



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2833/09

In the matter between:

CLIVE GREGORY VAN WYK

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

LUNGILE MTIYA N.O

Second Respondent

VALORTRADE (PTY) LTD t/a KOTZE

CONSTRUCTION

Third Respondent

Heard on: 24 November 2011

Delivered on: 20 January 2012

JUDGMENT

BOQWANA AJ

Introduction

[1] This is a review application in terms of section 145(2) of the Labour Relations Act¹ ('the LRA') to review and set aside the arbitration award made by the second respondent ('the commissioner') on 08 October 2009 under case number GAJB28616-09. The commissioner found that the dismissal of the applicant was substantively fair and accordingly dismissed the applicant's claim of unfair dismissal.

[2] The review application was preceded by an application for condonation for the late filing of the answering affidavit. The condonation application was not opposed. I granted condonation having been satisfied with the explanation proffered by the third respondent and on account of it not being opposed. Averments and submissions leading to the granting of the condonation application would clearly appear on record. I would therefore not burden this judgment with the condonation aspect of the proceedings.

Background Facts

[3] The applicant was employed by the third respondent on 01 October 2008 as a junior foreman until his dismissal on 27 August 2009.

[4] The applicant had been charged for:

- unauthorised absence from work from 11 August 2009 to 19 August 2009 at Standard Bank Computer Center at Samrand;
- not notifying the third respondent of his absence timeously and as instructed previously by Leon Lamprecht ('L Lamprecht') from 2009-08-11;
- Failure to follow standing orders and procedures by not forwarding any documentation/sick note to the office in time regarding his absenteeism from 2009-08-11;

¹ Act No 66 of 1995.

- Incurring unnecessary loss of income to the third respondent at Samrand due to his negative behaviour in that regard;
- Bringing the third respondent's name into disrepute due to his behaviour;
- Insubordination in relation to his superiors by not following instructions given to him.

[5] On 20 August 2009, the applicant was given notice to attend the disciplinary hearing that was scheduled for 25 August 2009. The disciplinary hearing was postponed to 27 August 2009. The applicant did not attend the inquiry. The inquiry accordingly proceeded in his absence resulting to the dismissal of the applicant.

[6] The matter proceeded to arbitration at the first respondent ('the CCMA') where the commissioner found that the applicant's dismissal was fair. At the arbitration hearing the third respondent called two witnesses, L Lamprecht and Adriaan Lamprecht ('A Lamprecht') to discharge its case, whilst the applicant called one Belinda van der Sandt ('van der Sandt') known to be his fiancé. It was the third respondent's case at the arbitration that:

- The applicant was in charge of one of the third respondent's contracts with one of their main contract Grinaker LTA, ('Grinaker'). The applicant was stationed at Standard Bank Computer Centre.
- The third respondent is a civil works/ constructions company. The applicant liaised with the main contractors on a daily and hourly basis. He was responsible to manage all work on site on the daily basis with the main contractor. He was in essence the first line of accountability to manage safety.
- On Tuesday 11 August 2009, at 09.00 in the morning, L Lamprecht received a phone call from one Grinaker Foreman, Kobus Koos ('Koos') asking for the whereabouts of the applicant on site. At the time, the third respondent was busy excavating diesel tanks for Samrand, which is probably top three of their most dangerous work. The

applicant's sole responsibility was the inspection of the diesel tanks on the ground formation for cracks, for collapsing tanks. L Lamprecht thought the applicant was on site but was advised that no one had seen him that morning. A junior foreman, one Herman Britz was sent immediately on site to manage the situation. Koos was upset but A Lamprecht managed to calm him down.

- At around 12.00 of the same day, A Lamprecht received a telephone call from the applicant's mother who notified him that the applicant was sick and will be back at work on Wednesday, 12 August 2009. On 12 August 2009, L Lamprecht decided to call the applicant on his cell phone at approximately 05.30 AM as he needed to know what was happening on the site. He did not get hold of the applicant. At about 06.30 AM, he called A Lamprecht to make sure that if the applicant does not come to work A Lamprecht could manage the situation. The applicant did not arrive at work.
- On Wednesday 12 August 2009 at night, A Lamprecht received an SMS that the applicant will be at work on Friday 14 August 2009. The SMS was saying that the applicant 'was on a lot of pills and not feeling very well and the doctor had booked him off and he will be back at work on Friday, 14 August 2009'.
- On Friday 14 August 2009, at 05.50 AM, A Lamprecht received another SMS that said the applicant is still not feeling well and will be back on Monday 17 August 2009. On Monday 17 August 2009, the applicant did not come to work either.
- Both A and L Lamprecht tried to call the applicant on his cell phone numbers daily and on the cell phone number where the SMS messages came from, which was apparently not the number they had on their records for the applicant. The applicant's cell phone numbers continuously went on voicemail when attempts were made to get hold of him. There were also no answers from the cell phone number they

received SMS messages from. This created a problem with a client, Grinaker as A Lamprecht kept advising the client that the applicant would be at work but did not arrive. Grinaker thought A Lamprecht was lying and that he created a new story every time. Grinaker also had a problem that there was no full time foreman on site.

- The applicant had apparently been previously disciplined and warned for unauthorised absenteeism as he had a habit of not coming to work particularly on Mondays. The applicant would never report in person but would always send his mother or fiancé to call on his behalf. L Lamprecht had a meeting with him in April 2009 to discuss this issue.
- At that meeting, the applicant was advised of the procedure that he should follow when reporting his absence from work. He was instructed that he should make a telephone call in person before 06.00 AM directly to L Lamprecht. This was to give the third respondent time to reorganise the whole station at Samrand and to get a person in his place in time on site to take over while the applicant was not present. L Lamprecht thought it important that the applicant reports in person so that the third respondent could get more information regarding work related problems on site which needed attention.
- The third respondent lost work of approximately R500 000.00 due to the applicant's actions.

[7] The applicant in his defence called van der Sandt who testified as follows:

- On 11 August 2009 at 05.30, she called A Lamprecht's cell phone number and left a message on a voice mail. She phoned very early in the morning so that the third respondent could get someone else. A Lamprecht's wife later called back and confirmed that she would relay the message to A Lamprecht. She left a message that the applicant was sick and that she was taking him to the doctor.

- She claimed that the medication that the applicant received from the doctor made him sleep and so he could not even talk. Van der Sandt sent an SMS everyday to A Lamprecht to advise him every time the applicant went to the doctor. She told A Lamprecht that the applicant had gone to the doctor and the doctor had booked him off for a second opinion after the applicant's mother advised her to do so.
- On 18 August 2009, the applicant received a call from L Lamprecht asking for the applicant's physical address and further told the applicant not to come back to work.
- The applicant attempted to submit the medical certificate on return to work but was not allowed to come in at work.

Grounds for review

[8] It appears that the applicant was unrepresented when he filed the Notice of Motion. Grounds for review are poorly set out in the Notice of Motion as follows:

- 'Disregarding of evidence (proof and facts)
- Disregarding of time keeping
- Biovest
- Violating of my right
- Unfairly dismissed (CCMA)
- New evidence (Defrauding documentation)'

[9] The applicant did very little to amplify his grounds for review in his supplementary affidavit apart for the averments that the commissioner failed to appreciate that the applicant was ill and could not attend work and that the commissioner committed gross irregularity in that she failed to consider the evidence conceded by the third respondent that A Lamprecht was told about the illness.

[10] The applicant attempted some elaboration in his replying affidavit that the commissioner failed to consider documentary evidence i.e. medical certificate that he was sick and therefore could not come to work and that constituted gross irregularity.

[11] In his heads of argument, the applicant introduced a new ground for review relating to procedure proposing that the commissioner committed gross irregularity in finding that the third respondent followed a fair procedure in dismissing the applicant, despite that no evidence was led regarding procedure. Alternatively, the commissioner committed a gross irregularity in failing to advise the third respondent and applicant as laypersons to lead evidence on procedure, despite that substantive and procedural fairness were issues for her to determine. This ground was neither alleged in the applicant's founding nor in his supplementary affidavits. It should therefore not be considered any further. In any event, the onus would have been on the applicant to lead evidence regarding his complaints on procedure at the arbitration. If he claimed that there was procedural unfairness he ought to have substantiated his submission by leading evidence in this regard. It does however appear on record that the third respondent did lead evidence relating to procedure.

[12] Evidence was led to the effect that the applicant was issued with a letter that he was required to report to work immediately on 20 August 2009 at 07.00. When he reported for work he was issued with a notice to attend a disciplinary hearing on 25 August 2009. The hearing did not take place on 25 August 2009 but was postponed for 48 hours to 27 August 2009 to give the applicant time to prepare and to go through new documentation. The applicant was offered transport to and from home if he attended the hearing.

[13] It appears that the applicant had an issue with the disciplinary hearing starting at 17.00. L Lamprecht testified that 17.00 was the only reasonable time that a disciplinary hearing could be held due to the third respondent's operational circumstances. He stated that it was standard practice for the third respondent to have all disciplinary hearings at 17.00. Apparently all disciplinary hearings in the three months prior to the applicant's disciplinary hearing were held at 17.00. The applicant was going to be paid his overtime if the hearing started at this time to

compensate him for the inconvenience. The applicant however chose not to attend the hearing and it was accordingly held in his absence.

Evaluation

[14] The grounds for review are set out vaguely. In fact, they are simply listed without any elaboration on them. The gist however appears to be that the commissioner failed to take into account that the third respondent was informed that the applicant was sick and could not attend work and he failed to consider the documentary evidence, i.e. the medical certificate. It appears that this medical certificate was not submitted at the disciplinary hearing. A bundle referred to as Bundle C, 'doctor's notes' was handed in by the applicant at the arbitration hearing.

[15] From the reading of the record it is clear that the third respondent had laid down a rule that needed to be followed by the applicant when he was not going to come to work. This was laid down because of the applicant's continuous absenteeism on previous occasions. The applicant was instructed to call his manager directly before six and in person if he was not going to come to work and that would enable the third respondent's management to get more information regarding the site from the applicant and to ensure that necessary plans were put in place and replacements were organised in his absence. It was accordingly not unreasonable for the employer to want to know when the applicant would be back at work.

[16] It can be accepted that at certain times the applicant may ask his family members to report on his behalf when he was not able to call himself on odd occasion. However those calls should be followed by some attempts from the applicant himself to contact his employer personally regarding his whereabouts and condition. It was crucial for the employer to have an opportunity to talk directly to the applicant so that it could be brought up to speed about the status of his work at the site. This is especially because the third respondent's managers were constantly calling him and leaving messages for him to call back on a daily basis to no avail. It may well be that the applicant was sick and could not speak at some point. Evidence however suggests that the applicant could speak at some point as van der Sandt confirmed on record. He should then at the earliest opportunity of his 'recovery'

contacted his employer as he was the foreman in charge on the site. It baffles my mind how the applicant would not think it important to contact the employer personally at some point in order to bring it up to speed about the situation on site and about what may need attention in his absence. The employer could not get hold of him on his cell numbers after various attempts to contact him on a daily basis. This is not the kind of behaviour that could be expected from a senior employee. The applicant was in charge of one of the main contractors, Grinaker who expected the presence of a full time and competent foreman on site at all times.

[17] Surely, the applicant could not have been sleeping for 24 hours for seven days. Van der Sandt conceded under cross-examination that she did speak to the applicant when he was awake. Van der Sandt was inconsistent in her evidence as she attempted so hard at times to suggest that the applicant's voice was gone for seven days and that he could not speak but only to concede later in her evidence that this was not the case. Van der Sandt also conceded under cross-examination that the applicant could have spoken to the third respondent's management if he wanted to but she had done that on his behalf. It is also not disputed that on the seventh day, 18 August 2009, the applicant did speak with L Lamprecht when Lamprecht called him. Even on that day no attempts were made by him to contact his employer. It is his employer that contacted him on account of the employer having been told by Grinaker that half of the assignment would be terminated, resulting in approximately R500 000 loss. I find the applicant's conduct irresponsible to say the least.

[18] It is common cause that SMS messages were sent reporting that the applicant would be back on Friday, 14 August 2009 and Monday 17 August 2009 respectively. The applicant failed to report to work on both occasions. I find the version by A Lamprecht more probable that these messages were sent during the day or well at night not before six as instructed by the third respondent. It would not make sense for the third respondent to risk losing its business from Grinacker by not putting proper plans in place if it was notified timeously.

[19] It is also undisputed that the applicant's mother phoned well within the day, at 12.00 on Tuesday, 11 August 2009.

[20] In my view, there has been a clear infringement of a rule by the applicant that he was aware of. His behaviour was unreasonable and irresponsible and such behaviour could not be expected from a foreman in charge of the site. This is not to say employees do not fall sick from time to time. A responsible employee at a senior level such as that of the applicant would ensure that an employer is notified about his or her absence timeously so that plans could be put in place urgently. Such an employee would also ensure that he or she is contactable when required by the employer.

[21] A Lamprecht kept promising Grinaker that the applicant would be back at work as advised on the SMS messages but the applicant would just not pitch on those days.

[22] Van der Sandt's evidence also did not make sense when she suggested that the applicant was booked off by the doctor on 12 August 2009 to 18 August 2009, but yet she wrote an SMS message to state that the applicant would be back at work on Friday, 14 August 2009. It does not help to say that she and the applicant 'spoke about it' and the applicant said he will go to work on 14 August 2009 if he was feeling better. It makes no sense why the applicant would go to work if he was booked off sick and supposedly declared unfit for that week.

[23] Van der Sandt also conceded that she did not submit the medical certificate to the third respondent and her excuse was that the applicant wanted to submit the medical certificate to his employer when he returned to work but was told not to come in at work. She also claimed that the third respondent should have known that there was a medical certificate as she informed the third respondent that the applicant 'was going to the doctor and the doctor had booked him off'.

[24] It is clear that the medical certificate was only issued on 18 August 2009 whereas van der Sandt had suggested that the applicant was in possession of the medical certificate already by 12 August 2009. Van der Sandt's evidence was misleading in that regard. The said medical certificate states that the applicant would be unfit for work from 11 August 2009 to 18 August 2009. The third respondent was never informed that the applicant was booked from 11 August 2009 to 18 August 2009. It was informed that the applicant would be at work on Friday 14

August 2009 and 17 August 2009 respectively by van der Sandt. The medical certificate, which was clearly not in existence before 18 August 2009, does not help the applicant's case at all in my view. The applicant still infringed a rule that directed him to inform his manager, L Lamprecht directly and personally before 6.00 AM regarding his whereabouts or absence from work so that arrangements could be made on time. The applicant did not do that. He did not even return telephone messages left on his cell phone numbers to contact his employer.

[25] I accordingly, find no basis for the commissioner's arbitration award to be said to fall within the band of decisions that are unreasonable. The commissioner clearly took into account evidence given by van der Sandt at the arbitration hearing. She also had regard to the allegations that the third respondent was notified by van der Sandt about the cause of the applicant's absence. She also took into account evidence relating to the sick note. She may have not specifically mentioned the medical certificate issued on 18 August 2009 in her award. This however does not make her award reviewable as the alleged medical certificate did not absolve the applicant of his responsibility to comply with the rule laid down by his employer.

[26] I therefore make the following order:

1. The review application is dismissed.
2. There is no order as to costs.

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

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FOR THE THIRD RESPONDENT:

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