THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2614/19

In the matter between:

BIDVEST STEINER **Applicant**

and

COMMISSIONER PIETER WILLEM LOURENS N.O **First Respondent**

THE CCMA **Second Respondent**

ADELE SNYMAN **Third Respondent**

Heard: **10 May 2023**

Delivered: **23 May 2023**

Summary: Review – Commissioner is not entitled to interfere with the sanction of an employer if the sanction is one that is fair. Labelling of a charge is irrelevant for the purposes of determining the fairness of a dismissal. A dismissal is fair if it is for a fair reason – related to conduct. A reasonable decision-maker will not substitute the sanction of the employer in the circumstances where the employee is guilty of misconduct. A reasonable decision-maker will not find procedural unfairness simply on the basis of the manner in which the charge had been crafted by an employer. Held: (1) The

award is reviewed and set aside and it is replaced with an order that the dismissal is fair. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This application agitates the important question of whether dismissal as a sanction may be interfered with simply because an employer had given a misconduct a particular label and the commissioner gives it another. In this application, the applicant, Bidvest Steiner (Steiner) is seeking to review and set aside an arbitration award issued under the hand of the learned Commissioner Pieter Willem Lourens (Lourens), in terms of which, Lourens found that the dismissal of the third respondent, Ms. Adele Snyman (Snyman) was unfair both substantively and procedurally. Having found the dismissal to be unfair, Lourens ordered Steiner to pay Snyman compensation. The present application is duly opposed by Snyman.

Background facts

[2] Although Lourens rendered a 55-paged arbitration award, a relatively long arbitration award by any standards, the factual matrix appertaining this dispute are less complicated and to a large degree common cause. Accordingly, in this judgment, a full rendition of the facts is not necessary. Steiner is a service providing entity. It provides cleaning and maintenance services to various clients. Snyman was employed as its General Manager, a senior position, in one of its branches. During 2018, it was observed that the branch under the beacon of Snyman began to underperform.

[3] Resultantly, on 16 November 2018, Snyman was placed on a precautionary suspension pending disciplinary steps. On 29 November 2018, Snyman was issued with a notification to attend a disciplinary enquiry in order to respond to six allegations of misconduct. The charges were crafted by the Regional Executive, Mr. Mynhardt (Mynhardt). For the purposes of this judgment only one of the allegations, for reasons that will become apparent in due course, shall be extrapolated. Mynhardt crafted it in the following terms:

> "2 **Gross Negligence**
>
> (i) You failed to exercise the degree of care as expected of you, in that you failed to ensure that there is control over *Ad-hoc* tickets.
>
> (ii) Your failure to exercise due care has resulted in the loss of revenue as some of the affected clients have been lost and the company is unable to get reimbursed.
>
> (iii) You failed to ensure [that] all tickets are accounted for, in that you open[ed] new tickets without first closing the old tickets as a result some tickets were not completed/closed."

[4] Following a disciplinary enquiry, Snyman was found guilty of all the charges she faced. After considering aggravating and extenuating circumstances, the chairperson of the disciplinary enquiry recommended the dismissal of Snyman. As recommended on 18 December 2018, Snyman was dismissed. Disenchanted by her dismissal, she referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal. As outlined above, the dispute was resolved in her favour much to the chagrin of Steiner. The displeased Steiner launched the present motion.

Grounds for review

[5] Principally, Steiner impugned the arbitration award on five grounds. It suffices to mention that the first and second grounds are more of a process-related attack. They attack the manner in which Lourens sought to interpret the charges that Snyman faced internally. The third ground relates to the labelling of gross negligence as opposed to negligence. This after Lourens concluded

that based on the evidence tendered, Snyman was guilty of negligence. This is the ground this Court shall give more attention to in due course. The fourth ground related to the inconsistency issue. This after Lourens concluded that two other employees namely; Pienaar and Walker were not disciplined and Snyman was, as such, she was treated inconsistently. The fifth and last ground is also process-related. It seeks to attack the manner in which Lourens dealt with the insubordination charge. Above all, Steiner contended that the arbitration award is not one a reasonable decision-maker may reach.

Evaluation

[6] A dismissal in terms of section 186 (1) (a) of the Labour Relations Act[1] (LRA) happens when an employer terminates the employment contract. In the present dispute it became common cause that Snyman was dismissed. In terms of section 185 of the LRA every employee, Snyman having been one, has the right not to be unfairly dismissed. In terms of section 188 (1) (a) (i), a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is for a fair reason related to the employee's conduct. Section 192 (2) places an obligation on the employer, in this instance, Steiner to prove that the dismissal it effected is fair.

[7] In any dismissal, what an employer is obligated to prove is a fair reason for the dismissal it effected. A reason is fair if it is related to the conduct of an employee. Therefore, in an instance where an employee faces a barrage of allegations of misconduct, all an employer is required to do is to prove one of the many allegations that may have been raised which questions the conduct of an employee. As it is often the case, an employer using its officials would craft allegations of misconduct against employees. As expected in many instances the crafting is done inelegantly. Some conduct related allegations are given labels that do not fit their ordinary meanings.

[1] No. 66 of 1995, as amended.

[8] As it was done in this present instance, Steiner chose to label the failures on the part of Snyman as "gross negligence". That notwithstanding, Lourens labelled the failures as "negligence". Of significance is that Steiner succeeded in proving the failures and those failures are related to the conduct of Snyman. Thus regard being had to the provisions of section 188 (1) (a) (i) a fair reason (failures to do certain things) is related to the conduct of Snyman. Such must mean that the dismissal is fair on the one leg of substance. The fact that Steiner through Mynhardt labelled the failures as gross negligence is of no moment. This point was reaffirmed by the Labour Appeal Court (LAC) in its judgment of *Cape Gate (Pty) Ltd v Mokgara and others*[2]. In a more emphatic terms, the erudite Tokota AJA, writing for the majority had the following to say:

> "[21] …It is sufficient if the employee is informed of the allegations against him to prepare for the hearing. What is necessary is that sufficient particulars of the charges preferred against an employee, which must be covered in the rules of conduct of the company concerned must be alleged.
>
> [22] …It is not about proving all the elements of an offence. All what is required is to prove the essential allegations which form the bases of the misconduct concerned."

[9] When the word "gross" is annexed to any form of misconduct all it implies is that the misconduct is serious. Grammatically, the word gross especially in wrongdoing means something that is obviously unacceptable. In my view the definition of gross negligence provided by the erudite Scott JA in the matter of *Transnet Ltd t/a Portnet v MV Stella Tingas*[3] is not one that would generally apply in an employment context. It is one that would apply in the delictual context.

[2] (2022) 43 ILJ 1277 (LAC).
[3] [2003] 1 All SA 286 (SCA) at 290-1

[10] That notwithstanding, one of the key findings that Lourens made which relates to the essential allegations levelled against Snyman was when Lourens concluded thus:

> "246 I therefore find that the applicant is indeed guilty of failing to exercise a degree of care as expected of her, in that she failed to ensure that there was control over *ad hoc* tickets in her branch."

[11] Naturally, this finding should have propelled Lourens to the next question, which is, is there a fair reason to dismiss Snyman when she failed to exercise degree of care and failed to ensure control. This question is different from the question whether dismissal as a sanction is appropriate or not. A reasonable decision-maker would have asked and answered that question and say yes the failure to exercise a degree of care and ensure control is related to conduct. Once that question is resolved as required by the Code of Good Practice (Schedule 8), the one that follows is that of whether having dismissed Snyman for amongst others failure to exercise care, was such dismissal an appropriate sanction. Instead of doing that, Lourens engaged in a tangential path and asked an irrelevant question which commands itself to the labelling afforded by Mynhardt. To my mind a reasonable decision-maker tasked with a duty to determine fairness of a dismissal would not have engaged in such a tangential path, in the circumstances where section 188 clearly provides that where a fair reason related to conduct exist, there is ostensibly fairness.

[12] Surprisingly, without any justification nor empirical bases Lourens concluded thus:

> "285 …I further find that dismissal was not the appropriate sanction."

[13] Nowhere in his interminable arbitration award does Lourens state why the dismissal effected by Steiner was not appropriate. Commissioners do not enjoy the *laissez faire* to willy-nilly interfere with the sanction of an employer.

They can only do so if the sanction of dismissal is unfair. In *Somyo v Ross Poultry Breeders (Pty) Ltd*[4] the LAC held as follows:

> "…where the degree of professional skill which must be required is so high and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal."

[14] Despite a definitive finding that Snyman is most definitely guilty of negligence of which the degree is excessive, Lourens still, with respect, ebulliently conclude that dismissal was not an appropriate sanction. There is a great measure of misalignment between the finding and the ultimate conclusion – a reviewable irregularity in of itself. A reasonable decision-maker would not reach such a conclusion. Such a conclusion is not justifiable regard being had to Snyman being guilty of negligence of an excessive degree, particularly in an instance where Lourens found that given her level of seniority her excuses for the failure were poor.

[15] In the circumstances a reasonable decision-maker would not have interfered with the sanction of dismissal in the circumstances where Snyman made herself guilty of serious failures or failures of an egregious degree as reasonably found by Lourens. The labelling of the charge by Mynhardt does not affect the seriousness or the excessive degree of the failures. Given my views above, the arbitration award falls outside the bands of reasonableness and is reviewable in law.

[16] That said, it may not be necessary to consider the issue of inconsistency. However for the sake of posterity, item 7 (b) (iii) of Schedule 8 of the LRA requires consistent application of the rule by the employer. Application of a specific work rule is not proven by the taking of disciplinary action. It is proven by an employer frowning upon departure from the rule. In other words, an employer must not be seen to be vacillating between two positions. As it is

[4] (JA9/97) [1997] ZALAC 3 (26 June 1997)

said it must not approbate and reprobate at the same time. It is unclear as to what Lourens meant by “any form of disciplinary action”. The evidence before him demonstrated that Steiner took umbrage against tickets that remained open a month later and called for action by a particular time. At all material times Steiner was concerned with tickets raised but not actioned. Therefore it must be so that at Steiner once a ticket is raised, it must be actioned. Such position was consistently held by Steiner. At no stage was it alleged and proven that Steiner took a decision to countenance raised but not actioned tickets. That being the case, a conclusion that Steiner inconsistently applied a work rule is not one that a reasonable decision-maker may reach. For these brief reasons, this Court concludes that the fact that disciplinary action was not taken against Walker and Pienaar does not of itself render the dismissal of Snyman inappropriate and unfair.

[17] Before I conclude, the finding that there was procedural unfairness is the most startling one. It is predicated on the fact that certain issues which do not appear on a charge sheet drafted by Mynhardt. It does seem that the issues related to the state of the fleet. Because the charge sheet said nothing about the fleet, in Lourens’ view Snyman suffered prejudice to a point of procedural unfairness. One of the allegations were that Snyman tarnished the image of the company. A fleet showing deterioration is capable of tarnishing the image of a company. If, as it was testified to, is the duty of Snyman to uphold the image of Steiner, allowing usage of fleet showing deterioration is most certainly a dereliction of duty. The fact that fleet was not specifically mentioned in the charge sheet does not breed unfairness. Snyman was able to respond to those allegations. Accordingly, procedural fairness entails an opportunity to state a case. On the evidence presented and not challenged, Snyman was afforded an opportunity to state her case around the allegations of the state of the fleet. Therefore, a finding that the dismissal of Snyman is procedurally unfair is one that falls outside the bands of reasonableness.

[18] As I conclude, this Court has before it sufficient material to determine the unfair dismissal dispute. It is in as good a position as Lourens was.

[19] In the result the following order is made:

Order

1. The arbitration award issued by Pieter Willem Lourens dated 21 October 2019 under case number GAVL 145-19 is hereby reviewed and set aside.
2. It is replaced with an order that the dismissal of Adele Snyman is both substantively and procedurally fair and her referral is dismissed.

3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr W Hutchinson
Instructed by:	Moodie and Robertson Attorneys, Braamfontein.
For the third Respondent:	Mr J Brits of Higgs Attorneys, Johannesburg.