18] Even if the Second Respondent did substitute the sanction with one that he deemed appropriate, this would not constitute a sufficient ground of review.<sup>1</sup>
- [19] It was further argued that the Second Respondent acted unreasonably by finding that the alleged non-payment of the July salary was unfair and that he attached too much weight to it as a mitigating factor.
- [20] Although the Second Respondent made reference to the issue of the non-payment of the July salary, its relevance is only in respect of the circumstances prevailing at the time that the Third Respondent had the outburst. In other words, it is relevant because it gives background facts of what led to the Third Respondent's outbursts.
- [21] The Second Respondent did not concern himself with the fairness of the non payment. In fact, the Second Respondent expressly said that this it is not an issue before him.
- [22] The charge of the Third Respondent's failure to attend work is also the subject of this review.
- [23] The Second Respondent found that he accepted the Third Respondent's submission that he was told to stay home until he knew how to ride a motor bike.
- [24] In his award, the Second Respondent considered that the Third Respondent attempted to contact the Applicant, in the usual manner at the workplace, to advice the Applicant that he had not been able to secure the agreed dates and he would attend lessons the following week and would not be attending work. Furthermore, the Second Respondent considered that the Third Respondent did not perform any gainful work, from about March 2010, because there was no car for him to drive and he could not ride a motorbike, and that reporting to work under those circumstances would have served no purpose at all.

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<sup>1</sup> See *Lithotech Manufacturing Cape, A division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper & Packaging Industries and Others* [2010] 6 BLLR 652 (LC), at para 25 where the court found that although it considered that "an arbitrator cannot find an employee guilty on a lesser charge, I am, despite of this defect in the award not persuaded that the award cannot stand."

[25] The Second Respondent was faced with two versions concerning the events of Monday to Wednesday and he was persuaded by the Third Respondent's version. In my view, it cannot be said that his decision is unreasonable or that it warrants interference.

### Conclusion

[26] The Second Respondent's award does not warrant interference. I am not persuaded that his decision does not fall within the bounds of reasonableness.

[27] In the premises, the review is dismissed with costs.

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Manchu AJ

Acting Judge of the Labour Court of South Africa

### APPEARANCES:

FOR THE APPLICANT:

Advocate Wilhelm P Bekker

Instructed by Nothnagel Attorneys

FOR THE RESPONDENTS:

Unknown

Instructed by Stan Fanaroff & Associates