



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR2198/13

In the matter between:

CHAR TRADE 117 CC t/a ACE PACKAGING

Applicant

And

ROSELINE KLOPPERS

First Respondent

BONGANI KHUMALO N.O.

Second Respondent

CCMA

Third Respondent

Date heard: 2 September 2015

Delivered: 1 February 2016

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review and set aside an arbitration award under case number GAJB11204-13 in which the third respondent (the Commissioner)

found the dismissal of the first respondent (Kloppers) to have been procedurally and substantively unfair. He order the applicant to pay her compensation equivalent to 12 months compensation.

[2] Kloppers was employed by the applicant from 1 November 2007 as an Area Sales Manager and earned R32,000.00 a month. On the 9 April 2013, she was suspended and summoned to attend a disciplinary hearing in consequence of her conduct at a dinner party hosted by the applicant for some of its clients. In an email dated 9 April 2013, it was recorded that she was charged with “bringing the companies (sic) name into disrepute by dancing on the tables and general disorderly behaviour”.

[3] On the 17 April 2013 she received the charge sheet which listed the following charges:

- 1) Not complying with a lawful and reasonable instruction
- 2) Bringing the companies name into disrepute
- 3) Jeopardizing the business with its clients
- 4) Behaving in a manner that is not appropriate
- 5) Breach of company policies and procedures
- 6) Conduct unbecoming an employee of the company
- 7) Breaking down the trust relationship between employer and employee

[4] The disciplinary chairperson found her guilty of bringing the name of the applicant into disrepute. She was dismissed on 26 April 2013. In his finding he stated that:

“The accused is the area sales manager of the company and part of her work is to entertain clients in order to maintain a good relationship. It is also common knowledge that the accused is a “party animal” and likes to stay until the end when entertaining clients. In the past the Company has gone all out to entertain clients, even paying for some client’s overnight accommodation on occasion.

However the Company has had a major shift in culture due to prevailing circumstances and maintaining a professional image with its clients. During this particular social event the behaviour of the accused was less than acceptable and in bad taste. The accused was and is aware of the shift in culture and should have exercised some caution and restraint. For me to refer to the CCTV footage it is clear that the employee attempted to get onto the table on a few occasions (and did so very briefly) and by doing this has offended some clients. Although another customer was dancing on the table he does not work for the company and therefore is not bound by its code of behaviour.

Furthermore the CCTV footage clearly shows the accused “enjoying herself” when her focus should have been with her own customers and focusing on her own behaviour. Although it seems that some customers were enjoying themselves it is clear that some others found her behaviour unacceptable to the extent that the Company may lose those customers. To now take this one step further the employer received a letter of apology from the accused clearly indicating, and by her own admission that she understood that her behaviour was unacceptable and offensive.

The CCTV says it all. The accused did not act in a manner that could be construed as restrained, professional or even acceptable.”

[5] The letter written by Kloppers included the following paragraphs:

“I was very surprised by the charge that I failed to comply with a lawful instruction I was not given any instruction before, during or after the function on Saturday. I only pretended that I was going to dance on the table but everyone that was present knows that I did not do so, and certainly not on a number of tables.

It is now clear to me that my stringent diet and exercise program impacted on my tolerance for liquor. I want to sincerely apologise if my behaviour was inappropriate. I love the company and not do anything to bring them into disrepute.....

As a company we have a reputation for entertaining customers at the trade show. We are known for having fun whenever there is a function and are often referred to as “the hooligans” We were all once banned from a hotel because of our behaviour as a company. In some instances we even paid for customers and reps to stay over night in the hotel because they were too intoxicated to drive home. This always used to be a big laugh for weeks after the trade show.

I realised during the evening that the alcohol was having an impact on me and when Annerette offered me an Ouzo I refused it and had a piece of baklava instead to try and settle my stomach. I cannot stress enough how sorry I am and pray that I can be forgiven for my behaviour...”

- [6] The charge of disobeying a lawful instruction was not proceeded with by applicant. In as far the Commissioner’s finding on substantive fairness is concerned, the applicant submits it stands to be reviewed in that the Commissioner misconstrued the nature of the enquiry before him. Instead of focussing on the charge for which Kloppers was dismissed i.e. that she brought the name of the company into disrepute, he found her dismissal substantively unfair because she did not dance on the tables. The award records:

“[20].....I find that it was undisputed and unchallenged that the Applicant did not dance on the tables. I accept that even the video footage does not show the Applicant dancing on the tables. The Respondent’s witnesses cumulatively supported Applicant’s defence that she did not dance on the tables. It is common cause that the applicant was not charged for putting her foot on the table. It is trite law that the Respondent cannot dismiss the Applicant for a specific reason at the company and rely on a different reason at the CCMA to justify the dismissal. I accept the uncontroverted evidence of the Applicant that no rule, policy or procedure exists at the employer’s workplace to regulate the alleged “disorderly behaviour”. No piece of documentary evidence except unsupported personal sentiments by the Respondent’s witnesses was tendered at the arbitration.

- [21] The fact that the company allowed a full bar to operate on the company premises is relevant to the question whether dismissal was fair. The evidence shows that the company’s approach to alcohol, entertainment is inconsistent and ‘conduct’ towards its customers is also ambiguous. On the one hand it provided alcohol on company premises and at its functions during working hours and, on the other hand, the company even paid for hotel accommodation for staff and clients who are extremely intoxicated to a point of being unable to drive home. Deon’s purported change in this culture is neither documented nor known even by himself as to when was it conveyed to staff members. This flies in the face of the LRA that a rule must be known and valid. On the undisputed facts I find that the Applicant was not, at any

rate, charged for excessive consumption of alcohol. It overwhelmingly counts against the Respondent that it removed from the charge sheet the alleged non-compliance with a lawful instruction which allegedly was challenging the failure of the Applicant to lead by example.

[22] My view is not different from that of the Applicant that no standard or policy required her to behave in accordance with any code of behaviour and that no such purported standard or policy was breached. Material concessions were drawn both in chief and in cross-examination from the Respondent's witnesses that (1) the Applicant did not dance on the table (ii) they were personally excessively drunk pursuant to the existing practice and (iii) they even slept at the hotel at their own expense as they were too drunk to drive home. For this reason alone I find that the Respondent was lax in regulating the expected behaviour, if any, at its functions and the consumption of alcohol. I found the Applicant to be a satisfactory witness who made no attempt to evade 'trick' questions put to her in cross-examination by Adv. Driver. All things considered I would favour Rosaline's version over that of the Respondent a finding which puts pay to the sole 'charge' proffered against the Applicant on the merits of this matter."

[7] The applicant submits that the above reflects that the Commissioner failed to grasp what Kloppers was actually dismissed for. I cannot agree. The Commissioner has rather considered whether the specific allegation against Kloppers i.e. that she danced on the tables (which allegedly brought the company into disrepute) had been proved. The record of the proceedings reflects that the applicant's General Manager, Mr Korff, both in chief and under cross-examination, stated that the charges against her related to her allegedly dancing on the tables – under cross-examination he conceded that the charges 'strictly' related to this. In such circumstances, the Commissioner's emphasis on this alleged conduct when considering whether her dismissal was substantively fair, and the outcome of his award on this leg, is well within the bounds of reasonableness

[8] It was alleged on behalf of Kloppers at arbitration, that the Chairperson of the disciplinary hearing was biased and that although Kloppers lodged an appeal, this was not entertained because according to the applicant no new evidence was

proffered for doing so. The Commissioner's finding on procedural fairness is contained in paragraph 19 of the Award as follows:

"While it is correct that the LRA guidelines on fair procedure do not require the inclusion of such a right¹, once it is conferred it should be observed by the Respondent. This procedural challenge must succeed I am persuaded that the chairperson was biased in that he gave unfair preference to the employer thus he cause direct or indirect prejudice to the employee. To cite but few examples, the DVD proved that the Applicant did not dance on the table in a provocative manner but the chairperson found her guilty as charged. It was undisputed that the chairperson rendered labour management services to the Respondent and also participated in Thursday drinking spree but she continued to chair the enquiry, the chairperson found the Applicant guilty on written emails by three people who were not present at the hearing to be cross examined on their declarations, the chairperson made his findings on wild, far-fetched and unsupported allegations that the Applicant was a 'party animal' and the chairperson on alleged customers complaints which were not tested. This procedural challenge must also succeed."

- [9] The Commissioner did not approach the issue of alleged 'bias' by applying the correct test in law to such an enquiry i.e. whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias.² Kloppers evidence on the issue of bias was to the effect that she believed he was biased because after seeing footage that showed that she had not danced on the tables, the chairperson still dismissed her. The factors listed by the Commissioner to substantiate his finding on the issue of bias are no more than an opinion that the Chairperson got it wrong. Kloppers did cross-examine the company's witness at the disciplinary hearing. That the Chairperson was a member of the company's employer's association cannot be considered out of the norm. In addition Kloppers did not bring forth new evidence in respect of the appeal, rather she wanted to raise evidence which she had not done but which she was aware of, at the hearing.

¹ i.e. to an appeal

² *Sasol Infrachem v Sefafe & others* (2015) 36 ILJ 655 (LAC) at para 48

[10] The procedural fairness requirements of the LRA require the satisfaction of the *audi alteram partem* principle and the rule against bias.³ I find that the decision of the Commissioner, that these were not met to be one that a reasonable Commissioner could not make.

[11] The compensation ordered by the Commissioner was considered by him to be just and equitable in the circumstances of a procedurally and substantively unfair dismissal. In the circumstances, in substituting his award, I take this into consideration. Given that the applicant has partially succeeded, I make no order as to costs.

Order

1. The award under case number GAJB11204-13 is reviewed and set aside and substituted as follows:
 - 1.1 The dismissal of Rosline Kloppers was substantively unfair;
 - 1.2 The applicant is ordered to pay Kloppers compensation in an amount equivalent to 6 months salary, being R192,000.00

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

³ *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC); (2008) 29 ILJ 73 (CC) at para 42

Appearances:

Applicant: MA Wesley and JK Driver

Instructed by: Lagoudis Lamberti Attorneys

First Respondent: Lee and McAdam Attorneys

LABOUR COURT