THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2454 /17

In the matter between:

MONEYLINE FINANCIAL SERVICES (PTY) LTD **Applicant**

and

TSIENTSI CHAKANE NO **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

NTHABISENG MOFOKENG AND 7 OTHERS **Third Respondent**

Heard: 12 June 2019

Delivered: 19 June 2019

JUDGMENT

Nkutha-Nkontwana, J

Introduction

[1] In this application, the applicant seeks to review and set aside an arbitration award issued on 31 July 2017 under case number FSBF 961-17 where the first respondent (commissioner) found the dismissal of the third respondents (respondent employees) procedurally fair but substantively unfair and ordered the applicant to reinstate the respondent employees with full back pay.

[2] The applicant's main ground of review is that the commissioner ignored the evidence before him when viewed in relation to the requirements for a dismissal based on poor work performance in terms of the Labour Relations Act[1] (LRA): Code of Good Practice on Dismissals (the Code).

[1] Act 66 of 1995 as amended

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[3] The respondent employees are opposing the application. I must mention that the respondent employees' attorneys of record failed to attend Court on the day of the hearing of this matter. Four of the respondent employees (Mr Tieho Joseph Mofokeng (Mr Mofokeng), Ms Jwalane Pascalina Keletsi, Mr Seiso Augustinus Tshabalala and Ms Seipati Esther Koetepe) did attend Court, having travelled from Bethlehem in the Free State Province by public transport. The rest of the respondent employees did not attend Court because they could not finance the travelling expenses. However, there was a telephonic consultation between the respondent employees who attended Court and those who were absent. They all resolved that the matter should be heard and Mr Mofokeng be their spokesperson.

Factual background

[4] The respondent employees were employed as sales representatives. When they commenced employment with the applicant, there were no performance targets set. On 21 September 2016, the applicant issued a memorandum to all its employees setting out the performance targets as follows:

4.1 Employees dedicated to selling Easy Pay Everywhere products should reach an average transaction rate of 200 transactions per month.

4.2 Employees dedicated to selling Smart Life Products should reach an average transaction rate of 100 transactions per month.

[5] It is common course that the respondent employees failed to achieve the performance targets between September 2016 and January 2017. On 12 October 2016, the first letter warning the respondent employees of poor work performance was issued in respect of the month of September 2016. On 9 November 2016, a second letter then serving as a final ultimatum was issued in respect of the respondent employees' poor work performance for the month of October 2016. The respondent employees were afforded the opportunity to make written representations wherein they were to give reasons for failing to meet the performance targets. The applicant found their explanation unacceptable. On 18 January 2017, the respondent employees were served with the notices to attend performance enquiries respectively.

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[6] During the respective performance enquiries, the respondent employees repeated the reasons they had given to the applicant in their written representations which can be summarised, *inter alia*, as follows:

6.1 There was a bad publicity about the green cards which was broadcast in Lesedi radio station. The applicant did nothing to improve its image.

6.2 There was a change of the system and they had to use the machines. They never received any training on the new system.

6.3 There was an issue of fingerprints which could not be found on the SASSA system and the prospective clients had to go to SASSA offices.

6.4 The clientele they were servicing was predominantly the aged people and most of them did not have cellular phones. As a result, they needed to use an override code which wasted time.

6.5 The respondent employees were arrested by SAPS whilst working in Marquard, Frankfort and Lindley.

[7] The same reasons were reiterated during the arbitration proceedings. The respondent employees testified that these challenges had been brought to the attention of the managers.

[8] Ms Sonnet MacGregor (Ms MacGregor), the applicant's Industrial Relations Manager, testified that the performance targets were reasonable and other employees were achieving them. The applicant needed to introduce the performance targets in order to improve cash flow for survival.

[9] Mr Marvin Edward Edwards (Mr Edwards), the applicant's Provincial Manager in the Free State Province conceded that he was aware of some of the problems experienced by the respondent employees but some were never brought to his attention. He was however adamant that the targets were reasonable and achievable and that the applicant would become bankrupt if all staff members failed to achieve the performance targets.

[10] Mr Keiso Khalaki (Mr Khalaki), the acting Branch Manager in Bethlehem where the respondent employees were based, conceded that the problem with cell phones was reported to him but beneficiaries could use their next of kin's

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cellular phones. This was however never communicated to the respondent employees when they made written representations. He also confirmed that in the case of system error, a client had to go to SASSA for verification of fingerprints.

[11] He also conceded that Mr Thabo Kibe (Mr Kibe) and Ms Refilwe Mokatile (Ms Mokatile) did not achieve the performance target but were never dismissed because their machines were malfunctioning. However, he could not remember what were the reasons for excusing other two employees, Ms Thembi Mofokeng and Ms Puleng Mofokeng, who also did not achieve the performance targets.

The commissioner's findings

[12] The commissioner found that the applicant acted inconsistently because it had accepted the reasons for non-performance proffered by the employees mentioned above without any justifiable reasons. He also found that the dismissal was not an appropriate sanction as training could have been a reasonable alternative. He accepted that the reasons proffered by the respondent employees for non-performance as genuine and plausible given the context of the industry they operated in.

Evaluation

[13] The test for review is trite. As per *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] the commissioner's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[14] The Code provides the following guidelines in cases of dismissal for poor work performance:

> 'Any person determining whether a dismissal for poor work performance is unfair should consider –
>
> (a) whether or not the employee failed to meet a performance standard; and

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[2] (2007) 28 ILJ 2405 (CC) at para 110.

(b) if the employee did not meet a required performance standard whether or not –

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

[15] The onus is on the employer to satisfy the commissioner, on a balance of probabilities, that the dismissal for reasons of poor work performance is fair. In *General Motors (Pty) Ltd v NUMSA obo Ruiters,*[3] the Labour Appeal Court (LAC) held that the employer has a duty to investigate all possible alternatives short of dismissal, and this duty accords with the onus of proving the fairness of the dismissal.

[16] The core issue in the matter at hand is whether the respondent employees were given enough opportunity to meet the performance target. The performance targets were introduced in September 2016 in the context where there were no targets before. The respondent employees failed to meet the newly introduced performance targets at the end of September 2016, on 12 October 2016 they were issues with letters of poor work performance in respect of September 2016. The respondent employees submitted that it was hardly a month after the introduction of the targets and they were subjected to a poor work performance management process. On 9 November 2016, they were issued with final ultimatums for poor work performance despite failure on the part of the applicant to address their concerns as contained in their written submissions.

[17] During the performance enquires held in January 2017, there was no response to the respondent employees' concerns. Ms Macgregor, the initiator, was clearly not in a position to deal with the respondent employees' concerns

[3] (2015) 36 ILJ 1493 (LAC).

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as she was not their line supervisor. It was only during the arbitration that the applicant led the evidence responding to the respondent employees' concerns.

[18] The respondent employees testified that they never received training on the new system and marketing. Mr Edward was adamant that the respondent employees were provided with the manual for the new system and were expected to read and understand it. Whilst Mr Khalaki testified that the respondent employees had been trained but failed to provide specific dates for such training. He also testified that there was no need for marketing training as the respondent employees were never asked to market the products but to sell them. Conversely, he testified that he had shown Mr Mofokeng, one of the respondent employees, how to approach clients and raise his daily statistics. This was disputed by Mr Mofokeng.

[19] Nonetheless, it would seem that there is some credence in the respondent employees' assertion that they never received training or coaching that would have assisted them to improve their performance targets. The commissioner correctly accepted the reasons proffered by the respondent employees as genuine and plausible. Messrs Edward and Khalaki conceded that there had been negative media publicity on the green cards. It was the respondent employees' undisputed evidence that as a result of the negative media reports, the prospective clients were suspicious and negative towards them. In fact, it is common cause that at some stage they were even arrested. The applicant did not investigate these allegations nor took any steps to defend its reputation within the affected communities. Also, Mr Khalaki was aware that most prospective clients had no cellular phones but never addressed this issue with the respondent employees.

[20] It is clear that there were no counselling sessions with the respondent employees in order to address their concerns and offer necessary support or training. The process of written representations was arbitrary; the respondent employees were never provided with the reasons for rejecting their representations.

[21] The applicant submitted, conversely, that the respondent employees knew the performance targets and, in any event, other employees managed to achieve

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the targets. There is no merit in this submission as the reasonableness of the performance targets is not challenged. In any event, the performance enquiry is targeted at the non-performers with a view to, firstly, assist them to improve their performance; and secondly, to establish whether dismissal is an appropriate sanction.

[22] The respondent employees were not senior employees who ought to have known what was expected of them without being given support and a chance to improve. As such, the *dictum* in *New Forest Farming v Cachalia and Others*[4] referred to in the applicant's written submissions is distinguishable. However, *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others,*[5] referred to in Mr Hutchinson's (applicant's counsel) written address to Court, is more pertinent. The LAC stated:

> 'In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.' (Emphasis added)

[23] In the present case, the applicant failed to show that the respondent employees were given sufficient training, guidance, support, counselling and reasonable time to improve their performance. The respondent employees had genuine concerns that were outside their control and could have been managed with the assistance from the applicant. Clearly, the commissioner correctly found that the applicant failed to explore alternative measures short of dismissal, like training. It follows that the applicant failed to show that the dismissal of the respondent employees was an appropriate sanction.

[4] [2003] 10 BLLR 1051 (LC).
[5] [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 25.

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[24] On the issue of relief, Mr Hutchinson submitted that reinstatement was not an appropriate remedy given the fact that the respondent employees conceded that they failed to achieve the performance targets that they readily accepted was reasonable. Even though, the respondent employees complained about training, other employees faced with the same circumstances were achieving the performance targets and they had been sales representatives for more than two years, so the submission went.

[25] Mr Hutchinson also submitted that, to the extent that the commissioner took into account the applicant's inconsistent application of discipline in relation to Ms Thembi and Ms Puleng, that relates to misconduct and finds no application in cases of poor work performance. Alternatively, such flaw does not justify reinstatement given the seriousness of the failure to meet the performance targets on the viability of the applicant's operations. At least, the commissioner should have awarded compensation.

[26] In my view, nothing much turns on the inconsistency issue in the light of my finding that the applicant failed to show that the dismissal of the respondent employees was an appropriate sanction. Reinstatement is a primary remedy in instances where dismissal is found to be substantively unfair. In the absence of any evidence that the circumstances surrounding the dismissal of the respondent employees are such that a continued employment relationship would be intolerable, alternatively, that it is not reasonably practicable for the applicant to reinstate the respondent employees, the commissioner correctly reinstated the respondent employees.

Conclusion

[27] In all the circumstances, I find no reason to interfere with the award. The application stands to be dismissed

[28] On the issue of costs, this Court has a wide discretion in respect of costs and I am not convinced that this matter should attract costs; particularly, since the respondent employees' attorneys of record bailed out on them.

[29] In the premises, I make the following order:

Order

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1. The application is dismissed with no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate H Hutchinson

Instructed by: Fluxmans Incorporated

Third Respondent: Nthabiseng Mofokeng & 7 Others (In persons)

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