



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no. JR1258/21

In the matter between:

**AECI INDUSTRIAL CHEMICALS, A DIVISION OF
AECI LIMITED**

Applicant

and

GIDEON LELAKA

First Respondent

**GENERAL INDUSTRIAL WORKERS UNION OF
SOUTH AFRICA**

Second Respondent

PANELLIST M SOMAN N.O

Third Respondent

**NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY**

Fourth Respondent

Date heard: 04 September 2024

Date delivered: 03 February 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date for hand-down is deemed to be 31 January 2025.

JUDGMENT

BALOYI, AJ

Introduction

- [1] The underlying issue in this review application is the unfair dismissal dispute. Its ventilation at the Bargaining Council resulted in the third respondent issuing an arbitration award. In terms of the award, the third respondent found the dismissal of the first respondent to be unfair on account of the sanction being too harsh. He ordered the applicant to reinstate the first respondent retrospectively without backpay. In essence, the third respondent upheld the guilty finding that was handed down by the applicant to the third respondent. The principal issue which this Court is called upon to determine turns on whether the third respondent's decision is reviewable for having found the dismissal not an appropriate sanction.
- [2] It is notable from the material placed before the third respondent that the first respondent was charged, found guilty and dismissed for gross misconduct which was set out in the charge sheet as follows:

“Allegation(s): Gross Misconduct

- 1.1 On or about 15 October 2020 you engaged in an uncalled-for and unwarranted manner with a fellow employee who perceived your conduct as intimidating and threatening.

- [3] The dispute arose from the altercation between the first respondent and his female colleague, Vanessa McIlroy in his office. It is common cause that Ms McIlroy came to the third respondent's office seeking assistance on work-related issues. The first respondent and Ms McIlroy's disagreements within their discussions escalated to the point that the first respondent felt disrespected. An altercation ensued with the first respondent's voice being the loudest. The other colleagues in nearby offices heard them. One of them, Mr

Lungile Koti came through and pulled Ms Mcllroy away from the first respondent's office.

- [4] Ms Mcllroy laid a grievance against the first respondent. According to the outcome of the grievance hearing a finding that the first respondent made himself guilty of misconduct was made. A recommendation for disciplinary action was made against the third respondent. The subsequent disciplinary process resulted in a guilty verdict followed by a sanction of dismissal.
- [5] In the challenge of the fairness of the dismissal, the third respondent who arbitrated the dispute made a finding that the first respondent was guilty of misconduct after having heard according to the Applicant that:
- 5.1 The first respondent intimidated Ms Mcllroy with verbal abuse when he told her to sit down, to respect him and to not treat him like a child and by pointing a finger.
- 5.2 The feeling of being intimidated was triggered by the aggressive manner in which the first respondent was addressing her.
- [6] What the third respondent heard from the first respondent was that he merely offered Ms Mcllroy a seat to enable him to explain how the purchase orders are processed. At no stage was he aggressive. He never shouted at Ms Mcllroy. In fact, she was the aggressive one and was not prepared to accept his explanation.

The arbitration award

- [7] As pointed out above, the third respondent found that the first respondent committed gross misconduct. She however disagreed with the applicant on sanction in that she found it to be harsh in view of the first respondent's long service of 28 years and clean disciplinary record. She also noted the absence

of evidence led to establish the breakdown of trust relationship. She relied on *Edcon Ltd v Pillemer NO and Others*¹ in support of this point.

Before this Court

[8] The grounds upon which the applicant is seeking review of the arbitration award are in essence that the decision of the third respondent is not one which a reasonable decision maker could reach given the underlying findings to the guilty verdict. The third respondent failed to appreciate the nature of the inquiry she was required to undertake. The finding on the sanction is not consistent with her own findings that led to the guilty verdict which she ignored when dealing with the sanction, amongst others that:

- 8.1 the first respondent showed no remorse and was not willing to accept the wrongdoing;
- 1.2 he proffered a disingenuous version;
- 8.3 he was aggressive, disrespectful and placed Ms McIlroy in a vulnerable position, and;
- 8.4 the third respondent had a greater onus as the chairperson of the Employment Equity Committee to conduct himself in a respectful manner.

[9] Further that the first respondent's length of service and clean record should weigh above the factors considered towards the guilty finding, which demonstrates that the third respondent's decision is not the one that a reasonable decision-maker could reach. Furthermore, that the applicant did not lead evidence to establish a breakdown of the employment relationship cannot amid overwhelming underlying factors to the guilty finding render the dismissal unfair.

[10] The first respondent's contentions are that the decision of whether the sanction imposed by the applicant was fair entails making a value judgment

¹ [2010] 1 BLLR 1 (SCA).

based on the third respondent's sense of fairness. The long service and clean record cannot be ignored and are instrumental in salvaging the trust relationship. There were no factors suggesting the breakdown of the trust relationship that would compensate for the applicant's failure to lead evidence to establish the breakdown of a trust relationship. In the absence of such factors, the applicant was bound to lead evidence to establish the breakdown of the trust relationship.

Evaluation

- [11] This matter turns on the fairness of the sanction. The third respondent found the dismissal of the first respondent to be harsh after having taken into account the first respondent's long service, clean record, the applicant's failure to lead evidence on the breakdown of the trust relationship and the applicant's delay in instituting the hearing and that the first respondent worked in the same environment as Ms McIlroy with their contact limited to email communication.
- [12] According to the third respondent, the first respondent's conduct should have attracted a final written warning. She rejected the applicant's argument on 16 days of activism which should be considered against the third respondent as violence against women is an aggravating factor. She also expressed a view that the first respondent should have conducted himself more responsibly as he was the chairperson of the Employment Equity Committee. An order reinstating the first respondent without backpay was made.
- [13] The applicant's grounds of review are heavily rested on the third respondent's consideration of the length of service, clean record and the applicant's failure to lead evidence on the breakdown of the trust relationship. The first respondent's reply is that these are not the only factors. The third respondent considered a variety of factors to arrive at the decision made.

[14] In *Autozone v Dispute Resolution Centre of Motor Industry and Others*² the Labour Appeal Court (LAC) at paragraphs 11 and 12 had this to say:

“[11] Consequently, the only issue on appeal is whether Sikhakhane’s conduct breached the trust relationship so as to render the continuation of the employment relationship intolerable.

[12] Undeniably, the evidence on the issue is somewhat thin. An employer relying on irreparable damage to the employment relationship to justify a dismissal would be prudent normally to lead evidence in that regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and/or the circumstances of the dismissal. Where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible.”

[15] The above *dicta* justifies the applicant’s submissions that it is not in all cases that the employer must lead evidence to establish that the trust relationship is broken down. The facts of the matter driven by the nature of the misconduct have a bearing in determining whether the trust relationship is broken down. Simply put; the underlying factors to the nature of the misconduct and circumstances of the dismissal may be sufficient to render it unnecessary to lead such evidence on trust relationships. The LAC in the *Autozone* decision made an order upholding the dismissal of an employee who was dismissed for dishonesty and deceitful conduct in circumstances where the employer had not led evidence on the breakdown of the trust relationship. The following was said in paragraph 13:

“[13] Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The employer thereafter will be hard pressed to place trust in such an employee. It will be difficult going forward for any task involving a

² (2019) 40 ILJ 1501 (LAC).

measure of discretion or reliance to be entrusted to the deceitful employee. The operational requirements of the employer alone, therefore, may very well justify the dismissal. An employer is entitled to have a driver it can rely on to act in good faith to advance and protect its interests. Sikhakhane's conduct shows that he is not such a driver. It was not necessary for Autozone in such circumstances to have produced evidence to show that the employment relationship had been irreparably destroyed. The nature of the offence and the manner of its commission support a conclusion that the continuation of the relationship had become intolerable. The employer cannot reasonably be expected to retain Sikhakhane in its employ. Hence, the finding to that effect by the arbitrator is one that a reasonable decision-maker could reach. There was accordingly no basis for the Labour Court to set aside the award."

- [16] The approach taken in the *Autozone* decision was not new to the LAC. It was previously adopted in *Impala Platinum Ltd v Jansen and Others*³ where the Court dealt with the dismissal of the employee who violated the safety regulations and remarked as follows:

"[20] The Commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the Appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to Appellant's service providers thereby compromising fairness and honesty within the Appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. This ground of appeal thus succeeds.

- [17] The Court also noted the path followed in *Edcon* calling for the need for the employer to lead evidence on the breakdown of trust relationship. This was

³ (2017) 38 ILJ 896 (LAC).

influenced by the nature of the charge⁴ which required sufficient evidence of breakdown of trust relationship to sustain the sanction of dismissal.

[18] In a similar matter where the employee proffered a version that was seen as far-fetched the LAC still found in *De Beers Consolidated Mines Ltd (Venetia Mine) v National Union of Mineworker and Others*⁵, that the dismissal was not an appropriate sanction. In essence, the employee's failure to disclose a relationship with the employer's service providers was found to be not so serious as to impede the restoration of the employment relationship. The Court found the dismissal to be unfair in so far as the sanction of dismissal had not been appropriate. It went on to award a relief of reinstatement without backpay.

[19] It appears from the above decisions that in a situation of misconduct that is not characterized by dishonesty and/or deceit where long service and a clean record are a feature, the possibilities of restoration of the employment relationship are realizable. In *casu*, the third respondent reasoned that the employer's leading evidence on the breakdown of trust relationship was the default position. This according to the third respondent is a blow to the applicant's case. In view of the settled position on this aspect, the third respondent missed a point in this regard. The question arising out of this; is whether the third respondent's award can be reviewed on this point alone. In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others*⁶, the LAC cautioned about the approach to review applications in a fragmented piecemeal fashion and the following was said at para 21:

"[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New*

⁴ Ibid at para 12.

⁵ (2020) 41 ILJ 884 (LAC).

⁶ (2014) 35 ILJ 943 (LAC).

Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork.”

- [20] The third respondent’s decision to interfere with the sanction on the basis of having faulted the applicant for failing to lead evidence of breakdown of trust relationship does not constitute an irregularity that renders the arbitration award reviewable. There was no evidence of dishonest conduct on the part of the first respondent that was placed before the third respondent. The third respondent also took into account other relevant factors to arrive at a finding that the employment relationship was capable of being restored including length of service and a clean record, hence a relief of reinstatement was ordered.
- [21] In view of the above, the third respondent’s decision cannot be faulted. The nature of the misconduct was not really detrimental or bringing the applicant’s business to a compromise. The third respondent’s opinion that the sanction of a final written warning should have been imposed on the first respondent clearly points to the effect that whatever issues that existed between Ms McIlroy and the first respondent required a conflict management exercise which the applicant should have undertaken. On this note, the decision of the third respondent falls within the bands of reasonableness and the application for the review of the arbitration award should under these circumstances fail.
- [22] With the employment relationship facing restoration, it will not be in the interest of law and fairness to make a cost order.

[23] In the premises, the following order is therefore made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

M. Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Mr D Cithi of Mervin Taback Inc t/a Anderson

For the third respondent : Mr A Ramkisson of Jayshree Juglal
Incorporated

LABOUR COURT