



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JS390/2014

In the matter between:

NKOSINATHI NTULI

Applicant

~~and~~ And

WEIR MINERALS (PTY) LTD

Respondent

Heard: 27, 28, 29, 30 January 2015 and 2 February 2015

Delivered: 6 February 2015

Summary: Automatically unfair dismissal claim founded on s 187(1)(d)(i) of the LRA; Applicant contending that he was dismissed for having lodged a grievance against his senior managers; Respondent taking the stance that the true reason for the dismissal was gross misconduct; Probabilities favouring a conclusion that the true reason for the dismissal was the alleged misconduct; Nexus between the grievance lodged and the disciplinary proceedings coincidental; Applicant's misconduct the true cause of the dismissal; Referral dismissed with no order as to costs.

JUDGMENT

VOYI, AJ

Introduction

- [1] This matter pertains to a claim for an automatically unfair dismissal as envisaged by s 187(1)(d) of the Labour Relations Act.¹ In its original state, the Applicant's case was premised on two causes of action.
- [2] The first and the primary cause of action was grounded on the provisions of s 187(1) of the LRA, read together with s 5(2)(c)(iv) of the same Act. The other leg of the case was founded on s 187(1)(d)(i) of the LRA.
- [3] I disposed of the Applicant's primary complaint in support of his case in my Ruling on an application for absolution from the instance that was launched by the Respondent.
- [4] Nothing more, therefore, needs to be said about the case and the allegations premised on the provisions of s 187(1) and s 5(2)(c)(iv) of the LRA.
- [5] In seeking to vindicate his right in respect of the remaining assertion that the dismissal was automatically unfair, the Applicant declares that he was dismissed for having exercised a right conferred by the LRA. That right was the lodgement of a grievance against his senior managers.
- [6] Without hesitation, I take the view that the lodgement of the grievance was the exercise of a right conferred by the LRA which, therefore, brings the Applicant's claim within the ambit of s 187(1)(d)(i) of the LRA.
- [7] I come to this finding on the basis that the grievance lodged was against a *demotion*.
- [8] A demotion would amount to an unfair labour practice if it is found to have been occasioned by an *unfair* conduct of an employer in relation thereto.
- [9] In lodging the grievance, the Applicant was, therefore, vindicating his right not to be subjected to unfair labour practice as protected under s 185(b) of the LRA.

¹ Act No. 66 of 1995 ("the LRA").

Background

- [10] The Applicant was, on 07 March 2011, employed by the Respondent in the position of Process Engineer. On 07 December 2012, he was promoted to the position of Product Manager: Cyclones and Engineering Systems.
- [11] There was a probation period of six months that was attached to this promotion. The probation period was, for reasons not relevant for purposes of this matter, extended by another three months.
- [12] Before the end of the extended probation period, the Applicant was demoted. Specifically and on 28 August 2013, the Applicant was demoted by the Respondent from the position of a Product Manager: Cyclones and Engineering Systems to that of a Process Engineer.
- [13] The Applicant felt aggrieved by this demotion. His first reaction was to address a complaint to the Respondent's Regional Managing Director, being one Mr Dave Athey ("Mr Athey"). He did so on 13 September 2013 and whilst on annual leave. Mr Athey responded to the Applicant's correspondence on 16 September 2013 and advised him that his correspondence was not in compliance with the Respondent's grievance procedure. The Applicant was, accordingly, guided by Mr Athey to express his concerns through the appropriate channels.
- [14] In the interim and on 17 September 2013, the Respondent's Sales and Marketing Director, one Mr Gavin Dyer ("Mr Dyer") issued an instruction to the Applicant to, *inter alia*, '...share all passwords in related models...' of a DMS Sink Product Model (hereinafter "the DMS Model").
- [15] There is a serious dispute between the parties as to who owns the intellectual property rights over the DMS Model. The Applicant was of the view that the DMS Model was product of his ingenuity and he, therefore, remained the proprietary owner thereof. He, further, contends that he had previously developed a particular DMS cyclone performance simulation program which he handed to the Respondent for free at the end of May 2013.

- [16] The Respondent, on the other hand, took the view that the DMS Model was company property whose intellectual property rights vested on it as the employer. I find it unnecessary to resolve this dispute as I take the view that ownership of the DMS Model is not central to the determination of the case before me.
- [17] The Applicant returned from annual leave on 27 September 2013 and he promptly lodged the formal grievance as advised by Mr Athey. The formal grievance was against Mr JD Singleton, Mr Dyer and Ms Florence Chandinha. The nature of the grievance was described as unfair demotion.
- [18] On the same date the Applicant returned from annual leave, he was approached by Ms Rene Calitz ("Ms Calitz"), who is the Respondent's Strategic Marketing and Communications Manager, about the DMS Model. Ms Calitz instructed the Applicant to send the DMS Model to the sales engineers of the Respondent.
- [19] The Applicant advised Ms Calitz that he was no longer in possession of the minerals DMS model and had completely destroyed the files. This, he reiterated in an electronic mail forwarded to Ms Calitz at approximately 10:56 on 27 September 2013.
- [20] On 30 September 2013, the Applicant was suspended. He was issued with a notice of a disciplinary enquiry on 3 October 2013. In the notification of the disciplinary enquiry that was issued, the Applicant was charged with two counts of gross misconduct. These were labelled as follows:
- 'Gross misconduct, i.e. Wilful damage to company property in that you have destroyed the DMS sinks product model
- Gross Insubordination in that you have deliberately disobeyed an instruction, issued by the Sales and Marketing Director on 17 September 2013 (instruction: to share all passwords in the related models)'
- [21] The disciplinary enquiry commenced on 8 October 2013 and it was concluded on 10 October 2013. The appointed chairperson of the disciplinary enquiry found the Applicant guilty and imposed the sanction of summary dismissal.

- [22] A certain 'disciplinary action form' that was issued by the Respondent on 10 October 2013 recorded the following:

'Mr Ntuli destroyed company property being the DMS sinks product model. He was further instructed to hand over all passwords in the related models by a Director and deliberately disobeyed such instruction.'

- [23] In the end, the 'disciplinary action form' stipulated that the sanction imposed was summary dismissal with effect from 10 October 2013. The Applicant's appeal against this outcome was unsuccessful.

Evaluation

- [24] The above being a truncated background to the matter, I now turn to the crux of the issue before me. I commence by pointing out that the approach to be adopted in matters of this nature was recently and aptly articulated by this court in *Mashigo v South African Airways (Pty) Ltd*.² In the first place, the employee has to adduce evidence which is sufficient to cast doubt as to the reason for the dismissal as advanced by the employer. Once this has been done, it then becomes the employer's duty to show that the reason for the dismissal is not one that is prohibited under s 187(1) of the LRA.
- [25] In this matter, the Respondent has demonstrated that the Applicant was dismissed for gross misconduct. The disciplinary charges, the minutes of the disciplinary enquiry as well as the 'disciplinary action form' all attest to this. In the entire scheme of things, it seems to me that what prompted the disciplinary proceedings was the Applicant's own conduct or rather misconduct. I draw this overall conclusion on the balance of all probabilities.
- [26] On the evidence before me, it is highly unlikely that the Applicant would have been dismissed regardless of his very own conduct. It is equally unlikely that the Respondent would have taken umbrage with the mere lodgement of a grievance. I say this as the Respondent has in place a grievance procedure that allows employees to vent out any dissatisfaction they may have. This policy even prescribes certain timelines.

² (JS488/12) [2014] ZALCJHB 366 (25 September 2014), at para's 14 and 15

- [27] What presents an insurmountable challenge for the Applicant is his conduct, for which he appears to accept no responsibility whatsoever. First, he deliberately ignored an instruction that was issued to him by Mr Dyer. One would have expected him to inform Mr Dyer why he would not be able to accede to the instruction, more so considering the warning that was embedded at the end of the written instruction. The Applicant elected to be defiant, apparently, on the ground that what he was being asked to do was not lawful for the employer to require of him.
- [28] Secondly, the Applicant did not flinch in informing the Respondent that he had destroyed the DMS Model. As to whether or not this Model was lawfully owned by him and could, therefore, be destroyed at whim is not for me to decide. What is, however, clear to me is that the destruction of the DMS Model lead to the disciplinary proceedings and the ultimate dismissal of the Applicant.
- [29] The Applicant had also led evidence to the effect that the Respondent's Mr Athey had admonished him on having lodged a grievance against a director of the Respondent, in this instance being Mr Dyer.
- [30] It was the Applicant's case that he was, as a result of the grievance, dealt with by the Respondent through the disciplinary proceedings which eventually resulted in his dismissal. Again, this claim is overwhelmed by the clear, calculated and defiant conduct of the Applicant as mentioned herein before.
- [31] All things considered, I am unable to find that the reason advanced by the Respondent for the dismissal was simply a pretext. The dismissal was occasioned by the Applicant's own conduct in refusing to abide by a lawful instruction and also in destroying the DMS Model.
- [32] Objectively, I find no connection between the grievance lodged and the ultimate dismissal except for a mere co-incidence in terms of the sequence of events. On the other hand, I find a solid connection between the Applicant's conduct and the ultimate dismissal.

[33] In *Janda v First National Bank*,³ it was held thus:

‘...when an automatically unfair dismissal is alleged, the sole enquiry is to establish the true reason for the dismissal, and the only legal issue is whether the reason so identified is covered by one or other of the provisions of section 187.’

[34] In this matter, it is my judgment that the Applicant has not adduced any evidence to rebut the reason advanced by the Respondent for his ultimate dismissal.

[35] At best, the Applicant merely raised an issue on the timing of his dismissal. On the evidence which serves before me, the nexus between the lodgement of the grievance and the disciplinary proceedings is simply coincidental.

[36] The long and short of it is that the true reason for the Applicant’s dismissal is evidently his misconduct. The fairness or otherwise of the dismissal as a result of such misconduct is not before me to decide upon. It is a matter for an arbitrator at arbitration to pronounce upon. The Applicant’s claim, therefore, stands to be dismissed.

[37] As for costs, I mention that they fall within my discretion. The Applicant did not have the benefit of legal representation. He, nevertheless, presented his case with commendable articulation for a lay litigant. No effort of his was spared in the thorough preparation of the case.

[38] The Applicant manifestly believed that he was unfairly dismissed on a prohibited ground. As a consequence, he lodged the claim with this court in order to vindicate his rights.

[39] The Applicant was, in essence, exercising his constitutionally guaranteed right of access to courts. The requirements of law and fairness dictate that I should not condemn him in costs.

[40] There shall, under the circumstances, be no order as to costs.

³ (2006) 27 ILJ 2627 (LC) at para 10

Order

[41] I, accordingly, make the following order:

- (i) The Applicant's referral on the basis of an alleged automatically unfair dismissal claim as founded on s 187(1)(d)(i) of the LRA is hereby dismissed.
- (ii) There is no order as to costs.

Voyi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: In person

For the Respondent: Mr C van Zyl of Van Zyl's Incorporated