

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 843/17

In the matter between:

PRABASHNIE NAICKER

Applicant

And

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

NOMUSA MBHELE *N. O*

Second Respondent

AFRICA FLIGHT SERVICES

Third Respondent

Heard: 11 October 2018 & 28 November 2018

Delivered: 21 May 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] Following her dismissal by the Third Respondent (Africa Flight Services) on account of misconduct related to insubordination, the Applicant (Ms Naicker) referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). At the conclusion of the arbitration proceedings, the Second Respondent (the Commissioner) found that Naicker's dismissal was procedurally and substantively fair.
- [2] Naicker approached this Court to seek an order reviewing and setting aside the arbitration award dated 12 April 2017. She further seeks an order that the dispute be remitted to the CCMA for a hearing *de novo* before another commissioner, and/or in the alternative, that the Court substitute the Commissioner's award with an order that her dismissal was unfair.
- [3] Africa Flight Services opposed the application, contending that upon the proper assessment of the record of arbitration proceedings, the finding by the Commissioner that Naicker was indeed insubordinate was reasonable in view of her own evidence that she was indeed issued with a lawful instruction which she had failed to comply with on numerous occasions. It was further contended that at the arbitration proceedings, Naicker had specifically mentioned that she had no confidence in the abilities and competencies of her superior, and that to that end, the Commissioner's arbitration award was not susceptible to review.
- [4] The matter initially came before the Court on 11 October 2018. The Court had expressed its concerns about the nature and structure of Naicker's pleadings, which Africa Flight Service in its answering affidavit had described as long winded and tedious. She had drafted her pleadings and appeared in person on 11 October 2018. By agreement, the matter was removed from the roll. Naicker was granted leave to approach the Saslaw *Pro Bono* Office and to file supplementary papers. Africa Flight Services also granted leave to file supplementary answering affidavits.
- [5] The Court is indebted to Adv Mairéad Edwards who appeared on behalf of Naicker in these proceedings, Adv Sarajulie Swartz for drafting the heads of

argument on behalf of Naicker, and the SASLAW Pro Bono Office. The Court also appreciates the patience and indulgence of Mr Biggs from Snyman Attorneys representing Africa Flight Services.

Background:

- [6] Africa Flight Services is in the business of providing aviation (cargo handling) services at key airport locations across South Africa. Naicker commenced her employment on 11 March 2013 as a Customer Service Agent. She reported directly to Ms Mellissa Fritz (Fritz), the Quality Assurance and Customer Service Manager.
- [7] Naicker was dismissed on 24 November 2016 on allegations of insubordination, in that she failed to obey an instruction issued to her by Fritz. Following her dismissal, she referred a dispute to the CCMA, and when attempts at conciliation failed, the matter came before the Commissioner for arbitration. She challenged both the substantive and procedural fairness of her dismissal.

The arbitration proceedings:

- [8] Evidence on behalf of Africa Flight Services was led by its Human Resources Officer, Ms Yolandi Silva and Fritz. Naicker led her own evidence.
- [9] The evidence of Fritz was that;
- 9.1 Part of Naicker's duties was to calculate payments when requested by agents. As a result of Naicker having provided clients with incorrect charges, Fritz sent an email on 3 November 2016 at 12:50 to Naicker, informing her that she should refrain from issuing incorrect charges in instances where she did not possess sufficient information to formulate the correct pricing¹. Notwithstanding these specific instructions;

¹ The email read:

'As per our discussions earlier, NO incorrect charges will be given knowing that you do not have all the information i.e. EDI charges. Just to reiterate that as you are aware, you are not allowed to give charges telephonically without following up with an email for traceability. Going forward please cc. me in all charges. If you need more training please let me know'

- 9.1.1 On the same day at about 13h51 and after the email from Fritz, Naicker forwarded pricing information to an entity called Procet Freight, and failed to copy Fritz on the same email.
- 9.1.2 At 13h58 on the same day, Naicker forwarded another pricing information to another entity, Reliable Freight and again did not copy Fritz on that email.
- 9.1.3 At 15h12, Naicker further forwarded pricing information to SekogIn without coping Fritz on the email.
- 9.1.4 At 15:14, Naicker forwarded a further email to Barloworld Logistics with pricing information without copying Fritz.
- 9.2 According to Fritz, there were further emails that were sent on 4 November 2016 by Naicker without copying her.
- 9.3 A meeting was held on 7 November 2016 with the customer services team where objectives were set for the team. At that meeting Naicker was again instructed by Fritz to copy her in all her emails to customers.
- 9.4 Subsequent to the instruction, Naicker copied Fritz in some of the emails communication but failed to do so in others. Naicker had not at any stage given any indication that she was unable to follow the instruction and she had in fact agreed in writing that she would comply with the instructions.
- 9.5 On subsequent dates of 8, 14 -16 November 2016, Naicker again failed to copy Fritz on her emails to customers.
- 9.6 In a notice dated 16 November 2016, Naicker was notified of the charges against her. In the internal disciplinary hearing held on 21 November 2016, Naicker pleaded guilty to the charge of insubordination.
- 9.7 On the issue of sanction, the chairperson of the hearing had according to Fritz, found that;

- 9.7.1 The instruction disobeyed by Naicker was important on account that an inaccurate pricing charge may negatively affect the relationship between Africa Flight Services and its clientele.
- 9.7.2 Naicker had a final written warning on her record valid until 31 August 2017 having been found guilty of insubordination on a previous occasion.
- 9.7.3 Naicker has proven that she was unable to obey reasonable instructions and thus the continued employment relations were intolerable.
- 9.7.4 Having considered Naicker's personal circumstances and disciplinary record for similar offences, the misconduct was so serious that it rendered the employment relationship intolerable and a dismissal was the appropriate sanction.
- 9.8 Under cross examination by Naicker, Fritz testified that she had further held a meeting with Naicker and another employee, wherein Naicker had undertaken to copy Fritz in subsequent pricing email communication with the clients.
- 9.9 She denied that Naicker's workload could have been a factor that could have prevented her from complying with the instruction, and that to the extent that she may have complained of being overloaded, this was resolved by taking away some of her work to lighten her duties.
- 9.10 Under cross-examination, Naicker put to Fritz that she lacked the prerequisite experience in logistics and customer services, and thus making her incapable of giving the instructions. Fritz maintained that the instruction was unambiguous and capable of being obeyed, and that the same instruction had not been given to other employees on basis that Naicker was the only employee who had communicated inaccurate pricing information to clients.

9.11 Fritz further testified that her relationship with Naicker was professional and denied that there was any animosity between the two of them.

[10] Ms Yolanda da Silva's evidence was that;

10.1. In terms of the company's disciplinary code and procedures, a first infringement in respect of a charge of insubordination would generally attract a sanction of a final written warning, and any further infringements would be met with a dismissal.

10.2. Naicker was previously found guilty on a charge of insubordination, which offence the employer viewed in serious light, but had failed to correct her conduct.

10.3. Da Silva denied the allegations by Naicker that Africa Flight Services had influenced the Chairperson of the disciplinary hearing to dismiss her, and contended that any interaction with the Chairperson of the disciplinary enquiry was limited to offering him refreshments.

[11] Naicker in disputing the substantive and procedural fairness of her dismissal testified that;

11.1. When Fritz arrived at the company on 1 April 2016, she gave her a 'hard time' owing to a personal disagreement between the two.

11.2. She conceded that on 3 November 2016, Fritz sent her an email instructing that she be included in future communication with clients in respect of pricing.

11.3. Her failure to include Fritz in the email communications did not constitute insubordination, as she lacked the element of intention and further since her conduct was a mere honest mistake.

11.4. The failure to copy emails to Fritz was on account of her busy schedule and further on basis that the instruction constituted a new procedure which she was not used to.

11.5. Her conduct was *bona fide*, and could have been corrected without the necessity of disciplinary processes, especially since the gravity of the allegations against her was minimal. She contended that her conduct did not result in a financial loss for Africa Flight Services.

[12] At the conclusion of the arbitration proceedings, the Commissioner found that the dismissal of Naicker was substantively and procedurally fair, on the grounds that:

12.1. It was common cause between the parties that Naicker was given an instruction which she failed to comply with.

12.2. It was improbable that she had mistakenly omitted to copy Fritz on the communication to clients as she was able to copy her emails to another colleague.

12.3. Naicker's testimony that her gruelling work-schedule hindered her ability to comply with the instruction ought to be rejected, as to copy emails to Fritz would have taken at least two seconds to do.

12.4. The documentary evidence adduced by Africa Flight Services revealed that Naicker repeatedly ignored the instruction and was thus guilty of undermining her superiors.

12.5. Africa Flight Services had applied progressive discipline against Naicker, and it was clear that she was incorrigible.

12.6. Naicker had failed to challenge the final written warning issued to her for a similar misconduct, which warning remained valid.

12.7. In regard to the allegations of procedural unfairness, and the specific allegation that there were attempts to influence the chairperson of the disciplinary hearing, the Commissioner found that Naicker failed to rebut Africa Flight Service's version that the interaction with the chairperson was limited to the serving of refreshments.

Grounds of review and submissions:

[13] In the heads of argument in support of the grounds of review, it was submitted that the award was reviewable since;

13.1 The Commissioner failed to apply her mind to the fact that the charge of not following the instruction to copy to her manager the emails could not on the facts and the law be interpreted as insubordination, in the light of established authority which requires the presence of wilful and serious challenge to, or defiance of the authority of the employer.

13.2 Had the Commissioner applied her mind to the material before her, she would have reached a conclusion that the misconduct of insubordination could not be sustained absent *mens rea* on her part. That failure to properly assess the evidence constituted a reviewable irregularity as contemplated by the provisions of section 145(2) of the Labour Relations Act (LRA).²

13.3 There is a distinction between the act of insubordination and insolence which the Commissioner failed to appreciate. The Commissioner further failed to apply the relevant legal principles, resulting in her misconstruing the whole nature of the enquiry.

13.4 Insubordination is more severe than insolence and further that where insubordination is proved, there may be a presumption that the disobedience was intended to breach the employee's duty of good faith towards the employer.

13.5 Naicker had persistently stated that her failure to copy Fritz on her emails was an honest mistake. The conduct in question was more an issue of performance rather than insubordination, and the outcome reached by the Commissioner was unreasonable having been polluted by her failure to properly consider the evidence and/or having misconstrued the evidence placed before her.

[14] In opposing the review application, it was submitted on behalf of Africa Flight Services that

² Act 66 of 1996 (as amended)

- 14.1 On the authority of *NUPSAW on behalf of Mani and others v National Lotteries Board*³, a simple disregard of an employer's authority or of an employer's lawful, and reasonable instruction would constitute insubordination.
- 14.2 On the totality of the evidence before the Commissioner, it was apparent that Naicker had within an hour of the instruction being issued, failed to obey it, and that in 20 hours, she had disregarded the instruction on no less than five times.
- 14.3 Naicker's view was that Fritz did not have the necessary knowledge and experience to issue her with instructions, and that she could not be expected to comply with instructions when she was under pressure.
- 14.4 It was highly improbable that Naicker could have forgotten to obey the instruction as she alleged, and the probabilities were that once she was under pressure, she made an informed decision not to comply with the instruction, as she did not view it as valid.
- 14.5 The Commissioner's decision fell within a band of reasonableness as she had found that Naicker was not overburdened with work; that copying Fritz on an email was an easy instruction to follow, and that it was taken into account that Naicker was already on a final written warning for the same conduct.

The legal framework:

- [15] The test on review is trite as restated in *Duncanmec (Pty) Limited v Gaylard NO and Others*⁴. It is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. Furthermore, in determining whether the impugned award was vitiated by unreasonableness, the Court is required to examine the award for the reasons motivating the decision reached. If the reasons advanced

³ [2014] ZACC 10; 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) at para [57], where it was held that;

'Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions...'

⁴ [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC)

rationally support the outcome arrived at, interference with the award on the basis of unreasonableness would not be justified. This would be the position even if the Court does not agree with the reasons furnished⁵.

[16] Naicker's case is that the Commissioner committed an irregularity in the proceedings by failing to take into consideration that her conduct did not constitute insubordination, as she lacked the prerequisite intention to consciously disobey the instruction from Fritz. To that end, the principal submissions are that the Commissioner failed to take into account, or ignored or failed to properly assess the material before her, and thus arrived at an outcome that does not fall within a band of reasonableness.

[17] To the extent that this was her case, in *Herholdt v Nedbank Ltd and Another*⁶ the Supreme Court of Appeal held:

"In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable."

[18] It is therefore apparent from the above *dictum* that it is not sufficient for an applicant to simply allege an irregularity in terms of the provisions of section 145(2)(a) of the LRA. Thus, the irregularity complained of must be so gross that it results in an unreasonable outcome as postulated in *Duncanmed* and *Sidumo*.⁷

⁵at paras 43 and 50

⁶ [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA)

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC)

- [19] Naicker was charged and dismissed for insubordination. Thus, if this Court is persuaded that the reasons advanced by the Commissioner rationally support the decision arrived at, there would be no basis for interfering with the award.
- [20] The Labour Appeal Court in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*⁸ has held that a refusal to carry out an instruction is not the only basis upon which to found a charge of insubordination. The offence of insubordination in the workplace entails a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even where there is no indication of the giving of an instruction or defiance of an instruction.⁹
- [21] Kathree-Setiloane AJA in *Palluci* proceeded to demonstrate the fine line between insolence and insubordination, and held that acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. Furthermore, a failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful and serious. It was further accepted in *Palluci* that the sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal¹⁰
- [22] In similar vein, Dambuza AJ in a dissenting judgment *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board*¹¹

⁸ [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC) ; (2015) 36 ILJ 1511 (LAC)

⁹ At para 19

¹⁰ At para 22

¹¹ At para 213

held that as a basic principle, insubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her, and that insubordination is misconduct because it assumes a calculated breach, by the employee, of the duty to obey the employer's lawful authority.

Evaluation:

- [23] It is common cause that Naicker pleaded guilty to the charge of insubordination at the internal disciplinary enquiry. Naicker only denied the allegations when the dispute came before the Commissioner at the arbitration proceedings. Her principal contention was essentially that she lacked the necessary intention for a charge of insubordination to be sustainable, and further that her failure to copy the emails to Fritz was a genuine lapse not deserving of a disciplinary enquiry.
- [24] There are several difficulties with Naicker's case, from which it can be deduced that there is no basis for an interference with the Commissioner's award. My conclusions in this regard are based on the following;
- 24.1. After the instruction was issued, Naicker failed to comply with it on no less than 8 occasions between 3 and 15 November 2016. It is accepted that mistakes do happen. In this case however, it cannot be an honest mistake when the failure to comply with the instruction was persistent and over prolonged periods.
- 24.2. The failures to comply further followed upon Naicker being again instructed on 7 November 2016 in a meeting, and after she had signed minutes and confirming that she would comply with the instruction.
- 24.3. The Court is obliged to take judicial notice that copying an email to another person, especially if the latter's email address is easily accessible and on one's email contacts, does not take less than a minute to do so, even if one is overworked and under pressure.

- 24.4. It is therefore improbable as the Commissioner had correctly established, that Naicker could have forgotten to copy the emails, or that she was under pressures of work or that a simple request like the one in question could have been a new procedural or operational requirement. Even if her computer had crashed as she had alleged, I did not understand her version to be that the computer was not repaired for her to perform her tasks, and comply with the simple request.
- 24.5. The instruction was clearly lawful and reasonable, as on Fritz' version, Naicker was prone to providing inaccurate pricing to customers, which had the potential to cause reputational and/or financial damage to Africa Flight Services. I did not understand from Naicker's version that the instruction to copy Fritz emails to those customers under those circumstances and concerns was an unreasonable or unlawful instruction. On the contrary, it was common cause that on certain occasions, she had copied her other colleagues emails sent to customers, and had also on the odd occasion, copied Fritz. Given the context and reasons advanced why Naicker should as a matter of course copy her Fritz her emails to customers, nothing clearly prevented her from doing so.
- 24.6. It is apparent from the evidence that Naicker had her own problems with the authority of Fritz. In the heads of argument, reference is made by Africa Flight Services to the transcribed record of Naicker's evidence, where she questions Fritz's knowledge and experience to issue her with instructions¹². She had openly questioned her abilities and competencies, stating that she had no clue and could not instruct her¹³; and contended that copying emails to Fritz was not a priority when she was under pressure.
- 24.7. Based on the above, an inference can easily be drawn that Naicker not only disrespected the authority of Fritz, but also challenged it, and

¹² Page 34, 44 of the Transcribed record;

¹³ Pages 44 and 45 of the Transcribed Record

in my view and based on the authorities referred to, there was a basis for a finding to be made that indeed Naicker was guilty of gross insubordination.

- [25] In summary, it is apparent from the overall material before the Commissioner that the failure to obey Fritz's instructions for emails to customers to be copied to her was not attributable to mere lapses, or a mistake, or being overworked or was unintentional as Naicker had alleged. In the light of a final written warning for the same offence; a clear, simple, lawful and reasonable instruction to copy the emails, which was followed by meetings and an undertaking that the instruction would be followed, I have difficulties in appreciating how it can be said that the reasons advanced by the Commissioner do not rationally support the outcome she arrived at, or that the award does not fall within a band of reasonableness.
- [26] It was further argued that Naicker had shown contrition and had pleaded guilty at the internal disciplinary enquiry, and that the sanction of dismissal was harsh under the circumstances. Item 3(2) of Schedule 8, Codes of Good Practice places emphasis on the need for corrective or progressive discipline. That concept however is not elastic, and there are limits to which it can be stretched.
- [27] It is something else to show contrition at the disciplinary enquiry, and yet approach the arbitration proceedings with a different attitude that negates the contrition allegedly shown, including a blatant demonstration of disregard and disrespect of one's manager's authority, let alone question one's manager's competencies and authority to issue instructions. The contradiction is glaring.
- [28] It was further submitted that the Commissioner misconstrued the evidence in that the previous final written warning was in relation to a "training" matter and did not constitute a similar offense in determining the appropriateness of the sanction of dismissal.
- [29] That final written warning was issued on 31 August 2016 in circumstances where Naicker had failed to follow an instruction to assist a trainee. The fact of

the matter is that she was found guilty of insubordination, and the context and the facts that led to that warning being issued are irrelevant, as it remained valid.

- [30] Naicker's conduct of consistently disobeying a simple, lawful and reasonable instruction was on the whole, wilful and serious. Given her attitude towards Fritz as can be gleaned from her evidence, her refusal clearly posed a deliberate (wilful) and serious challenge to the her (Fritz's) authority as her manager. The contention that the Commissioner failed to appreciate the distinction between insolence and insubordination is clearly without merit, especially in circumstances where it was found that all the excuses that Naicker had proffered were lame. This was not just a case of poor performance or an employee being forgetful or being under pressure. The refusal to obey the instruction in question was indeed serious and wilful to justify a dismissal.
- [31] The Commissioner had further concluded that any employment relationship with Naicker was unsustainable. In line with the principle that respect and obedience are implied duties of an employee under contract law, and any repudiation thereof would constitute a fundamental and calculated breach, I fail to appreciate how given the facts of this case, it can possibly be expected of Naicker and Fritz to have had any normalised working relationship.
- [32] In regards to procedural fairness, any allegations of bias on the part of the chairperson of the enquiry were not pursued and there is no basis for a finding that the dismissal was procedurally unfair.
- [33] In the end, I am satisfied that on the whole, there is no basis for any conclusion to be reached that the Commissioner misconstrued the issues that she was called upon to determine or the nature of the enquiry. The Commissioner considered the principal issues before her; afforded the parties a fair opportunity to state their respective cases; took regard of all pertinent material which she had properly assessed; and gave reasons that rationally supported her decision that the dismissal was procedurally and substantively fair. Ultimately, there is no basis to interfere with the award.

[34] I have had regard to the issue of costs. In the light of the circumstances under which Naicker was represented in these proceedings, there is clearly no basis for any costs order.

[35] Accordingly, the following order is made;

Order:

1. The Applicant's application to review and set aside the arbitration award issued by the Second Respondent under case number GAEK 11771-16 dated 12 April 2017 is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M Edwards (Pro bono), instructed by:
SASLaw *pro bono* Law Clinic

For the Third Respondent: Johan Biggs of Snyman Attorneys