IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 34/18

In the matter between:

AFGEN (PTY) LTD **Appellant**

and

NTOMBIZODWA ZIQUBU **Respondent**

Heard: **14 May 2019**

Delivered: **13 June 2019**

Summary: Review of arbitration award – employee dismissal found substantively unfair – Commissioner granting limited compensation on account that reinstatement impracticable. Appeal –Court finding employee's relationship with her direct superior did not exist – consequently it was impracticable to reinstate employee- Appeal upheld - Court setting aside only the quantum of compensation granted by the commissioner and awarded maximum. Recusal – no basis for the application – refused.

Coram: Waglay JP, Jappie JA and Coppin JA

JUDGMENT

WAGLAY JP

Introduction

[1] This is an appeal and cross-appeal against the judgment of the Labour Court (Molebaloa AJ) which set aside the arbitration award issued by the Commissioner under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] The Commissioner had found the dismissal of the respondent substantively unfair but refused reinstatement and awarded the respondent three months' salary as compensation. On review, the Labour Court substituted the award with an order that the appellant reinstates the respondent and compensate her in the sum equal to 24 months' salary.

[3] The appellant appeals both against the order of reinstatement and the amount of compensation. The respondent cross-appeals against the quantum of back-pay.

[4] Before dealing with the merits of the appeal and cross-appeal, I need to deal with notices of appeal and cross-appeal. Both parties sought condonation for their failure to file their notices on time. This was granted.

Background

[5] The respondent commenced in appellant's employ in January 2011 and had been in the appellant's employ for just over a year during which period she suffered from depression and was placed on sick leave for about two months between October and November 2011. After her return and in December 2011,

she was charged with misconduct. The charges against her were to the effect that she: (i) send unauthorised e-mails to the customers and (ii) made untruthful statements in the e-mails about a meeting which the appellant was to convene to deal with her work performance.

[6] The e-mail which the respondent sent to many of the appellant's customers was to the effect that her employer would be meeting with her to discuss her work performance and she would appreciate if the customers provided a report about her performance in her dealings with them.

[7] According to the appellant, it only discovered this after a number of its customers complained that they were required to do a report on their interaction with the respondent, hence the charge. Furthermore, no meeting was scheduled to be held as averred by the respondent in her e-mail.

[8] On 14 December 2011, a disciplinary hearing was held and the respondent was found guilty of both charges and issued with a final written warning. The respondent was not satisfied with this and referred the matter to the CCMA as an Unfair Labour Practice dispute.

[9] In January 2012, the respondent referred a further Unfair Labour Practice dispute to CCMA. This related a dispute concerning payment of a bonus; medical-aid contribution; and the supplying of a uniform. Apart from the respondent referring this to the CCMA, nothing seems to have happened to this referral.

[10] In January, the appellant again decided to charge the respondent with misconduct. Curiously, the charge again related to the e-mails the respondent had sent to the appellant's customers for which she was charged and convicted in December.

[11] The charges were fashioned differently this time. The charges were as to the following effect, that the respondent: (i) had broken the trust relationship; (ii) had brought the company into disrepute; (iii) was insubordinate and (iv) had made false accusation against the management.

[12] Exactly the same facts and allegation that were raised as at the disciplinary hearing in December were raised at the second disciplinary hearing and the charge was that the respondent's conduct in sending the e-mails had broken the relationship between the parties and brought the company into disrepute because the customers complained about having to write a report, believing that the appellant sought of them to write such a report.

[13] Notwithstanding that it was totally irregular and unacceptable to recharge the respondent on the same facts. The chairperson of the disciplinary hearing (who was also the same person who had chaired the December hearing) found the respondent guilty of breaking down the relationship of trust and bringing the company into disrepute and summarily dismissed the respondent.

[14] The charge of insubordination also was based on the same facts as the December hearing with one addition: the respondent was also accused of abusing appellant's assets by using them without permission, this related to e-mails with her curriculum vitae which the respondent had sent to potential employers with whom she sought possible employment. The respondent was also found guilty of this charge of insubordination and was given a final written warning.

[15] The respondent was found not guilty of the fourth charge.

[16] Believing her dismissal to be unfair and the final written warning given to her constituting an Unfair Labour Practice, the respondent referred the matters to the CCMA.

[17] The referrals came before the Commissioner for arbitration. The commencement of the arbitration reads like a muddled discussion. The Commissioner was desperately trying to establish what is it that he was required to arbitrate and he was receiving all kinds of response from two unhelpful representatives. Eventually, they settled for the following: that the Commissioner arbitrate two disputes; (i) an unfair labour practice dispute which related to the final written

warning issued to the respondent on 14 December 2011 and (ii) the unfair dismissal dispute relating to the respondent's dismissal based on the two charges she was found guilty of in January 2012.

[18] The Commissioner found that in issuing the final written warning on 14 December 2011, the appellant committed an unfair labour practice and as such, the final written warning was set aside.

[19] The Commissioner further found that the appellant had failed to satisfy him that by reason of the respondent sending off the e-mails as she did, stating in them that the appellant would be holding a meeting to discuss her work performance and calling for a report on her performance (i) led to a breakdown in the relationship of trust or (ii) that the respondent brought the company into disrepute. Accordingly, the Commissioner found the dismissal of the respondent substantively unfair.

[20] There appears to be confusion on the final warning issued by the appellant on the charge of insubordination. From the record, it appears that the respondent took the view that because the issue of the final written warning in December was found by the Commissioner to constitute an unfair labour practice, this also applied to the final written warning issued by the appellant in January. It did not. The final written warning issued in January does not appear to have been addressed, in fact, the Commissioner was not asked to deal with this when the parties confirmed what the Commissioner was required to arbitrate. In my view, this was clearly an oversight and but for the use by the respondent of the appellant's e-mail facilities to send emails for personal purposes, there was nothing new in the insubordination charge of January to that of December.

[21] In my view, however, nothing much turns on it although the Commissioner took into account the existence thereof in deciding the appropriate remedy and the Labour Court wrongly took the view that the Commissioner had in fact set aside the final written warning issued in January.

<u>Remedies</u>

[22] Having found that the dismissal of the respondent was substantively unfair, the Commissioner was mindful that the primary remedy he was required to award the respondent was that of reinstatement because that is what she sought. This was what section 193 of the Labour Relations Act 66 of 1995 obliges a Commissioner to do unless the exceptions contained in section 193 subsections 2(b) and (c) come into play. S193 (2) (b) and (c) provides:

> *'2) The Labour Court or the arbitrator* ***<u>must</u>*** *require the employer to reinstate or re-employ the employee unless* –
>
> *(a)…*
>
> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
>
> *(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee;'* [emphasis added]

[23] The Commissioner took the view that the unchallenged evidence of the respondent clearly demonstrated that the relationships between the respondent and the appellant was so broken that reinstating the respondent would not be appropriate. In coming to this conclusion, the Commissioner made mention of the evidence of Ms Wostmann the respondent's immediate superior and also the final written warning.

[24] In my view, there was no reason to take into account the final written warning which was issued almost at the same time as the respondent was dismissed.

[25] The primary issue is that because the respondent's dismissal was found to be substantively unfair she was entitled, in terms of s193(1)(a), to reinstatement or to re-employment in terms of 193 (1)(b). There has to be extraordinary reason to deviate from such relief and only so if s193(2) comes into play. The conduct of

the employee plays a crucial role where reinstatement or re-employment is refused notwithstanding there being no grounds for dismissal. Thus for example in the matter of *Edwin Maepe v CCMA and Another*[1] although the employee's dismissal was found to be unfair, this Court refused to reinstate him because it found it was impracticable for the employee to reinstate or re-employ Mr. Maepe who given false testimony under oath. Mr. Maepe was employed as a Commissioner at the CCMA and was required to arbitrate disputes and consider evidence presented to him under oath; having displayed total disregard for truthful testimony he could, this Court held, not be fit to continue as a Commissioner of the CCMA.

[26] The other relevant matter is that of *Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others*[2] (Glencore) where the Court properly accepted that an employee's behaviour can be taken into account to determine if reinstatement or re-employment must be awarded, more particularly where an employee behaved offensively against the employer. Whether the bad behaviour was pre- or post dismissal is irrelevant. This Court in *Glencore* stated that an employee's behaviour no matter how abominable, cannot automatically deny her/him an award of reinstatement or re-employment. Consideration should be given to the degree of relationship contact between the employee and his superior. The lack of a "functional role" performed by the employee in Glencore including the lack of "functional rapport with the superiors" meant that they could be no real obstacle in the continued employment of the employee by Glencore notwithstanding the employee's abominable behaviour.

[27] In this matter, the respondent dealt with the accounts of the appellant's customers. She fell directly under the supervision of Ms Wostmann with who she was required to interact on daily basis; from whom she had to take instruction; and, to who she must report on all and every issue. Yet she refused to do so. The unchallenged evidence of Ms Wostmann was that the respondent:

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[1] [2008] 8 BLLR 723 (LAC).
[2] [2018] 1 BLLR 1 (LAC).

'seldom if at all reported back to her as she was required to do;

did not take her seriously and bypassed her totally;

did not respect her as her superior;

did not report back to her as was required in her contract of employment;

did not adhere to instructions given to her;

was generally rude;

did not have a good working relationship with her;

did not respond to her emails;

allowed her work to fall behind in an unacceptable manner;

had received a number of verbal warnings and reprimands for her behaviour yet this did not improve things at all in that the respondent simply ignored these;

generally ignored her instructions. [3]

[28] Added to this respondent's own admission was that there was no relationship between her and the appellant. In fact, at the very beginning of the disciplinary hearing, the respondent's union representative stated to the chairperson of the hearing that no relationship exists between the respondent and the appellant's management.

[29] This is not a case where there is a distant relationship between the employee and those in authority over her. In fact, the relationship is dependent on the respondent and her superior working closely together and in the absence of this relationship to reinstate the respondent into her position would be totally inappropriate and this is compounded by the fact that the respondent was in fact only in appellant's employ for a period of just over a year.

[3] Record vol 3 pages 248-249.

[30] In the circumstances, I am satisfied that the Commissioner's decision that it was inappropriate to reinstate the employee cannot be faulted.

[31] Turning then to the issue of compensation, this is a matter where the respondent's dismissal is found to be substantively unfair and while it is correct that the respondent was only employed for over 12 months it cannot be said that she is not entitled to the maximum compensation that the law permits.

[32] Section 194 of the LRA provides for compensation up to a maximum of 12 months' salary to be awarded. I see no reason why this should not be awarded to the respondent. I fail to understand the rationale behind the Commissioner only granting the respondent three months' compensation, this in my view, cannot be reasonable.

[33] In view of my finding above, there is no need to deal with the cross-appeal.

[34] Finally, I need to add that having completed the judgment, I received a letter of complaint from the respondent. She complained that I had failed to give her a proper opportunity to state her case; that I had given an appellant far greater time than I accorded her to present her argument; and that I should not have been a judge in the matter as I was party to granting the petition for leave to appeal.

[35] The respondent then launched an application for the recusal of the bench on the grounds of "appearances of bias, partiality, direct personal interest in the outcome [of the matter] and procedural unfairness"

[36] There is simply no basis for the application. not only did the respondent hand in her heads of argument timeously, we had read the record and the heads of all the parties prior to holding our conference for the hearing of the appeal. At the hearing, both parties were informed that they need not read their heads as we have done so but raise all the issues they wish to in respect of the appeal. Neither Adv Kruger who represented the appellant or the respondent read their heads. In fact, when Adv Kruger sought to read the various complaints set out in the affidavit, he was told not to do so. I fail to understand what is meant by the

respondent's averment that Add Kruger "read an opportunistic or misplaced or twisted or untruthful or invalid or irrelevant paragraph from his heads of argument."

[37] The only discussions on the bench had to do with the matter itself, there was no instructions to ask or not to ask questions.

[38] The respondent furthermore, was never stopped from saying what she wanted. In fact, the respondent herself concluded without any comment from the bench and then before the appellant could reply she stood up again to raise another point this was also allowed. Only after the respondent sat down was the appellant asked if he had anything to say in reply. With regard to time for argument, no restriction was placed on the respondent and in fact, she errs when she says far more time was allocated to the appellant as no time was allocated to either party and the appellant in fact took less time than the respondent in delivering its argument.

[39] With regard to the issue that I should not have heard the appeal because I was one of the judges on the panel that granted leave to appeal, this again is no bar from hearing the appeal.

[40] Finally, I need to add that we are not the first to be accused of being biased and unprincipled in this mater by the respondent, she has similarly accused the commissioner who heard the arbitration as also the court *a quo* and persisted at this hearing with that view.

[41] With regard to costs, the appellant justifiably argued that costs should be awarded in its favour in respect of the recusal application. While there may be merit in this submission, I believe that in the interest of equity, there should be no order as to costs.

[42] In the result, I make the following order:

(a) The late filing of the notice of appeal and cross-appeal is condoned.

(b) The appeal is upheld with no order as to costs.

(c) The order of the Labour Court is substituted as follows:

> 'The arbitration award under CCMA case no GAJB 29210-11 is set aside only in respect of compensation awarded. The employer (respondent) must pay the Employee (applicant) the sum of R 78 432 being the amount the applicant would have earned over a 12 months' period in respondent's employ.'

(d) The aforesaid amount must be paid on or before 30 June 2019.

(e) The cross-appeal is dismissed

(f) The application for recusal is refused.

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Waglay JP

I agree

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Jappie JA

I agree

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Coppin JA

APPEARANCES:

FOR THE APPELLANT: Adv M A Krugers

Instructed by Marshall Attorneys

FOR THE RESPONDENT: In Person