THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: DA 7/2024

In the matter between:

CCI CALL CENTRES (PTY) LTD **Appellant**

and

DALE KEELEY PINN **Respondent**

Heard: **13 March 2025**
Delivered: **17 April 2025**
Coram: Van Niekerk JA, Waglay AJA *et* Mooki AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] The respondent (employee) was employed by the appellant as a management accountant. He was dismissed after being charged with gross insubordination, gross insolence and inappropriate workplace conduct. The employee challenged the fairness of his dismissal and ultimately referred the matter to arbitration, where the arbitrator found that he was guilty on the charges of gross insolence and inappropriate workplace conduct. However, the arbitrator considered that dismissal was too harsh a penalty in

the circumstances and that the employee's dismissal, for that reason, was substantively unfair. In regard to remedy, the arbitrator found that the primary remedies of reinstatement or re-employment were inappropriate and ordered the appellant to pay the employee compensation in an amount equivalent to one month's remuneration. The employee sought to have the arbitrator's award reviewed and set aside, in part, based on the arbitrator's decision not to reinstate him, and the limit on the award of compensation. The review succeeded. The Labour Court set aside the award and substituted it with an award of reinstatement, retrospective to the date of dismissal, less the one month's compensation awarded, if already paid. With the leave of this Court, the appellant appeals against that order.

The material facts

[2] The factual background is a matter of common cause. The employee was engaged by the appellant as a management accountant. As part of his duties, the employee was required to create payment codes on a monthly basis to enable the payment of salaries to the appellant's employees. After some unhappiness at not having been granted a salary increase and bonus, in January 2019, the employee declined to create the necessary codes for payment. The employee's direct superior, Mr Bridgmohan, the appellant's chief financial officer, sent an email to the employee directly instructing him to create the codes. The employee replied, copying in Bridgmohan's subordinates, not only refusing to comply with the instruction but attacking Bridgmohan personally and impugning his integrity. Bridgmohan called the meeting, chaired by the appellant's head of human capital, to resolve the dispute between him and the employee. The employee accused Bridgmohan of dishonesty and used inappropriate language towards him, for which he later advanced an apology. Arising out of this misconduct, the employee was suspended and charged with gross insubordination, gross insolence and inappropriate workplace conduct. After a disciplinary inquiry, the employee was found guilty of insubordination (including the refusal to create company allocation codes), gross insolence (disrespecting his line manager in front of other senior managers and managers), and inappropriate workplace

conduct (refusing to assist colleagues when requested to supply them with information). The employee was dismissed.

[3] After his dismissal, the employee found employment at a competitor of the appellant, the Ignition Group. The employee did not disclose or quantify his earnings post dismissal but in the review application, sought a substituted award of reinstatement retrospective to the date of his dismissal, without any loss of benefits, being the relief ultimately granted by the Labour Court. In these proceedings, the appellant filed an application to have the matter remitted to the Labour Court for further hearing to ascertain the employee's employment history and earnings after the date of his dismissal, and to determine the extent of any enrichment that may have been occasioned by virtue of the retrospective effect of the Labour Court's order.

The arbitrator's award

[4] The arbitrator considered the charge of gross insolence and reasoned that in deciding whether the employee's actions had been willful and serious, they needed to be considered within the context of uncertainty that the arbitrator found to exist surrounding the employee's job description. Further, the arbitrator found that the employee had been rude when confronted with his reluctance to initiate the payroll codes and that his language towards his superior 'left much to be desired'. However, the arbitrator did not consider these to be the 'defining factor' in making any decision concerning the employee's dismissal. In his view, the third charge brought against the employee, that of inappropriate workplace conduct, had more serious ramifications for the employment relationship. In this regard, the arbitrator found that it was common cause that the employee had refused to do certain work based on what he perceived to be no longer part of his duties. Although the employee had eventually prepared the codes, his refusal almost led to salaries not being paid to employees, with potentially serious repercussions for the appellant. This conduct was to be viewed in a context where nothing prevented the employee from performing the work in question, work that he had previously performed. The arbitrator concluded as follows:

’79 … It is difficult to mitigate his decision not to do the work at hand. Had these duties been sprung on him by the employer, one would have been in a position to understand and excuse his actions in this regard. More importantly, if he lacked the necessary skills to do the payroll codes then this would have been a mitigating factor for him to refuse to do the work. Also important is the timing of his refusal. It was at the time of payment of salaries leaving one with one conclusion, and that is that his refusal was for sinister reasons and that was to leave the Respondent without codes for the payroll and without a means of paying employees their salaries. In short there was nothing preventing the Applicant from assisting with the creation of payroll codes.

80. His actions were willful as he knew and was aware of the repercussions of his actions. He was also deliberate in his actions. Any reasonable employee in the position of the Applicant would have known of the serious repercussions of his actions.

81. The actions of the Applicant were also serious in the outcome of his actions could have left the employer stranded in so far as paying salaries to its employees. It is very important to consider that the Applicant was the only one who could do the payroll codes.

82. The applicant was guilty in respect of charge 3.’

[5] The arbitrator went on to consider an appropriate sanction for the misconduct that he had found to exist. He had reference to the statutory Code of Good Practice, and in particular, item 3(3), which recommends that dismissal be reserved for cases of serious misconduct or repeated offences. The arbitrator had further regard to item 4, which provides that dismissal for a first offence is generally not appropriate, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. After reference to a number of authorities in which the intolerability of continued employment had been considered, the arbitrator came to the following conclusion:

’96. In the present matter I have considered among other factors, the length of service of the employee, the harm or potential harm that could have arisen out of

his actions and most importantly in this case the circumstances of the currents of the misconduct and believe that dismissal was harsh. In this regard I have considered the circumstances around his job description. However, I believe that it would not be prudent to reinstate the Applicant. The relationship between the applicant and his senior, Mr Bridgmohan has broken down completely. They cannot work together. It is for this reason that I believe it would be just and equitable to award the Applicant one month's compensation...'

[6] What is clear from this formulation is that the serious misconduct that the arbitrator found the employee to have committed materially influenced his decision on the remedy to be afforded the employee. Although the arbitrator's decision smacks of a generous application of Solomonic wisdom, his refusal to reinstate the employee in the face of a finding that dismissal was too harsh a sanction is rooted both in the seriousness of the employee's misconduct and the intolerability of continued employment, the latter predicated on the breakdown in the relationship between the employee and his immediate senior manager, Bridgmohan.

Labour Court's judgment

[7] As I have indicated, the employee's case on review was that the arbitrator had committed a gross irregularity and exceeded his powers by failing to reinstate him in circumstances where he submitted that the arbitrator was statutorily enjoined to do so. Further, the employee contended that the arbitrator had committed a gross irregularity by finding that the relationship between him and Bridgmohan had broken down in circumstances where the evidence did not support such a finding. Finally, the employee submitted that the arbitrator had failed to properly exercise his discretion in determining a just and equitable amount of compensation for a substantively unfair dismissal. The employee sought to have the award of one month's compensation set aside and substituted by an award of retrospective reinstatement without loss of benefit, alternatively, compensation equivalent to 12 months' remuneration.

[8] In his founding affidavit, the employee did not challenge the arbitrator's finding that he had committed an act of serious misconduct. The review was narrow and premised solely on the basis that the arbitrator's finding of a substantively unfair dismissal ought to have resulted in an award of reinstatement or, alternatively, compensation equivalent to 12 months' remuneration. Although the appellant alluded in its answering affidavit to the prospect of a cross-review seeking to have the employee's dismissal declared substantively fair, no formal cross-review was filed.

[9] The Labour Court recorded that the arbitrator's finding that the relationship between the employee and Bridgmohan had deteriorated to the extent that continued employment was intolerable, the Labour Court came to a different conclusion, finding that there was insufficient evidence to demonstrate any irretrievable breakdown of the employment relationship. The Court's reasoning can be gleaned from the following passage:

> '[39] The submission made by the employer in relation to the irretrievable breakdown of employer-employee relationship and trust have been dealt with above, and I find that the employer failed to provide cogent reasons and evidence to support that the employer employee relationship has irretrievably broken down. The evidence demonstrated that the immediate manager Bridgmohan was open to mend the relationship and move forward in the event that the Applicant is successful.'

[10] For the Labour Court, the most significant consideration was Bridgmohan's evidence that he could still work with the employee. The Labour Court went on to find that in the absence of the exceptions listed in section 193(2) of the LRA,[1] the arbitrator had no discretion but to reinstate the employee, and that the award of one month's compensation 'induced a sense of shock and was unjustifiable'. The arbitrator's award

[1] Section 193 (2) provides that the Labour Court or an arbitrator must require the employer to reinstate or re-employ any employee and employee who is found to have been unfairly dismissed unless:
'(a) the employee does not wish to be re-instated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

was thus set aside and substituted with the award of reinstatement, with full retrospective effect.

Grounds for appeal

[11] The appellant submits, among other grounds of appeal, that the Labour Court applied the incorrect test, treating the matter as an appeal rather than a review; that the Court misdirected itself in identifying what the appellant's case was and ignored evidence inconsistent with that misidentification; and further that the Court misdirected itself in ordering that the employee be reinstated, and in so doing, erred in its application of section 193(2)(b) and (c) of the LRA.

Analysis

[12] The first question to be determined is whether the Labour Court applied the correct test on review. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[2] *(Sidumo)* the Constitutional Court set the threshold for review. The question that the Labour Court was required to ask and answer is whether the arbitrator's decision is one that a reasonable decision-maker could reach, having regard to the available material. The distinction between a right of review and a right of appeal was recently affirmed by this Court in *Makuleni v Standard Bank of South Africa Ltd and Others*[3] where Sutherland AJA said the following:[4]

> '… The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

[2] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).
[3] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).
[4] Ibid at para 4.

[13] And further:

> 'To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.'[5]

[14] The Labour Court was obliged to determine, on review, whether the arbitrator's decision that one month's remuneration was an appropriate remedy is a decision to which a reasonable decision-maker could have come on the available evidence. The Labour Court's judgment makes no mention of the threshold of reasonableness. To the extent that the employee submits that the Labour Court, without saying so, approached the matter as a reasonableness review, this is not borne out by the judgment itself. The Court records at the outset of its analysis that the issue to be determined is whether *"… the exceptions listed in section 193 (2)(a) to (d) exist in this matter to justify the failure to reinstate or to re-employ the Applicant?"*. The balance of the judgment is devoted to a determination of this issue, not through the lens of the reasonableness of the outcome of the proceedings under review, but as a fresh determination made by the Court on the record of those proceedings. This is a basic error. However, since an appeal is directed at an order granted by the Court *a quo*, it remains to be determined whether the order granted was nonetheless correct.

[15] In my view, the Labour Court's order cannot be sustained. First, the order of retrospective reinstatement takes no account whatsoever of the unchallenged finding that the employee committed an act of serious misconduct. The evidence of the nature and extent of the employee's misconduct clearly weighed heavily with the arbitrator when he decided that whatever the degree of unfairness that attached to the decision to dismiss the employee, the employee should not be reinstated and only a limited amount of compensation awarded. Secondly, the Labour Court failed to appreciate the overwhelming evidence to the effect that in consequence of the employee's misconduct, there had been a complete breach of trust between the employee and the appellant, to the extent that a continued employment relationship could not be resuscitated. The

[5] Ibid at para 13.

Labour Court's primary reason for reaching a contrary conclusion is focused on a single, minor aspect of Bridgmohan's evidence, during cross-examination, that was nothing more than a statement of the obvious: that if the employee were to be reinstated, Bridgmohan would do his best to mend the relationship and move forward. Viewed in context, this was not a concession in relation to the tolerability of the continuation of the employment relationship between the appellant and the employee. Bridgmohan's evidence was clear in relation to the nature of the employment relationship between the appellant and the employee and any prospect of its continuation. Bridgmohan testified that the employee was insolent and disrespectful and that the employment relationship had completely broken down. Specifically, he testified that the employee had copied in his subordinates into an email in which the employee was not only insolent and insubordinate but repeated an allegation that Bridgmohan was untrustworthy. Further, after the employee's request for a salary increase and bonus had not been supported, the employee became uncooperative and unwilling to work with his colleagues, became openly disrespectful of Bridgmohan and openly refused to take instructions from him. Bridgmohan stated repeatedly and consistently during cross-examination that the employee had been disrespectful to him and that he disregarded his direct instructions (on occasion in front of his subordinates), that he openly suggested that Bridgmohan's character and integrity were questionable, which, in Bridgmohan's view, the employee did with the deliberate intention of embarrassing him in front of others. Similarly, in respect of Ms Mahabir, there was no basis for the Labour Court to reduce her evidence to a conclusion that she could still work with the employee. The gravamen of her evidence was that the employee had refused to create the salary codes for the first time in January 2019 and had also refused numerous verbal requests from her to create those codes. The requests were made on 29 January 2019 because the salaries are to be loaded the following day for payment to reflect on 31 January 2019. Mahabir's request for the employee to intervene was a last resort in circumstances where thousands of employees stood to be prejudiced by the delay in the payment of their salaries. The employee did not refuse to create codes once only – he did it repeatedly, knowing the consequences of his refusal. It was not unreasonable for the arbitrator to

conclude that there was ample evidence that the employee's conduct was such that, in the circumstances, a continued employment relationship would be intolerable.

[16] In short, the employee was revealed by the evidence to be an employee who was prepared not only to undermine a superior manager but to hold his employer to ransom and potentially prejudice thousands of his co-employees solely on account of a personal pique. The Labour Court did not engage with any of this evidence, nor did it set out why this evidence could not rationally support the arbitrator's conclusion that any continued employment relationship would be intolerable.

[17] The Labour Court's appeal to the authority of *Booi v Amathole District Municipality & others*[6] *(Booi)* is misguided. Although the Constitutional Court in that matter affirmed that the bar of intolerability is a high one,[7] the bar is not absolute. *Booi* concerned the denial of the remedy of reinstatement to an employee who had been exonerated of the misconduct for which he had been dismissed. The present case involves the intolerability of continued employment in circumstances where it is not disputed that the employee committed an act of serious misconduct. *Booi* is thus entirely distinguishable.

[18] Section 193 (2)(a) establishes the intolerability exception by reference to 'the circumstances surrounding the dismissal'. Intolerability generally addresses the trust relationship between the employer and the employee,[8] a matter that is directly impacted by an employee making serious and scandalous accusations against management[9] or where, as in *Department of Finance and Economic Development (The Province of Gauteng) v Mosome and Others*[10], the employee had acted in a grossly insubordinate fashion toward a supervisor and used language that demonstrated disrespect, which this Court in upholding an arbitrator's decision not to grant reinstatement, described as

[6] (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC).
[7] Ibid at para 40.
[8] See *Potgieter v Tubatse Ferrochrome & others* (2014) 35 ILJ 2419 (LAC); [2014] ZALAC 114.
[9] *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC), *Dunwell Property Services CC v Sibande & others* [2012] 2 BLLR 131 (LAC).
[10] [2014] ZALAC 95 (19 September 2014).

conduct striking at the core of the employment relationship. By any measure, the arbitrator's conclusion that the circumstances surrounding the employee's dismissal were such that a continued employment relationship would be intolerable met the threshold of reasonableness.

[19] In summary: the outcome of the review proceedings, i.e. the Labour Court's finding that section 193 (b) did not apply and its consequent order of retrospective reinstatement, cannot be sustained given the threshold of reasonableness that applies to the scrutiny of the arbitrator's award under section 145 of the LRA. The appeal thus succeeds, and the Labour Court's order stands to be set aside and the arbitrator's award upheld. It is not necessary in the circumstances to consider either the appellant's further grounds of appeal or the application to lead further evidence in relation to the employee's post-dismissal employment.

[20] The requirements of the law and fairness are best satisfied by each party bearing its own costs.

[21] I make the following order:

Order

1. The appeal is upheld.
2. The order of the Labour Court granted on 16 January 2024 under case number D201/2020 is set aside and substituted by the following:
'The application is dismissed.'

van Niekerk JA
Judge of the Labour Appeal Court of South Africa

Waglay AJA *et* Mooki AJA concur.

APPEARANCES

FOR THE APPELLANT: W Shapiro SC

FOR THE RESPONDENT: SR Mhlanga, Mhlanga Inc.