



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JR 691/15

In the matter between:

CASHBUILD (PTY) LTD

Applicant

And

**POTO, P S N.O. (cited in his capacity as
Commissioner of the Commission for
Conciliation, Mediation & Arbitration)**

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

Second Respondent

NKOMO, STEVEN

Third Respondent

Heard: 07 February 2018

Delivered: 16 February 2018

Summary: Review in terms of s145 of Labour Relations Act 66 of 1995 – Decision that dismissal inappropriate reasonable in light of circumstances surrounding infraction and employee's personal circumstances – Parity principle not demanding rigid and indiscriminate application of dismissal where cause exists for differentiation – Application dismissed.

JUDGMENT

LEKALE, AJ

BACKGROUND AND INTRODUCTION

- [1] The third respondent was employed by the applicant as a sales coordinator from 05 February 2005 to 05 November 2014 when he was dismissed following a disciplinary inquiry into allegations of gross insubordination levelled against him.
- [2] The third respondent felt aggrieved by the dismissal and referred a dispute concerning alleged unfair dismissal to the second respondent for resolution. When the dispute remained unresolved after an unsuccessful attempt at conciliation, the third respondent requested arbitration. The dispute, thereafter, served before the first respondent for arbitration and he eventually issued an award on 20 March 2015 finding the dismissal procedural fair but substantively unfair on the basis that dismissal was not appropriate as a sanction.
- [3] The applicant now approaches this court in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA") for an order reviewing and setting aside the arbitration award. The application is opposed by the third respondent who effectively maintains that the award is unassailable insofar as the first respondent considered the evidence properly before him and came to a conclusion thereon which is reasonable with regard to appropriateness of dismissal as a sanction.

ISSUE FOR DETERMINATION

- [4] The parties are in dispute over whether or not the decision of the first respondent on the appropriateness of dismissal as a sanction is the one that a reasonable decision-maker could not have reached on available evidence.
- [5] In the event of this question being decided in the affirmative, I am in the main requested by the applicant party to set aside the award and to replace it with an order declaring the third respondent's dismissal substantively fair.

- [6] In the alternative to paragraph [5] above I am requested by the applicant party to set the award aside and to remit the matter back to the second respondent for arbitration *de novo* before a commissioner other than the first respondent.

DEPOSITIONS AND CONTENTIONS FOR THE APPLICANT

- [7] The applicant's branch manager to whom the third respondent reported deposes, *inter alia*, to the effect that the applicant had been experiencing difficulties with the latter's attitude towards her as the branch manager. On or about 21 October 2014 the applicant's customer, who had previously purchased roof tiles from the branch, wanted to buy additional tiles. The applicant had, by then, changed the supplier who provided the initial tiles bought by the customer and, as such, the additional tiles could not match the initial ones. The customer was, thus, required to return the initial tiles so that all the tiles could be sourced from the new supplier. The third respondent wanted to collect the tiles from the customer and she, as the manager, declined informing him that the applicant only delivers and does not collect in such circumstances. She specifically instructed the third respondent not to have the tiles collected. The third respondent, however, instructed a truck which was supposed to make a third delivery for that day viz. 21 October 2014 to collect the tiles after the second delivery. The truck, thus, did not return to the store for the third delivery and only returned the following morning full of the tiles from the customer. When she enquired from the third respondent after the reason for acting contrary to the instructions, the latter pointed out that the customer was insulting him and he, as such, decided to act. He, further, adopted the attitude that he was entitled to go over her head where it came to customers and that he could ignore her.
- [8] The third respondent was, thereafter, summoned to a disciplinary hearing where he was found guilty of gross insubordination and was, eventually, dismissed. At the disciplinary hearing the third respondent was defiant, pleaded not guilty and maintained that he did nothing wrong. At the relevant time the third respondent had a final written warning for gross negligence. According to the applicant's Disciplinary Code and Procedures dismissal is a competent sanction for gross insubordination. At the arbitration hearing

before the first respondent the third respondent challenged the dismissal on substantive grounds only. Procedural fairness was not in dispute. The first respondent was biased in favour of the third respondent insofar as he did not allow the applicant legal representation at the hearing and, further, refused to accord applicant's legal representative observer status.

- [9] In argument on the papers and before the court Ms Moyo, for the applicant, submits, *inter alia*, to the effect that the third respondent showed no remorse at the arbitration hearing and the dismissal was in line with the applicant's Disciplinary Code and Procedures which the applicant applies consistently. In her view, the circumstances under which the infraction was committed and the third respondent's personal circumstances do not justify a departure from the relevant prescribed sanction.

DEPOSITIONS AND CONTENTIONS FOR THE THIRD RESPONDENT

- [10] The third respondent deposes, *inter alia*, to the effect that the customer involved had previously bought roof tiles supplied by Marley from the applicant and when she came in October 2014 to buy additional tiles the supplier had been changed. The second batch of tiles the customer bought in October 2014 were delivered to her but she phoned him later in the day to complain that the new tiles were different from the initial ones. Indeed, the new tiles that were supplied by the new supplier being Kulu differ from those supplied by Marley in that their connections are round while those from Marley are square. He promised the customer to talk to the manager to see how he could collect those tiles. The Marley tiles were, thereafter, sourced from the applicant's Tweefontein store at his instance. The manager, however, indicated that they could not collect the Kulu tiles from the customer until they had cleared the yard as there was limited space. On 21 October 2014 there were six deliveries to be made by the store and four of which were to be made in Moloto while the last two were to be made at Kwa-Mhlanga and Ezakheni. The first delivery of four loads were made at Moloto and when the truck returned around 14h00 to load the Kwa-Mhlanga and Ezakheni deliveries he told the crew that after the last delivery, they should return with the tiles from the relevant customer as she was staying at the village neighbouring Kwa-Mhlanga and Ezakheni. He, thus, did not dispatch

an empty truck to collect the relevant tiles but just asked the crew that was going in the customer's direction to collect the tiles on their way back.

- [11] On 22 October 2014 he was surprised when the manager asked him who gave him permission to collect the tiles as he initially understood her as having said that the tiles could only be collected once the yard was cleared out. The yard got cleaned before the tiles were collected.
- [12] Mr Mthimunye submits for and on behalf of the third respondent, *inter alia*, that the question in the instant matter is whether the first respondent, as the commissioner, committed misconduct or a gross irregularity or exceeded his powers within the contemplation of section 145 of the LRA. Although the third respondent disagrees with the finding of the first respondent on the disciplinary verdict, he accepts that the first respondent applied his mind to the facts before him. The first respondent, further, considered all available evidence when he came to the conclusion that dismissal was inappropriate as a sanction. The factors considered are reasonable and justify the decision reached in this regard. The fact of the final written warning for gross negligence was not before the arbitrator when the impugned award was made. And is, as such, not apparent *ex facie* the record. Even if it were before the first respondent at the relevant time his decision would still be reasonable because of the material difference between the mental elements of the two misconducts. Insubordination requires intention or ***dolus*** while negligence requires ***culpa***.

APPLICABLE LEGAL POSITON

- [13] The test in the instant matter is whether or not the impugned award is not the one that could reasonably be made on the evidence properly before the first respondent in relation to the issue he was seized with.¹
- [14] Anyone considering the fairness of the dismissal, such as a CCMA Commissioner, is obliged to take any relevant Code of Good Practice issued in terms of the LRA into account.²

¹ See generally *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC) and *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

- [15] The parity principle is applied with caution by the courts and does not demand rigid application of the same disciplinary sanction to all employees guilty of the same or similar infractions where there are sound reasons for distinguishing between such employees. Each case is decided on its own facts and circumstances.³
- [16] In deciding on an appropriate sanction the presiding officer is required to strike a balance between the interests of the employer and those of the accused employee and to have regard to the nature and/or seriousness of the misconduct involved. **“Generally it is not appropriate to dismiss an employee for a first offence except if the misconduct is serious and is of such gravity that it makes continued employment relationship intolerable.”**⁴

APPLICATION OF LEGAL POSITION TO THE FACTS AND FINDINGS

- [17] In deciding whether or not dismissal was appropriate as a sanction the first respondent was obliged to strike a balance between the applicant employer's interests and those of the third respondent by, *inter alia*, looking at the gravity of the infraction involved, the circumstances surrounding its commission and the third respondent's personal circumstances.
- [18] The parties are at variance on the circumstances surrounding the commission of the infraction with the applicant effectively deposing, through its branch manager, that the roof tiles collected were those purchased earlier from Marley while the third respondent's version is that the collected tiles were those supplied by Kulu that were purchased from him during October 2014.
- [19] The parties are, further, in dispute over the third respondent's conduct and attitude towards his manager at all times material to the infraction with the applicant effectively maintaining that the third respondent was insolent while the latter, on his part, contends, in effect, that he was surprised when the

² See section 188(2) of the LRA.

³ *Absa Bank Ltd v Naidu & Others* [2015] 1 BLLR 1 (LAC).

⁴ See item 3(4) of the Code of Good Practice in schedule 8 of the LRA.

branch manager asked him who told him to collect the tiles from the customer when the applicant's policy was to deliver and not collect in such circumstances. His view is he only acted in the best interests of the applicant's business at all times.

- [20] A perusal of the impugned award in this regard reveals that the first respondent accepted the third respondent's version on the facts surrounding the collection of the tiles from the customer and, further, found that he was, in fact, at all times trying to further the applicant's business.
- [21] A look at the recorded evidence confirms the third respondent's version with regard to the circumstances surrounding the commission of the relevant misconduct. In this regard it is worth noting that the record reflects that indeed the tiles that were collected were those supplied by Kulu and not Marley. The applicant's policy, therefore, allowed for collection of such tiles insofar as it was a wrong delivery. In this regard it is worth noting that the parties were in agreement before the first respondent that collection was competent in the case of wrong delivery. I may, further, mention *en passant* that it is possible that the instruction was misunderstood by the third respondent insofar as it is clear from the store manager's evidence that there was no room to accommodate the tiles sourced from the Tweefontein branch and it was, therefore, necessary to clean the yard in order to create space. The third respondent could have thought that the manager was referring to the tiles from the customer when she said that the tiles could only be collected after the area has been cleared up when she was, in fact, referring to those sourced from Tweefontein branch that they were supposed to collect themselves.
- [22] The first respondent appears to have appreciated the issue before him insofar as he considered the gravity of the misconduct, the interests of the applicant and the personal circumstances of the third respondent when he decided that dismissal was not appropriate as a sanction. In this regard it is worth noting that he was alive to the fact, that the applicant, as the employer, was interested in maintaining and upholding discipline at the work place while, at the same time, furthering its business. The foregoing, in my view,

is evident from the sanction he awarded to substitute dismissal which serves to express his disapproval of the third respondent's conduct.

[23] The circumstances surrounding the commission of the infraction which were underpinned by the desire, on the part of the third respondent, to satisfy a customer and to further the applicant's business as well as the third respondent's personal circumstances, inclusive of his length of service with the applicant, reasonably demanded a departure from dismissal as an applicable ultimate permissible sanction. In this regard, it should be recalled that disciplinary codes serve as a guide and the officer presiding over disciplinary hearings retains the discretion as far as the sanction is concerned insofar as he is obliged to take the gravity of the misconduct and the accused employee's personal circumstances into account when determining an appropriate sanction. The parity principle does not demand an automatic, rigid and indiscriminate application of dismissal simply because it is a sanction which is consistently applied for the same or similar infractions. Differentiation is, in law and equity, permissible where cause, such as different set of personal circumstances, exists.

[24] [24] I am, further, not persuaded by the recorded evidence that the first respondent was biased in favour of the third respondent. There exists no evidence whatsoever to sustain the contention on the part of the applicant to the effect that he ignored relevant evidence and considered irrelevant one all with a view to finding in favour of the third respondent. He was in law and equity entitled to decide on legal representation regard being had to the provisions of Rule 25 of the Rules for Conduct of Proceedings before The CCMA.

[25] In conclusion I am satisfied that the decision of the first respondent on the appropriateness of dismissal as a sanction is a reasonable one that could be reached on the evidence properly before him.

Order

[26] In the result the application is dismissed with costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Ms T Moyo (Snyman Attorneys)

For the Respondent: Mr B Mthimunye (Baphasile Mthimunye-Attorneys)

LABOUR COURT