Sneller Verbatim/PJ

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J3914/00

2002-02-11

In the matter between

BANKING INSURANCE ASS. WORKINGS UNION First Applicant

M.NHLAPO Second Applicant
and

MUTUAL & FEDERAL INSURANCE CO. LTD Respondent

JUDGMENT

WAGLAY J:

In this matter the second applicant claims that his dismissal by the respondent constitutes an automatically unfair dismissal and the relief he seeks is that of reinstatement.

The grounds upon which the claim is based is that respondent dismissed the second applicant because second applicant exercised his right to represent a fellow employee at an arbitration. This, second applicant contended amounted to

victimisation.

Second applicant further alleged that his dismissal was also procedurally unfair, because the respondent failed to notify and/ or consult the First Applicant about the disciplinary action being taken against him as respondent was required to do because the second applicant was a shop steward of the first applicant.

Very simply the relevant facts are the following. One Monyai was charged with misconduct. The second applicant represented Monyai at the disciplinary hearing. Monyai was found to have committed the misconduct and was dismissed. In due course Monyai referred the matter to the CCMA for conciliation and thereafter to arbitration in terms of the provisions of the LRA.

At the arbitration the commissioner found that the dismissal of Monyai was substantively fair, but procedurally unfair. One of the alleged reasons given by the commissioner for finding Monyai's dismissal to be procedurally unfair, was that the chairperson of the disciplinary hearing, unreasonably refused to grant Monyai a postponement of the hearing.

The submission that the chairperson unreasonably refused to grant a postponement as requested by Monyai at Monyai's disciplinary hearing was made by the second applicant at Monyai's arbitration. He did so in writing. In fact the most relevant portion and that which forms the substantive subject matter of the proceedings before this court as written by the second applicant and forwarded to the commissioner as heads of argument, records the following:

"...Secondly, during the hearing the applicant requested a postponement of the hearing at least for four days and also requested that the respondent provide copies of all documentation upon which it intended to rely for evidence during the investigation as well as the identity of all [of its witness]."

As a consequence of making the above and similar statement elsewhere, second applicant was charged with misconduct.

It was alleged by the respondent that in making the statement to the commissioner at the arbitration that Monyai applied for a postponement of the disciplinary hearing and that such request was unreasonably refused, second applicant was dishonest.

Respondent alleged that the above statements as made by the second applicant were false to second applicant's knowledge and were made deliberately. They were made to mislead the commissioner and as such constituted a serious breach of the employer/employee relationship because it breached the implied duty of trust that forms the basis of an employment relationship.

An employee must in relation to his duties act fairly and faithfully. When an employee takes on the role of representing fellow employees in disciplinary matters, this may create conflicting interests. Here the employee, representing a fellow employee, must act in good faith and honestly while the law will protect him in so far as he fulfils his role as a representative of a fellow employee in disciplinary matters, he cannot escape disciplinary measures being taken against him if he commits a misconduct simply because the misconduct was committed while performing duties that he was entitled to perform.

Representing a fellow employee does not licence the

representative to be untruthful or dishonest. If the representative is simply advised of a state of affairs of which he has no knowledge and he represents a fellow employee asserting such a state of affairs even if it transpires that the state of affairs as represented were untrue, no blame can be apportion to the representative. This is so because he, like a lawyer defending his client, carried out an instruction.

However, where the representative places "evidence" or makes submission in the defence of an employee knowing that such evidence or facts or submissions are false, then it goes beyond the bounds of performing a duty of representing a fellow employee. He is in fact committing a misconduct which his employer is entitled to act against.

In this case if what the respondent alleges is true, then the second applicant cannot escape disciplinary action on the basis that he was acting upon "instructions" given. In any event second applicant's defence is not that he made the statements knowing them to be false because he believed that he could do so or that he was not aware that such submissions would be improper to make. His defence to the charge was that the

submissions made to the commissioner at the arbitration were based on fact and were true.

During the course of the trial the second applicant firstly alleged that at no time during Monyai's arbitration proceedings, did he ever raise the issue or put to respondent's witnesses that Monyai had applied for and was refused a postponement and he therefore could not be said to have mislead the commissioner. This is not borne out from the transcript of the arbitration proceedings. If anything the record unequivocally shows that the issue of postponement was cross-examined about by the second applicant.

Secondly, and in any event, so second applicant's defence goes, at Monyai's disciplinary hearing Monyai did in fact request a postponement and it was refused by the chairperson of that hearing. In support of this defence second applicant submitted that there were four instances in which postponement was requested and refused. I shall deal with each.

The one instance it said was recorded on page 8 of the Monayi disciplinary hearing transcript. This page, accordingly to

applicants, is a proper transcript of what is on the tape with the changes suggested by them and that the cassette tape records all that transpired at the hearing. On this page it is recorded that second applicant sought an adjournment and that it was refused. Later on this same page the chairperson inquires if Monyai still needed the adjournment and it was then granted.

According to the second applicant the adjournment that was granted was in respect of an issue different than the one for which adjournment was requested earlier.

Having read page 8 of the transcript and the page preceding it, I do not

believe that second applicant has been truthful. It is quite plain perusing the context of the evidence there recorded that the adjournment granted was linked to the earlier request (made no more than 5 to 10 minutes earlier). Second applicant also sought to suggest that what it sought was to adjourn for days and not minutes. This again is, having regard to the transcript, false. I am therefor satisfied that second applicant, when he suggest that he made the submission based on the instance as recorded at page 8, that he was being untruthful.

The second instance applicants claimed was as recorded on page 18. According to the applicants the transcription on page 18 is self evident-it demonstrates that Monyai at that time requested that the matter be postponed and that the postponement was not granted.

Again applicants admit that the transcript was correct and that the recording did not contain any omissions. Having read this page I found there to be nothing which by any stretch of the imagination can be construed to imply a request for a postponement. Second applicant's evidence here is that the request for the postponement must be implied because a person's name is mentioned who could possibly be a witness against Monyai, this according to applicant meant that a postponement was necessary.

This is not only unlikely but so far fetched that the only inference I can draw is that second applicant was aware that the contents of this page did not constitute any request for a postponement, implied or otherwise.

This then takes us to the two other instances where the second applicant suggests requests for postponements were made. However, the second applicant contends that neither the tape recording has it on record nor are these request for postponements in the transcript of the hearing. According to second applicant at page 33 and 38 of the transcript there should have been recorded requests for postponements because it was at that time period that such requests were made. The more important missing evidence should have been on page 38 where a four day postponement was in fact requested according to the second applicant.

I find it surprising that this evidence which is so crucial to the second applicant would have been deliberately not recorded, more so because this evidence was recorded at the hearing which took place years before anyone knew that applying for a postponement was going to be an issue at all. Why was this evidence not recorded? There is no explanation.

According to the unchallenged evidence of Slater, who was the prosecutor at Monyai's disciplinary hearing and the person who

operated the recording of the hearing, all of the evidence and arguments given and made were recorded. Am I to assume that this evidence simply disappeared?

The evidence tendered by the respondent was that there never was a request for a postponement and that if such a request was made it would have been entertained. This is also evident from the transcript of the Monyai disciplinary hearing. If one has reference to the record of the said disciplinary hearing it is difficult to accept second applicant's version that the requests for postponement were in fact made. This is so for *inter alia* the following reasons:

1. If such request was made and refused, why was this not recorded as one of the grounds upon which Monyai's dismissal would be contended to be procedurally unfair in the pre-arbitration meeting?
2. Why was it not raised by the second applicant in his defence at his disciplinary hearing?
3. Why was it not raised in response to a direct question relating thereto at the pre-trial minute in this matter?

Furthermore having regard to the transcript, there is no logical reason why a postponement would have been sought on those specific instances (page 33 and 38). Second applicant's evidence that postponements were sought at the time the evidence as recorded on page 33 was given because it required the respondent to amend the charges preferred against Monyai, does not make sense. The respondent who was preferring the charges did not desire to amend the charges why then would applicant request that the matter be postponed for respondent to amend the charge-sheet and thereby prejudice Monayi (his own client)?

With regard to page 38 again I refuse to accept having regard to the transcript that second applicant and Monyai would have at the time in the proceedings sought a postponement, let alone one for four days. I have no doubt that no postponement as alleged by the second applicant was sought by Monyai at his disciplinary hearing wherein he was represented by the second applicant.

In the circumstances the submission made by the second applicant at Monyai's arbitration hearing to the effect that

Monyai sought postponement and was refused, was false. In this respect I accept that adjournment and postponement carry the same meaning.

In so far as second applicant seeks to claim that he believed that postponements were sought and refused and that he did not intend to mislead or intentionally mislead the commissioner, these claims I also do not accept. Intention and belief are not proved or disproved by the *ipse dixit* of the parties. It is evident from a number of factors, not least of which are the circumstances surrounding the actions which are found to be deliberate. Circumstances surrounding the submission made by the second applicant to the commissioner at Monyai's arbitration hearing, having regard to detail in which it was done, demonstrates that the submissions were deliberate. Furthermore the fact that this was not an issue that was recorded as an instance relating to procedural unfairness at Monyai's hearing seen against the background that second applicant was thorough, competent and capable of attending to the arbitration negates any challenge that his actions were not deliberate or not intentional.

Having found therefore that second applicant did commit the misconduct, is this misconduct of such a nature that an ultimate penalty of dismissal should be visited upon the second applicant? The misconduct is serious. It is not one, however, which relates to the duties and functions of his employment with the respondent. It relates to activities which he voluntarily assumed. However, this does not make the wrong less serious.

One also cannot simply look at the misconduct in isolation from what transpires in respect of the process that flows from the charge. Not only do I find that second applicant has committed the misconduct, but has compounded his wrongful conduct by his failure to admit it and to make serious accusations against those who sought to prove second applicant's wrongful conduct. By the admission of the wrong, this instance might have received a degree of sympathy with regard to sanctions. As things have developed they can be no working relationship between the parties, the only appropriate sanction in this case would therefore be one of dismissal. In the circumstances I am satisfied that the dismissal of the second applicant by the respondent was substantively fair.

Turning then to the dismissal being procedurally unfair. The only complaint raised by the second applicant in this regard is that his dismissal was procedurally unfair because respondent failed to inform his trade union, first applicant, as required by item 4[2] of schedule 8 of the Act of the disciplinary action being taken against him.

In this regard firstly, the first applicant is not recognised by the respondent. Secondly, on the evidence led on behalf of the applicants, the evidence was that the respondent in fact never communicated with the first applicant in respect of issues relating to the work place other than when dealing with retrenchments and thirdly, that the respondent in fact never regarded the shop stewards as shop stewards and that respondent dealt directly with all its employees. I therefore see no reason why respondent here should have been obliged to inform first applicant about the disciplinary action it intended taking against second applicant.

Schedule 8 merely serves as a guideline. While compliance therewith is often recommended and at times non compliance

may for good reason constitute unfair conduct on the part of the employer. This, however, is not the case here, for reasons stated above, taken together with the fact that the purpose of item 4[2] is to ensure that the trade union is aware that an action is being taken against its representative because this may effect its operation within a work place wherein it is recognised and operates, where a trade union and/or its representatives is/are not recognised the need for such notice or consultations cannot be obligatory. In the circumstances I am satisfied the dismissal was also procedurally fair.

With regard to costs. The basis upon which I have to consider whether or not costs should be awarded is to have regard to both law and equity. In terms of law costs should follow the results. In terms of equity I have a discretion. I have had some doubts on the granting of costs, however, after careful consideration I am satisfied that this is a matter where it would be iniquitous for costs not to follow the result. As there are two applicants, I order that costs should be paid jointly and severally, the one paying for the other to be absolved.

In the result I make the following order:

The application is dismissed with costs. The costs are to be paid by the applicants, jointly and severally, the one paying for the other to be absolved.

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WAGLAY J