



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no: JA 119/14

In the matter between:

**BARLOWORLD LOGISTICS**

**Applicant**

and

**ADVOCATE LEDWABA N.O.**

**First Respondent**

**NATIONAL BARGAINING COUNCIL FOR**

**THE ROAD FREIGHT INDUSTRY**

**Second Respondent**

**PRAGASEN CLIVE NAIDOO**

**Third Respondent**

**Heard: 24 March 2016**

**Delivered: 11 May 2016**

**Summary: Review of arbitration award – employee dismissed for conducting a business without permission - commissioner finding that dismissal of employee too harsh a sanction and issuing final written warning – no evidence led that employee conducting business using employer’s time and resources – employee obtaining verbal permission from immediate superior – sanction imposed by commissioner commensurate for first time offender as contemplated by the employer code of conduct – commissioner’s award falling with the band of reasonableness – Appeal dismissed.**

**Coram: Tlaletsi DJP, C J Musi JA, and Murphy AJA**

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**JUDGMENT**

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C J MUSI JA

- [1] This appeal, which is with the leave of this Court, is against the judgment of the Labour Court (Van Niekerk, J) wherein it dismissed with costs a review application brought by the appellant.
- [2] The third respondent was employed by the appellant as an accountant from 1 September 2006 until his dismissal on 30 April 2009. He referred a dispute to the second respondent, National Bargaining Council for the Road Freight Industry (NBCRFI). Conciliation failed and he subsequently referred the dispute to arbitration. The first respondent, (the Commissioner) found that he transgressed a workplace rule but found that dismissal was not an appropriate sentence. He imposed a final written warning valid for six months. He ordered his retrospective reinstatement on the same terms as those that prevailed prior to his dismissal.
- [3] The appellant launched a review application against the award. The Labour Court dismissed the application with costs.
- [4] The proceedings before the Commissioner were mechanically recorded but unfortunately, the cassettes could not be found. The record was reconstructed and the appellant used the reconstruction in the review application.
- [5] The appellant employed the third respondent based on Ms Tracy Naidoo's recommendation after she recruited and interviewed him. She was his immediate line function manager. The salient terms of the employment contract were as follows:

'This appointment is subject to the terms and conditions noted herein and in the attached addendum document. Your signature on these documents will signify your acceptance of the terms and conditions of this appointment.

In the following pages the essential duties and responsibilities flowing out of this employment contract will be clarified. This contract cannot deal with every possible circumstance that may arise, but the essential requirement is that you act in the best interest of your employer at all times. This requires trustworthiness, good faith, honesty, respect, efficiency, competence and

good conduct in all your dealings with customers, fellow employees and suppliers.

#### EXTRANEIOUS EMPLOYMENT

It is your undertaking that during the duration of this employment contract, no external employment or work may be undertaken by yourself without prior consent of the employer, irrespective of whether such work is undertaken during outside normal working hours.'

- [6] On 26 March 2007, the third respondent and Tracy Naidoo registered a close corporation named Godiva Financial Services (Godiva). They also lived in the same house. Their relationship is unclear.
- [7] Mr Watzlawick who was employed in the appellant's human resources division testified that the third respondent did not obtain permission to run Godiva because the practice was that permission should be obtained from the company director. In light of the fact that the third respondent stated that he obtained verbal permission from Tracy Naidoo he testified that permission should have been accelerated to a level higher than hers because she was conflicted.
- [8] Ms Heidi Meintjies testified that she is the appellant's financial manager. She checked the calls made from the third respondent's landline and noticed that 84% of the calls made and received by the third respondent were private calls. Most of those calls were made between the third respondent and Tracy Naidoo. She could not say whether they discussed Godiva matters or other matters. She could also not dispute that the third respondent made official calls with his cellular phone because she did not check that data.
- [9] Mr Van Huysteen, the National Operations Manager of the appellant, shared an office with the third respondent. He overheard telephonic conversations between the third respondent and third parties on two occasions. On the first occasion in March 2009, he heard the third respondent talk to a Solly – which sounded like a bank manager to him – complaining about an account he had with the bank which was not yet activated. On the second occasion, he heard him complain about a quotation that he was supplied for work to be done.

- [10] Ms Tracy Naidoo, who was employed by the appellant between 2005 and 2008, confirmed that she verbally gave the third respondent permission to be a member of Godiva. She confirmed that she was also a member of Godiva when she was still in the appellant's employ and also that she did not seek permission to be such. She mentioned two other employees of the appellant who conducted other businesses without ramification.
- [11] The third respondent testified that he obtained verbal permission from Tracy Naidoo to be a member of Godiva. There is nothing in the contract of employment which states that the permission had to be in writing or given by the director or executive. Godiva was dormant and never did any business in competition with the appellant. He denied knowing about the disciplinary and grievance procedure of the appellant. He testified that there were other managers who had business interests outside of the appellant. He stated that he was targeted because he discovered irregularities that were not in the best interest of the appellant and its shareholdings and was about to expose it. He denied that the verbal permission given by Tracy Naidoo should have been checked by someone in a higher position.
- [12] The Commissioner correctly identified the issue that he had to decide was whether the dismissal of the third respondent was substantively fair because the procedural fairness was admitted. He correctly stated that due to the fact that the dismissal was admitted, the *onus* to prove the substantive fairness thereof rested on the appellant.
- [13] The Commissioner found that there is nothing in the employment contract or code of conduct that states that written permission to conduct extraneous business was needed and that it must be obtained from the director or executive. He however found that the third respondent, given his position, ought to have known that getting permission from a senior employee who is also a member of Godiva would not be in the best interest of the appellant. He found that such permission, especially if it is verbal, has the potential of defeating the very aim of preventing conflicts of interest. He rejected the third respondent's version that he did not know about the appellant's disciplinary and grievance booklet.

[14] The court *a quo* in a short but well-reasoned judgment found that the appellant did not attack the Commissioner's finding in relation to the nature of the misconduct but only challenged the remedy of reinstatement. The court *a quo* found that the Commissioner, in essence, undertook the required assessment and balanced the interest of employment, justice and the need for the efficient operation of the appellant's business and decided on a sanction short of dismissal. The court *a quo* was of the view that the Commissioner's decision is one that a reasonable decision-maker could make. I agree with the court *a quo*'s assessment.

[15] The facts of this matter are cast in the same mould as those of *Sidumo*.<sup>1</sup> In *Sidumo*, it was said that "a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances."<sup>2</sup> Navsa AJ set out some of the factors which a commissioner should consider. He said the following:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record...'<sup>3</sup>

[16] The Commissioner had regard to the appellant's Disciplinary and Grievance Procedure. Schedule 1 thereof classified conducting a business for own or others account using the company's time or resources as a very serious

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<sup>1</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC);; 2008 (2) SA 24 (CC).

<sup>2</sup> At para 79.

<sup>3</sup> At para 79.

offence. It however states that in the case of schedule 1 misconduct for a first offender, the minimum sanction may be a final written warning with the maximum sanction being summary dismissal. The Commissioner found, correctly, that dismissal is the most severe form of punishment and should be used as a last resort. Dismissal is indeed a very severe sanction which in most cases has horrendous consequences. It should not be resorted to as a first option but as a last resort especially when other forms of sanction have been identified as appropriate by the employer. The third respondent was a first offender. The Commissioner found, correctly so, that there was no evidence that the third respondent conducted Godiva's business using the time and resources of the respondent. The conversations that Van Huysteen overheard do not prove that the third respondent was busy conducting Godiva's business. The account might have been a personal account and the quotation could also have been for personal work that he wanted done.

- [17] The Commissioner found that the submission of the appellant that there was a conflict of interest is wrong. He cannot be faulted. It was undisputed that Godiva was dormant. The phone calls to Tracy Naidoo were not proved to have been to further the interests of Godiva. Godiva was described as a financial service provider whereas the appellant is a logistics company. The Commissioner properly found that there was no prejudice to the appellant.
- [18] There was also no dishonesty. The Commissioner found that the third respondent failed to get permission from a person in a higher position to that of Tracy Naidoo. He was therefore only found guilty of a failure to obtain permission from a person higher than Tracy Naidoo because of the conflicted position that Ms Naidoo was in. It must be remembered that he could conduct extraneous business with permission.
- [19] The Commissioner also considered that the appellant alleged that it could no longer trust the third respondent, and that the third respondent indicated that the trust relationship was broken down. In his heads of argument at the NBCFRI, the third respondent, who conducted his own defence, admitted that the trust relationship had broken down from the employer's perspective. Much was made of this during argument before us. This admission must be

contextualised. In the same heads of argument, he requested to be reinstated. He stated that Heidi Meintjies and Carsten Schubert who alleged that the trust relationship had broken down were replaced in the business unit. There was therefore, according to him, no reason to dismiss him based on the evidence of Ms Meintjies.

[20] The breakdown of the trust relationship is not solely dependent on what the employer says. Irrespective of the employers' testimony in this regard, the Commissioner is still enjoined to enquire whether that is indeed so. That enquiry is part of the enquiry to determine whether dismissal was a fair sanction. The appellant was of the view that the trust relationship had broken down because the third respondent was dishonest. That would generally be a fair proposition. In this case however there was no evidence that the third respondent was dishonest at all. A finding that the trust relationship has broken down because he sought permission from his senior who was also a member of a dormant close corporation would be unreasonable. Moreover, the third respondent did not conceal the fact that he registered a close corporation in order to conduct a business. His evidence was that he spoke openly with his co-employees about the business that he intended to venture into.

[21] In my view, the Commissioner considered all the relevant factors before coming to the conclusion that dismissal was not a fair sanction. His conclusion is a decision which a reasonable decision-maker could reach.

[22] There was no appearance on behalf of the third respondent.

[23] I therefore make the following order.

- a) The appeal is dismissed.
- b) No order as to costs is made.

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C. J. MUSI, JA

Tlaletsi DJP and Murphy AJA agreed with C J Musi JA.

APPEARANCES

FOR THE APPELLANT:

Adv. D. O. Pretorius

Instructed by Fluxmans Incorporated

FOR THE RESPONDENT:

No appearance