INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

LAC Case no: CA4/2014

LC Case no: C965/2011

In the matter between:

DOORGESH JHUPSEE HARRINARAIN **Appellant**

(Applicant in the Court *a quo*)

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

DU PLESSIS N.O. **Second Respondent**

SABS COMMERCIAL (PTY) LTD **Third Respondent**

Heard: 22 September 2015

Delivered: 06 November 2015

Summary: **Review of award – employee dismissed for insubordination for defying manager authority and failing to carry out reasonable and lawful instruction - commissioner finding dismissal substantive unfair but procedurally fair - employee awarded compensation – commissioner award falling within the ban of reasonableness - Rule related to peremption restated - conduct of an unsuccessful litigant must point indubitably to the conclusion that he does not intend to attack the judgment - *onus* on the party alleging peremption to prove it – employee accepting payment for compensation but**

seeking review of the award – employee not accepting award. Appeal dismissed.

Coram: Waglay JP, Musi JA, and Savage AJA

JUDGMENT

C J MUSI JA

[1] This is an appeal against the judgment of the Labour Court (Rabkin-Naicker J) wherein it found that the appellant had acquiesced in the award and that his right to review had therefore become perempted.

[2] The appellant was employed as the Manager: Laboratories (Western Cape) of the third respondent (SABS) and reported to Ms Yoliswa Kula, the Regional Manager (Western Cape). The appellant and Ms Kula had a very rocky work relationship. She was of the view that the appellant did not afford her the necessary respect. The problems between the two were the subject matter of numerous disciplinary inquiries against the appellant which ultimately culminated in his dismissal for insubordination and failure to carry out work related instructions. Dissatisfied with the dismissal, he referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). After conciliation failed, he referred the dispute to arbitration. The second respondent (the Commissioner) found that the appellant's dismissal was substantially fair but procedurally unfair. The SABS was ordered to pay the appellant compensation in the amount of R89 100 by 4 November 2011. The SABS paid the compensation as ordered, which was accepted by the appellant. Aggrieved by the award the appellant launched a review application against it.

[2] Although the court *a quo* dismissed the review application based on peremption; I propose to set out the facts in some detail, for reasons which will presently become apparent.

[3] Ms Kula testified about four incidents that happened during the latter part of 2010. On 7 September 2010, some of the staff members of SABS Western

Cape had a meeting with Mr Seane, the General Manager: Chemical Laboratories who was based in Pretoria. There was a concern that the laboratories were not profitable. It was decided, during the meeting, that a sales plan must be compiled by the appellant and submitted to Ms Kula.

[4] The appellant initially testified that he did not know that he was supposed to compile the sales plan because he is not well versed in marketing. He subsequently testified that he was busy researching how to go about writing the sales plan when Ms Millicent Julius, his subordinate, sent him a sales plan. He was impressed with it and added some of his own ideas to it and sent it to Ms Kula.

[5] The minutes of the meeting clearly stated that the appellant was to compile the sales plan. His testimony that he added his own ideas to Julius's sales plan turned out to be false because he passed-on her sales plan as his. The sales plan that he submitted was dated 16 September 2010 and clearly marked Marketing Mix compiled by Millicent Julius.

[6] Ms Kula testified that on 29 October 2010 she sent the appellant an e-mail which reads as follows:

> 'Can you please give me a full report as to why you still have 5 Internal IRQs that are almost three months old and are still open.
>
> Can I please have the report together with the paperwork for closure of these by next Tuesday the 2nd of November 2010 by the end of business.'

[7] The appellant sent her documents relating to 17 IRQs (investigation requests) that were closed and nothing about the five which she requested. She further testified that Ms Julius had to close the five IRQs.

[8] The appellant testified that he sent Ms Kula more information than she requested. He sent her information about 17 IRQs instead of only five IROs. When he was requested, in cross-examination, to produce evidence of the five IRQs that he was requested to report on, he could not.

[9] Ms Kula testified that on 1 November 2010, she requested the appellant via e-mail to give her pertinent information regarding cancellations. The e-mail reads as follows:

> 'Can you please prepare a spread sheet for me on all your cancellations. It has to include the company name, the tests usually done for this customer, the total revenue lost and the reasons for the loss of business. I basically need to assess the trend over a three year period. I need it for each lab.'

[10] According to Ms Kula, she needed this information because the laboratories (both the water and the chemical laboratories) were not making money. She wanted to know why they were losing customers. The appellant compiled a spread sheet that did not contain all the information that she needed. He, for example, under reason for loss of business just stated: "In general the major reason poor service levels and some extent cost. Happy with swift." Swift was SABS' competitor.

[11] On 13 November 2010, she sent him an e-mail pointing out that she needed the reason why each company did not make use of their services anymore. She pointed out that the reason why she needed the information was because they need to separate business which was lost due to their own negligence from that which was lost for reasons beyond their control.

[12] The appellant did not comply with the instruction. He testified that Ms Kula knew all the tests that they were doing and there was therefore no need to give her that information. He did not call all the companies to ascertain the reason for cancellation because it would be too expensive. He wrote the reasons from which she could see the trend.

[13] He conceded during cross-examination that Loyiso Magqi, who was his subordinate at the Water Chemistry laboratory pointed out to him, in an e-mail, that the information on the spread sheet was not accurate. Loyiso's e-mail reads as follows:

> 'The information on the spread sheet is not accurate. About 70 companies you've listed as 'lost' have tested with us for the year 2010. We lost the Cape

> Winelands Tender before our suspension. They were not happy with the TAT.'

[14] The appellant however testified that Loyiso did not understand the process properly because some companies would come and go regularly. He confirmed that he did not have information from all the customers but added that his reason for the loss of business was a fair indication.

[15] Ms Kula testified that on 2 November 2010, she received an e-mail from their Head Office at Pretoria to complete blank slides that she had to use during a presentation that she had to do on 4 or 5 November 2010. The slides related to all the operations in the Western Cape. She printed the blank slides and gave copies to the relevant managers to complete. All the other managers, except the appellant, completed the slides. She told all of them that she needed the information urgently, before the end of 2 November 2010 because she had to consolidate the information in order to do the presentation at Pretoria.

[16] At 16:58 on 2 November 2010, she wrote the following e-mail to the appellant:

> 'Can you please submit the info as requested from you this morning. I need to consolidate for the region and submit my presentation by mid-day tomorrow. I cannot do my consolidation without the info from the labs. Can you please have this info asap.'

[17] The appellant responded at 17:04 as follows:

> 'Currently I am not well. I think I am coming down with the flu. Sorry for any inconvenience caused.
>
> As per your request, you want me to give you growth and revenue estimates (for BU 2816 and 2819) to show a positive variance.
>
> Before I comply with the request, I wish to highlight the following:
>
> I feel we should have realistic achievable plans, if implemented, with a continuous, solid marketing support in place to achieve the revenue targets…to give the process a fair chance. What I am afraid of is to mislead and give unrealistic, unachievable, very favourable revenues to make the

budget look good. We must understand the issue and address it accordingly. There are no guarantees. Please refer to the business plan that was sent to you…

To comply with your request, please note this is a purely thumb suck estimate. Looking at the history and trend, I do not have any facts to support it.

Growth areas applicable to both BU

Regulatory and compliance	50% revenue growth
Mark scheme	20% revenue growth
Food/water/safety management systems	15% revenue growth
Industry	15% revenue growth.'

[18] Ms Kula testified that the appellant did not comply with her request in that he did not give her the specific information required and he failed to complete the slides as requested.

[19] The appellant's testimony was that it was not his presentation. He wanted to know why she did not complete the slides herself because she could have extrapolated the information from other budgetary documents, which she had in her possession.

[20] It is common cause that Ms Kula had to ask Loyiso Magqi and Millicent Julius to assist her with the slides that were supposed to be completed by the appellant. Instead of complying with the instruction, the appellant chose to make innuendos of dishonesty and insinuated subtly that Ms Kula does not understand the budgetary system.

[21] Ms Kula testified that she does not think that the appellant respects her. According to her, they cannot work together. She metaphorically described them as two fighting bulls and stated that as they were fighting SABS was suffering. She testified that when she called the appellant to her office, he would refuse to sit even when requested to do so. He would deliberately leave

her office door open so that her subordinates could hear how he shouted at her. They could not engage in a normal fruitful conversation.

[22] The appellant testified that he respects Ms Kula and that he would have no problem working with her.

[23] The Commissioner found that both Ms Kula and the appellant were not in all respects satisfactory witnesses. He analysed the evidence in relation to all the incidents mentioned above and found that the probabilities in each one of them favoured the case of SABS. He found that:

i) the appellant had not complied with the instruction to compile a sales plan;

ii) the appellant felt it was not necessary to give a full report in relation to the five IRQs and he thus challenged Ms Kula's authority;

iii) the appellant did not comply with the instruction relating to the cancellations;

iv) the appellant did not comply with the instruction in relation to the slides.

[24] The Commissioner concluded that the appellant's refusal to comply with Ms Kula's instructions was deliberate and amounted to insubordination. After considering all the relevant circumstances, the Commissioner found that dismissal was a fair sanction. He however found that the dismissal was not effected in terms of a fair procedure because SABS did not comply with its own appeal process and ordered SABS to pay the appellant the compensation mentioned above, which amounted to two months' salary.

[25] The court *a quo* did not deal with the merits of this matter because of its finding that the appellant acquiesced in the award.

[26] Mr Garces contended that the court *a quo* was incorrect in finding that the appellant's right to have the Commissioner's award reviewed was perempted. He submitted that the fact that the appellant accepted the money in terms of the award may be indicative but not determinative of peremption.

[27] Mr Tsatswane contended that the court *a quo* was correct in its finding that the doctrine of peremption precluded the appellant from prosecuting the review application. He also contended that the Commissioner cannot be faulted on the merits.

[28] In *Dabner v South African Railways & Harbours*,[1] Innes CJ said the following about peremption:

> 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'[2]

[29] The court is therefore enjoined to look at all the facts and circumstances and in light thereof to make a determination based on the facts of the particular case. Peremption is therefore fact specific.

[30] There is no evidence as to when the money was paid to the appellant. The money was paid into his bank account. He did not acknowledge receipt of the payment as full and final settlement of the issue between him and the SABS.

[31] The award is dated 19 October 2011. The appellant launched the review application on 1 December 2011, well within the six weeks prescribed by the Labour Relations Act 66 of 1995 for reviews. Although he accepted the money, he also challenged the award timeously. It is therefore clear what the attitude of the appellant was towards the arbitration award: he did not accept it.

[32] In my view, the court *a quo* should have found that the SABS, who bore the *onus* of proving that the appellant accepted the payment in compliance with the terms of the award and, as such, waived his right to subsequently

[1] 1920 AD 583.
[2] At 594.

challenge it, failed to discharge its *onus*. At the very least, it is clear that this is a doubtful case in which the court *a quo* should have found that the acquiescence was not proven.

[33] On the merits, Mr Garces all but conceded that the arbitration award is unassailable because the award is one which a reasonable decision-maker could make.

[34] It was said that insubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her. It is misconduct because it assumes a calculated breach, by the employee, of the duty to obey the employer's lawful authority.[3] When an employee disregards the authority of or a reasonable and lawful instruction by an employer that amounts to insubordination.[4]

[35] The Commissioner correctly, in my view, found that the evidence presented by the SABS is of a better quality and more probable than the evidence presented by the appellant.

[36] The appellant was evasive and denied objective facts that were contained in e-mails which he received and read. He conjured up all sorts of reasons and excuses for conduct, which was clearly damning.

[37] The evidence in this matter exhibits deliberate recurring and sustained actions on the part of the appellant to undermine the authority of Ms Kula and not to execute reasonable instructions given to him by her. The manner in which he undermined her authority was so serious that they could no longer have a proper conversation about work related matters. Ms Kula's testimony in relation to the irretrievable breakdown of the employment relationship was correctly accepted.

[38] In deciding whether dismissal was a proper sanction, the Commissioner *inter alia* said the following:

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[3] *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC) at para 213.
[4] At para [57].

> 'As to the appropriate sanction, the principle that the penalty must fit the offence requires an employer to consider alternative sanctions before taking the decision to dismiss. When doing so, regard should be had to the circumstances surrounding the commission of the offence, the employee's blameworthiness, the manner in which like infractions were handled in the past, the employee's past disciplinary record and length of service and the consequences of the particular infraction for the future good of the enterprise. The determination of the fairness of the sanction of dismissal entails comparing the reasons given by the employer to justify the dismissal with the reasons advanced by the employee for challenging it.'

[39] He then had regard to the factors mentioned in the preceding paragraph and pointed out that the appellant was the second most senior employee at the Western Cape office and that the ongoing strife between him and Ms Kula (the most senior employee in the Western Cape) could not be tolerated. He considered that to dismiss a senior employee had serious implications. He however pointed out that the appellant was incapable of admitting that he did wrong.

[40] The appellant was given a written warning on 14 May 2010, valid for nine months for non-compliance with procedure. On 27 July 2010, he was issued with a written warning for failing to follow instructions and procedures. This warning was also valid for nine months. On 7 October 2010, he was given a final written warning valid for 12 months for not carrying out reasonable work instructions.

[41] Having regard to all the facts and circumstances of this matter, I am of the view that the decision of the Commissioner is one that a reasonable decision-maker could reach. The appeal must therefore fail.

[42] I accordingly make the following order:

The appeal is dismissed.

No order as to costs is made.

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C. J. Musi JA

Waglay JP and Savage AJA agreed with C J Musi JA

APPEARANCES:

FOR THE APPELLANT: Mr Garces

Instructed by Parker and Associates

CAPE TOWN

FOR THE RESPONDENT: Mr Tstsawane

Instructed by Gowman Gilfillan Inc.

CAPE TOWN