THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: JS830/14

In the matter between:

OLIVIA RADEBE **Applicant**

and

KANGRA COAL (PTY) LTD **First Respondent**

SHANDUKA GROUP (PTY) LTD **Second Respondent**

Decided: In chambers

Delivered: 9 May 2017

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

BALOYI, AJ

Introduction

[1] The applicant seeks leave to appeal against the judgment and order in which I dismissed her claim of unfair dismissal by the first and second respondent. The application for leave to appeal is opposed by the first respondent.

[2] I do not consider it necessary to traverse the facts in detail as these are fully set out in the judgment and the following summary suffices. The applicant was

employed by the first respondent, of which the second respondent is a shareholder. In the cause of her duties, the applicant was requested to provide information to the second respondent which information ordinarily fell within her area of work relating to environmental affairs. Similar requests for information were previously made to the applicant and she provided the requested information. In the present matter, whilst the applicant initially agreed to provide the information requested of her, and in this regard exchanged cordial emails with, *inter alia*, the first respondent's Nkosinathi Kunene and the second respondent's Tozama Kulati-Siwisa (including providing some of the information, offering suggestions about how to improve the requested information and undertaking to complete the task by a later date), and later with her newly appointed immediate superior, Fredah Moatshe, the tenor of the email exchanges soon changed with complaints that the applicant was failing to deliver the information as undertaken by her, and the applicant for her part, asserting to Moatshe that Moatshe, and not the applicant, made commitments to Kulati-Siwisa to provide information. In addition, the applicant demanded that issues that she raised about the communication line or protocol with the second respondent be resolved before she dealt with the issue of the outstanding information (the issue the applicant sought to be resolved pertained to her complaint that she was excluded from liasing directly with the second respondent which she did before the appointment of Moatshe). The dates of and the various email exchanges are set out in the judgment. This last conduct of the applicant resulted in the applicant's dismissal from employment following a disciplinary hearing on charges of "Disobedience – (i) deliberate refusal to obey a legitimate order; (ii) failure to submit a Shanduka report as requested, made a commitment and not commit to even after some emails requesting the documents; therefore putting the company into disrepute."

[3] The applicant seeks leave to appeal on the ground that I erred in - (i) finding that there is no evidence to support the allegation that the applicant's dismissal was automatically unfair; (ii) admitting hearsay evidence; and (iii) I failed to consider the procedural fairness of the applicant's dismissal.

[4] Leave to appeal is granted only if this Court is satisfied that another court might reasonably reach a conclusion different from that appealed against.[1] It follows that for the Applicant to succeed, I must be satisfied that another court may reasonably come to a different conclusion from mine.

[5] I now turn to consider the various grounds of appeal.

(i) Automatically Unfair Dismissal

[6] The Applicant contends that I erred in finding that her reliance on section 5(2)(c)(vi) of the Labour Relations Act[2] (LRA) had no merit and that I should have found that the Applicant was disciplined and dismissed because she intended to refer a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). In particular, the applicant asserts that in the absence of the evidence of Moatshe and Kulati-Siwisa, both of whom did not testify, I should have accepted her evidence that she was dismissed because she exercised her right to refer a dispute to the CCMA and I should have accordingly found that her dismissal is unfair as contemplated in section 187(1)(c) of the LRA.

[7] I found that there is no evidence that the applicant was subjected to the disciplinary hearing and subsequently dismissed as a result of her referring a dispute to the CCMA. Quite significantly, I make mention that the applicant, on her own account before me, did not refer the intended dispute to the CCMA because of her decision to seek an amicable resolution of whatever concerns she has. The applicant did not point to any facts, and I could find none, that point to or otherwise manifest that the disciplinary action against her was the result of her having informed Moatshe of an intention to refer a dispute to the CCMA, an intention which did not manifest. In the event, the applicant could not succeed on this ground and I found accordingly. I am not persuaded or

[1] *Van Der Merwe v Du Plessis* [1999] 5 BLLR 531 (LC)
[2] LRA

otherwise satisfied that another court may reasonably arrive at a different conclusion in this regard. It follows that this ground must fail.

[8] In so far as this ground of appeal relies on the contention that I should have rejected evidence pertaining to Moatshe and Kulati-Siwisa, I deal with the issue in the next paragraph.

(ii) Admission of hearsay evidence

[9] This ground for leave to appeal permeates both the complaint about my finding that the applicant has not made out a case for an automatic unfair dismissal and for a substantively unfair dismissal. Accordingly, what I say is equally applicable to both.

[9] As I understand it, the applicant's case is that in the absence of the testimony of Moatshe and Kulati-Siwisa before me, I should have found that evidence of the email exchanges between Moatshe, Kulati-Siwisa and the applicant is hearsay evidence. This is, so it is contended by the applicant, because neither Moatshe nor Kulati-Siwisa testified before me and the applicant did not have the opportunity to cross examine them. For this reason, I should not have admitted this evidence, so it is contended.

[10] Whilst it is so that Moatshe and Kulati-Siwisa did not testify before me, the contention of the applicant that I should have disregarded the evidence regarding them and their involvement in the facts that culminated in the dismissal of the applicant is without merit.

[11] The email exchanges that were relied upon by the first respondent span the period October 2013 to March 2014 (copies thereof were part of the evidence). The applicant did not deny, in fact admitted that the documents provided were copies of the emails exchanged with her. She did not deny the contents of the emails but in fact spoke to their contents and sought only to dispute – (i) that she did not provide the information; and (ii) that she was under an obligation to provide the information to the second respondent.

[12] Notwithstanding her contention before me that she provided the required information in November 2012, it is apparent on the face of the email copies that as at December 2013, the applicant had not provided all the information. This is apparent from her email of 17 December 2013 in which she undertakes to complete the task by the next Friday of that date.

[13] Two witnesses of the first respondent with intimate knowledge of the issues raised in the emails testified to the emails and their knowledge of the issues raised in the emails was not challenged. Technical Manager Harry Jennings who was initially the applicant's superior, and later Moatshe's superior (to whom the applicant reported), testified to his knowledge of the issues raised in the email which resulted in the dismissal of the applicant, and to the applicant's unhappiness with the fact that she was now required to report to Moatshe and not to Jennings directly. Jennings also testified in the internal disciplinary hearing. It was never contended by the applicant that Jennings has no knowledge of the issues raised in the email exchanges pertaining to the applicant's failure to provide the information when requested. The other witness was the first respondent's Stakeholder Relations Manager, Nkosinathi Kunene, who is included in at least some of the email exchanges. He testified to the content of the emails, in particular, that the information that the applicant was required to provide fell within her domain and that she was responsible to provide the information, and that she had previously been required and in fact provided similar information. Both witnesses were cross-examined about the content of the emails and about the first respondent's contention that the applicant was obliged to provide the information that was required from her.

[14] Jennings and Kunene also testified that the applicant was required and obliged, by virtue of her position with the first respondent, and by virtue of a contractual relationship between the first and second respondents, to provide the required information to the second respondent. I have given my reasons why I did not accept the applicant's contention that she had no contractual obligation to provide the requested information to the first respondent and in

fact accepted the evidence of Kunene that the first respondent, and therefore the applicant, was obliged to provide the information to the second respondent. That no written contract to evidence this obligation of the first respondent to the second respondent is a red herring and this was not a pertinent issue to determine whether such an obligation existed. In any event, on the evidence that was before me, it is clear that the applicant has previously not contested the first respondent's obligation to provide information to the second respondent, and the request to her to provide the information. She initially helpfully participated in the task of providing the requested information, including in this instance until she changed her mind about this.

[15] The contents of the emails exchanged between the applicant, Moatshe and Kulati-Siwisa are self-evident. It was not necessary that Moatshe and Kulati-Siwisa testify that the emails were exchanged, more particularly that the exchanges contained therein occurred. It was not necessary that either testify that the applicant did not provide the information as it is evident from the email exchange between the applicant and Kulati-Siwisa that as at December 2013, the applicant had not provided certain outstanding information, notwithstanding previous undertakings. It is also evident from email exchange between the applicant and Moatshe that as at 4 March 2014, the applicant had not provided all the requested information. Her obligation to provide the information appears not only from the said emails, but is also explained in the evidence of Jennings and Kunene in particular. I found the witnesses credible and accepted their evidence in this regard. I am satisfied that there is no basis in law why I should not have accepted this evidence of the two witnesses..

[16] The applicant contends that she was denied the opportunity to cross-examine Tozama Kulati-Siwisa and Moatshe. By her own admission, the two persons referred to were not called as witnesses by the employer. It follows that they were not liable to cross-examination by the applicant. However, and more importantly, the applicant did not call these persons as witnesses, under subpoena if necessary, to testify in furtherance of her claim and she

offered no explanation why she did not do so. The applicant had the right, and responsibility, to subpoena the two witnesses if she considered them necessary for the determination of her claim.[3] The failure to bring them before court in the circumstances cannot be placed at the door of the respondents at all. I find that there is no merit to this complaint or ground for leave to appeal. It follows that I am not persuaded that another court will find that I erred in accepting this evidence of the first respondent.

(iii) Failure to consider the procedural fairness of the dismissal.

[17] With this complaint, the applicant's contention is that in invoking section 158(2) of the LRA, and considering the merits of the applicant's dismissal, I was required to considered both the substantive and procedural fairness of the dismissal and that I failed to consider the latter. I do not agree.

[18] Notwithstanding that the applicant belatedly raised the complaint of procedural unfairness in her evidence, and notwithstanding that I agree with the first respondent that the applicant was precluded from raising procedural unfairness at this stage, I nonetheless considered the complaint of unprocedural unfairness as alleged by the applicant. The applicant contends that her dismissal is rendered procedurally unfair by the fact that Moatshe, and not the CEO, dismissed the applicant. Accordingly, the applicant was dismissed by a person who has no authority to dismiss her, so it is contended by the applicant. This contention is founded on the evidence that the applicant's letter of dismissal was signed by Moatshe whereas the first respondent's Code of Discipline prescribes that the authority to dismiss an employee rests with the CEO of the first respondent. On its face, the letter of dismissal records that Moatshe signed the letter of dismissal on behalf of the General Manager, indicated with "*pp*" which ordinarily denotes that the signatory does so on behalf of another. It follows that I could not find that Moatshe dismissed the applicant. I found that there is no evidence that

[3] Rule 32 of the Rules for the Conduct of Proceedings in the Labour Court.

Moatshe was not authorized to sign on behalf of the General Manager concerned as she did. It was also not contended by the applicant that the General Manager on whose behalf Moatshe signed did not have the authority to dismiss the applicant. In the result, this ground of complaint must fail.

[19) In the event, I find that the applicant has not shown that a court of appeal may reasonably come to a different decision. Accordingly, I make the following order:

(i) The application for leave to appeal is dismissed.

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MS Baloyi

Acting Judge of the Labour Court