



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JOHANNESBURG

Not reportable

Case no: JR838/13

In the matter between:

CLASSIC NUMBER TRADING 80 (PTY) LTD

T/A NASHUA TSHWANE

Applicant

And

EBRAHIM SHAIK-AHMED

First Respondents

KD MATJI N.O

Second Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND MEDIATION

Third Respondent

Heard: 19 December 2014

Delivered: 5 March 2015

Summary: Application to review arbitration award. Dismissal, absence without authorisation and desertion and abscondment.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number GATW 15351-12 dated 15 April 2011³, in terms which the dismissal of the first respondent (the employee) was found to have been unfair. It was for that reason that the applicant was ordered to pay him compensation.

Background facts

- [2] The employee who was at the time of his dismissal employed as a warehouse supervisor was dismissed for desertion and being absent without authorisation. It is common cause that the employee was absent from work from 26 November 2012 to 17 December 2012. He was dismissed during his absence on 04 December 2012.
- [3] The employee was informed on 18 December 2012, that he was dismissed in absentia. The employee was unhappy with the decision and, accordingly, referred the unfair dismissal dispute to the third respondent (the CCMA), alleging that his dismissal was both substantively and procedurally unfair.
- [4] The matter remained unresolved after attempt at conciliation. The employee then referred the matter to arbitration. The outcome of the arbitration, as indicated earlier, was that the dismissal was found to be unfair and the applicant was ordered to compensate the employee in the amount of R190 450.00 which is an equivalent of 10 months remuneration.

- [5] The applicant, being unhappy with the outcome of the arbitration award, instituted the current proceedings. The employee has opposed the review application.
- [6] The case of the applicant, in contending that the dismissal of the employee was for a fair reason, is based on the testimony of four witnesses. The evidence of those witnesses appears on the record and is summarised by the Commissioner in his arbitration award. I, therefore, do not deem it necessary to repeat the same in any detail in this judgment. I only deal with the testimony of those witnesses whose evidence I regard as being material in the determination of whether the arbitration award is reviewable.
- [7] The first witness of the applicant was Ms Schultz, who testified that she received information about the absence of the employee from work on 26 November 2012. She also received information that morning that the employee was hospitalised and had brain damage. In attempting to establish the whereabouts of the employee, the applicant telephoned and visited him at his house to no avail. In this respect, a day or so the applicant sent two of its employees to the house of the employee where they were told by his domestic worker that he had gone to America.
- [8] In further investigating the whereabouts of the employee, Ms Schultz contacted the medical aid to find out if they had any record indicating that he was admitted at any hospital. The response from the medical aid broker indicated that there was no record of admission of the employee at any of the hospital in the country.
- [9] Ms Schultz further testified that she, on 3 December 2012, issued notice to the employee to attend a disciplinary hearing on advice of the financial manager. Having not heard from the employee, the disciplinary hearing proceeded in his absence the following day, 4 December 2012.
- [10] The next time Ms Schultz heard about the employee was on 18 December 2012, when she received a call from warehouse informing her that the employee has

reported for work. Soon thereafter, the employee reported at her office where she enquired from him where he had been. He refused to respond to her question and apparently insisted, as he had earlier told the chairperson of the disciplinary hearing that he wanted to see either Mr Mr Patel or Mr Chan.

- [11] During cross examination, Ms Schultz testified that the applicant was informed that the employee was ill. She also testified that the employee had a clean disciplinary record over the 16 years that he had with the applicant.
- [12] The second witness of the applicant was Mr Rathoto, who largely confirmed the testimony of Ms Schultz regarding attempts at locating the whereabouts of the employee including going to his house. He also testified that he had received a call on 26 November 2012, from a person who said he was a doctor and informed him that the employee was in the hospital having suffered brain damage.
- [13] Mr Rathoto further testified during cross examination that, prior to his absence from work, the employee used to leave work earlier to receive medical attention.
- [14] The case of the employee is that he did not go to work from 26 November 2012 until he returned on 18 December 2012, because he was ill. He went to India to consult a spiritual healer because he had problems with stress, depression and nervous breakdown. He was aware of the rule that he needed to contact the applicant in case that he was ill and could not report for work. He encountered a problem with his cell phone and was so sick just before he left for India that he could not phone the applicant. According to him, although he does not know what his brother said to the applicant, he did phone and inform them that he (the employee) was ill and that he would not be able to report for work. He conceded having received a message from the applicant's director when he opened his phone on 12 December 2012.
- [15] Mr Goolman testified on behalf of the employee. He testified that on the morning of 26 November 2012, he contacted the applicant telephonically wanting to speak

to Mr Wally but was referred to Mr Rathoto. He told him that the employee needed to go for a brain surgery. Although he was not told by any doctor that the employee had to go for surgery, he assumed that to be the case from his condition. The employee, according to him, was sweating and could not speak properly.

[16] According to the employee, his plans were to leave for India during December but his plans changed when he suddenly became seriously ill in November.

Grounds of review

[17] The applicant has raised several grounds of review in its challenge of the arbitration award. In summary, the complaints of the applicant in this regard is that the Commissioner:

- a) failed to into account properly the evidence placed before him and consequently his decision is unreasonable.
- b) ignored the fact that the employee failed to produce proof of his illness and that he flew to India to receive medical treatment.
- c) committed a number of gross irregularity thus rendering the arbitration award reviewable.
- d) ignored the fact that the applicant made every effort to determine the whereabouts of the employee.
- e) ignored the facts that the law permits that in certain circumstance disciplinary hearing can be held in the absence of an employee as was the case in the present instance.

The arbitration award

[18] In dealing with the issue of procedural fairness, the Commissioner found that it was common cause that the disciplinary hearing was conducted in the absence

of the employee. He further also found that failure to attend the hearing on the part of the employee was not wilful and that the chairperson of the disciplinary hearing should have enquired about the whereabouts of the employee before he proceeded with the hearing.

[19] The Commissioner further found that even if the employee was available, the procedure would have been unfair because he would have received the notice on the 4 December 2012, the same day that the disciplinary hearing was conducted. In this respect, the employee would not have had sufficient time to prepare for the hearing.

[20] As concerning substantive fairness, the Commissioner found that:

- a) the applicant failed to discharge its duty of showing on the balance of probabilities that the employee was guilty of absence without authorisation.
- b) even if the employee was guilty of unauthorised absence, the dismissal would still have been unfair when regard is had to the clean disciplinary record that he had over the period of 16 years, as the employee of the applicant.

The legal principles

[21] It is generally accepted that desertion like absence without authorisation is a form of misconduct which entitles the employer to take disciplinary action against an employee accused of such misconduct.¹ The authorities regard desertion as repudiation or breach of contract by an employee.² In terms of our industrial relations desertion like any other misconduct on the part of the employee, the employer is required to act in a fair manner and has to investigate the reasons and the circumstances of that misconduct. The employer has to also weigh

¹ See *SACWU v Dyasi* (2001) 7 BLLR 731 (LAC).

² See *SABC v CCMA and Others* (2001) 22 ILJ 487 (LC) at para 16 and *SACWU v Dyasi* (*supra*) at paras 19-20.

whether in the circumstances, it would be fair to impose the dismissal sanction. Failure to do so would result in the dismissal being regarded as being unfair.

[22] In dealing with the issue of desertion, the Court in *Khulani Fidelity Services Group v Commission for Conciliation Mediation and Arbitration and Others*,³ held that:

‘[15] Desertion consists of absence without authorization by the employee, with the intent to remain permanently away from his or her employment. The intent can generally be inferred from the circumstances of the absence of the employee. The period of absence and the surrounding circumstances can serve as an indication of the intention not to continue with the contract of employment.

[16] In general, a short period of absence may not be sufficient to establish evidence of the intention not to continue with the employment contract. In other words a short period of absence without authorization may not, depending on the circumstance of the case, constitute repudiation of the contract by the employee. However, and again depending on the circumstances of a given case, prolonged absence may serve as evidence of desertion particularly where the employee willfully terminates communication with the employer during the period of absence.’

[23] In *South African Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and Others*,⁴ the Court held that:

‘[13] The real problem arises from circumstances of unexplained absence. Mere absence is no more conclusive evidence of desertion (which is absence plus an intention not to return), than it is evidence of willful absence without leave (which axiomatically includes an intention to return, albeit at a time of the employee's choosing). The means by which the employer established the existence or absence of the intention to return is the critical point of the debate. What constitutes desertion is of

³ [2009] 7 BLLR 664 (LC).

⁴ *SABC v CCMA and Others* (*supra*) at para 13.

course a matter of fact. In some instances an unexplained absence for a reasonable period, that is to say, reasonable in relation to the employer's operational requirements, will establish the fact of desertion.'

- [24] The same approach was adopted in *SACWU v Dyasi*,⁵ where the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee once again tenders his/her service.
- [25] The Labour Appeal Court made it clear that even in the case of desertion or abscondment the employer still has to ensure that a fair procedure is followed and that there is a fair valid reason for a dismissal.⁶
- [26] In the *SABC v CCMA and Others*,⁷ (LAC decision) the LAC in dealing with the issue of procedural fairness held that the issue of whether the employer should hold a disciplinary hearing before dismissing an employee who had deserted his employ depends on the circumstances and the practicality of doing so. On the facts, the Court found that the employee was in breach of his obligation to tender his services from 27 November 1997. The employer had placed him on terms to report for work by the 4 December 1997. The Court further held that the employer should have called on the employee after he failed to report for work on 4 December 1997 to show cause why he should not be dismissed.
- [27] In *Impact (Mondi Packaging SA (Pty) Ltd) v National Bargaining Council for The Woods and Paper Sector*,⁸ the Court held that:

'[22] ...On the expiry of the five day period, Applicant was justified in inferring an intention to desert his employment from the employee's disappearance from work without reporting his whereabouts, which left the employer in ignorance as to his whereabouts or the reasons for his absence. Thus the employee's dismissal *in absentia* was substantively

⁵ *SACWU v Dyasi (supra)*.

⁶ *Ibid* at paras 20-21.

⁷ [2002] 8 BLLR 693 (LAC) at para 15.

⁸ (2013) 34 ILJ 2266 (LC) at para 22.

justified at the time, provided this did not close the door to the possibility of reversing the decision if the employee returned and was able to satisfactorily justify his absence... As mentioned earlier, if the employee failed to justify his absence on his return, his dismissal in terms of the code was justified, the onus being on the employee to justify his absence.'

Evaluation

- [28] In making the finding that the dismissal was procedurally unfair, the Commissioner reasoned that the employee was dismissed in his absence and thus he was not given the opportunity to be heard. He also noted that on his return to work on 18 December 2012, the employee was not afforded an opportunity to explain where he was. The Commissioner made this finding in the context where the case of the applicant is that the employee failed to respond to Ms Schultz when she enquired from him where he had been.
- [29] According to Mrs Schultz, when she enquired from the employee where he had been, he simply shrugged his shoulders and said that he was no well. At the arbitration hearing, the employee conceded that he was asked by Mrs Shultz where he had been. He stated that he felt that there was no need for him to respond and that is why he shrugged his shoulders.
- [30] In my view, the above facts reveal that the applicant conducted an investigation into the prolonged absence of the employee. The outcome of the investigation indicates very clearly that there was a need to convene a hearing so as afford the employee an opportunity to be heard. Put in another way, the applicant should have called the employee to show cause why his dismissal on the 4 December 2012, should not be confirmed. In this respect, I do not fault the Commissioner in finding that the dismissal of the employee was procedurally unfair.
- [31] Turning to the issue of substantive fairness, it is common cause that the employee was dismissed for desertion and unauthorised absence from work. The issue that arose in the determination of whether the dismissal was fair or

otherwise centred on the question of whether the employee had provided a satisfactory justification for his absence.

[32] In *Impact Ltd (Mondi Packaging SA (Pty) Ltd) v National Bargaining Council for the Wood and Paper Sector and Others*,⁹ the Court held that the real issue underlying substantive fairness, in cases of this nature was whether the employee had offered satisfactory justification for his extended unauthorised absence. The issue of the intention to desert is a secondary issue.

[33] The applicant, in contending that the dismissal was for a fair reason, emphasised the allegation that the employee did not comply with its sick leave policy which provides amongst others that:

‘If any Employee is sick, (he/she obviously cannot know in advance) , he/she must, by nine o’clock (09h00), either telephone his/her manager or get an urgent message to his/her manager so that we know he/she is, and how long he/she may be off work. If we do not hear from an employee after two (2) days, the employer will deem this as absconding.’

[34] In my view, the Commissioner in considering the substantive fairness of the dismissal failed to take into account the totality of the facts and circumstances of this case, in particular the provisions of the above policy. It is clear from the above extract of the policy that the employee was expected to report his absence from work every other second day of his absence from work. As indicated earlier, he was aware of this rule. Except for reporting his absence from 26 November 2006 through his brother-in-law, the employee did not provide any satisfactory justification as to his very prolonged absence without authorisation. Calculating his absence on a five working day week, he was absent from work for about 16 days.

[35] In my view, the period of absence from work is excessive and thus required frank and proper justification. The employee was a supervisor and thus the above

⁹ *Ibid* at para 21.

policy would apply even more to him as he had to set an example of good conduct and compliance with policies to his juniors. He received a cell phone message on 12 December 2012 and did nothing about it. He was totally indifferent to the interests of his employer.

- [36] Although the employee says that he had planned to leave for India later in December 2012, he had to change because of his ill-health; he does not explain why he did not contact the applicant in terms of the sick policy during that period. If it was to be accepted that on the day of his departure to India, he was so sick that he could not contact the applicant, then the question is why did he not do that subsequent to his arrival there and more, particularly, on 12 December 2012 when he saw a message from his phone which indicated that the applicant was looking for him.
- [37] The employee has, in seeking to justify his absence for the period of 16 days without authorisation, submitted a note from the Pretoria Islamic Education Centre, (Islamic Centre) an affidavit from Mr Ebrahim of the Quadiriya Sufi Order and a medical note from Psychologist, Mrs Jordan.
- [38] The note from the Islamic Centre states that as a religious organisation, they certify that the employee attended spiritual assistance in India from 25 November 2012. The note does not state why he had to leave on that date and for how long he was to stay there to receive the assistance.
- [39] The affidavit from Mr Ebrahim states that he, as a spiritual leader based in South Africa and that assisted the employee spiritually after the passing of his mother, brother and father. As his condition did not improve, it was recommended that he should visit a specialist in India. There is no indication in the affidavit as to why he had to leave without making the necessary arrangement with his employer.
- [40] The note from the Psychologist indicates that the employee was not feeling well since 23 November 2012 and as a result did not attend work. It does not say that he was booked off since then. The note indicates that the Psychologist, saw the

employee on 14 December 2012 and booked him off for that day. This does not account for all the other days that the employee was absent from work.

[41] In my view, having regard to the above analysis, it is clear that it is unreasonable to expect the applicant to keep the employee in its employ when he has little regard to its operational interest. This, together with failure to show remorse when confronted about the incident, cancels-off consideration of the length of service which he had with the applicant.

[42] In light of the above analysis, I find that the decision of the Commissioner is not one which a reasonable decision maker could have reached when regard is had to the evidence and the material which was presented during the arbitration hearing.¹⁰

Order

[43] In the premises, the following order is made:

1. The arbitration award made under case number GATW 15351-12 dated 15 April 2011, is reviewed and set aside.
2. The arbitration award is substituted with the following:
 - ‘(i) The dismissal of the Applicant (First Respondent in the present matter) was procedurally unfair.
 - (ii) The Respondent should compensate the Applicant for the procedural unfairness in the amount equivalent to 2 months’ salary calculated at the salary he received at time of his dismissal.
 - (iii) The dismissal of the Applicant was substantively fair and thus his claim for unfair dismissal is dismissed.’
3. There is no order as to costs.

¹⁰ See *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine)* (2014) 35 ILJ 943 (LAC) and *Herholdt v Nedbank Ltd (Congress of South African Trade Unions Amicus Curiae)* [2013] 11 BLLR 1074 (SCA).

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr H Wissing of Wissing Henk Inc

For the First Applicant: Advocate Z. Marx.

Instructed by: DP Du Plessis Inc Attorneys.