IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA32/2017

In the matter between:

TMT SERVICES AND SUPPLIES (PTY) LTD	**Appellant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
ERIC MYHILL NO	**Second Respondent**
SAMWU OBO FELICIA LUNGILE	**Third Respondent**

Heard: **18 September 2018**

Delivered: **17 October 2018**

Summary: Summary: Review of arbitration award – employee dismissed for defying employer reasonable instruction – court cautioning Labour Court not to construe review and appeal – dominant factor is the defiance of managerial authority - on the facts, arbitrator has not misdirected himself – Appeal upheld - Labour Court's judgment set aside, and arbitration award confirmed.

Coram: Waglay JP, Phatshoane ADJP and Sutherland JA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The third respondent (Lungile) had been employed on a five-year fixed contract by the appellant (TMT). At the relevant time, she was two years into that contract. She was a Training officer.

[2] She was dismissed for gross insubordination. The gravamen of that charge was that she refused to obey an instruction to attend a meeting to discuss an audit report of her performance. The matter went to arbitration whereupon an award was issued upholding the fairness of the dismissal. On review, the Labour Court reversed that finding and ordered TMT to pay her salary for the balance of her fixed term contract from the date of dismissal, in effect, about three years' worth of pay. The appeal lies against those orders.[1]

[3] The test in *Sidumo* dictates the resolution of the controversy; ie was the arbitrator's decision one to which no reasonable arbitrator could come.[2]

[4] As to "insubordination" as a class of misconduct, it has been advanced by John Grogan that the enquiry into the gravity of the specific insubordination considers three aspects: the action of the employer prior to the deed, the reasonableness of the instruction, and the presence of wilfulness by the employee.[3] In this case, only the presence of wilfulness by Lungile is controversial.

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[11] An application to condone the Late filing of the appeal was unopposed and shall be granted.
[2] *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC).
[3] John Grogan, Workplace Law, Juta 12th Edition, chapter 12, Para 3.8, pp125-126.

The Facts

[5] The central factual issue related to Lungile's deliberate refusal to attend a meeting which her immediate superior, Stols, had told her to attend. The arbitrator held that she had defied an instruction. Even on the common cause facts, in our view, there can be no doubt that this finding was unassailable.

[6] In the afternoon of 25 April 2013, Stols and Lungile spoke over the telephone. Stols gave the instruction to attend the meeting in that conversation. The meeting was to commence the next day, 26 April at 07h00. The persons present were to be Stols, Yolanda Soden, another employee and colleague of Lungile, and Lungile herself. The purpose of the meeting was to receive and discuss an audit report that Soden had carried out on the work performance of Lungile. Lungile, during that conversation, stated that she was uncomfortable about Soden being present. Stols' reply was that Soden's presence was unavoidable as she was presenting an audit report prepared by herself. Nothing in this conversation could be reasonably construed to mean that the meeting had been tentatively arranged. As things stood, Lungile was obliged to attend the meeting at 07h00 the next day.

[7] It was argued on behalf of Lungile that no "instruction" was given. This contention invoked the fact that Soden had told Lungile about the meeting before Stols had mentioned it. Lungile then called Stols to enquire about the meeting. These facts are neutral. Moreover, if no instruction had been given, there would have been no need for the e-mail sent later that night by Lungile, which is the next event to be examined.

[8] In the evening of 25 April at about 20h40, well after working hours, Lungile sent an e-mail to Stols. It stated:

> 'As telephonically discussed today regarding the meeting that I found out about from [Soden] late today that we will be meeting tomorrow at COC [ie the head office] I am still not comfortable as indicated to you telephonically.

My reasons are:

(1) A proper notice was not given, please give me the proposed agenda for the meeting in order for me to prepare for the items as proposed.

(2) I could be happy if you could reschedule the meeting for 3, 4 or 6 May, please choose a date that could best suit your schedule so that we can formalise the meeting, this proposal however does not mean that I am refusing the verbal meeting proposed by yourself but for the meeting to be formalised and have minutes thereafter for one to refer back to.'

I trust that is all in order.' [record: 67]

[9] Lungile, also at that moment, sent an SMS to tell Stols she had sent an e-mail. It stated:

'...I have sent you an e-mail about tomorrow's meeting. Please check it ….'

[10] Notable in the SMS is its vagueness. Objectively, when Stols read it that night, she was not alerted to any urgency to read the e-mail nor was there any hint that the meeting would or ought or could be aborted. Thus, unsurprisingly, this e-mail was not at once read by Stols. Moreover, the e-mail itself is an acknowledgment that Lungile is supposed to meet the next day and asks for a postponement. Objectively, a person who makes that request for a postponement of a meeting would expect an answer either agreeing thereto or refusing, in time to either attend or not, and in this case before setting off to work in Kempton Park or setting off to CAC to the meeting.

[11] Stols read the e-mail and responded to it at 04.38 the next morning. Her response was:

'This is not a counselling session or any form of disciplinary process therefor I do not need to give you a proper notice. It is an instruction from me for you to attend the meeting today at 7h00. The agenda will be to discuss your audit report where [Soden] will explain the audit report to both of us of which thereafter I will ask

> [Soden] to leave the meeting and discuss your punctuality as well as the email you have sent me.
>
> I told you telephonically yesterday about the meeting therefor saw no need to send you a meeting request.
>
> I find this email that you have sent me very disrespectful.
>
> See you at today's meeting, 07h00 at COC.' [record 68]

[12] At the same time an SMS was sent by Stols to Lungile stating that the e-mail had been read and they would see one another at the meeting.

[13] No reply was made by Lungile until 07h16 when Lungile in an e-mail states:

> 'I only saw your email now I am already at Kempton Park depot.
>
> I am sorry if you find my email disrespectful but that was not my intention it was a sincere request. When we spoke telephonically yesterday you only informed me the meeting would be about the audit not my punctuality.
>
> Can we please arrange another day rather than this one?' [record 68]

[14] So much for the bare facts.

[15] The unavoidable consequence was that owing to her absence and being physically at a distance from the COC office, the slot scheduled for the meeting was forfeited and the postponement desired by Lungile was successfully engineered.

[16] An obvious question arises from these common cause facts. In the absence of being released from the meeting, Lungile ought to have gone to it, not gone to Kempton Park. Having communicated a request for a postponement late in the evening of 25 April, why did she not react to the message that she must have been waiting for, sent by Stols at 04h38, well in time to alert her to come to the meeting and not go to her desk? Lungile claims her cell battery ran down and she could not communicate with anyone before reaching her desk in Kempton

Park at 07h00. In our view, if she was acting in good faith, it is implausible she would not have been keen to get an answer and it would be highly unlikely that she would allow the chosen means of communication through which she awaited an answer, to become inoperable. The inference to draw is that she contrived to procure a postponement by presenting the employer with a *fait accompli.* This is the true gravamen of the case.

[17] Stols thereupon telephoned Lungile after reading the 07h16 message. The exact content of the oral exchanges is, to some extent, in dispute. The critical import of that conversation was Stols rebuking Lungile for defying her instruction and Lungile stating she would not attend that meeting. They argued. Lungile insisted on a formalised arrangement with written notice and an agenda as a condition for meeting to discuss the audit. Ultimately the matter was referred to higher authority, and in a conference call, it was decided to reschedule the planned meeting for a given date.

[18] A sterile debate took place in cross-examination about the number of times the instruction was given by Stols, supposedly four times. The mere repetition of an instruction does not affect the true issue: the giving of an instruction and its defiance. This debate arose in the context of whether the appropriate degree of "persistence" was established. However, "persistence" is relevant to determining whether the employee indeed has defied the employer and not merely neglected to carry out instructions. It is thus an evidential instrumental tool to test a conclusion. The idea of "persistence" should not be allowed to slide into the basket of Labour Law myths which include the idea that an employee must be warned three times before disciplinary action can be taken. "Persistence" means an absence of capitulation to the employers will, not exclusively a reference to repeated refusals.[4]

[4] An example where repeated refusals was the substance of the insubordination is *PSA of SA obo Khan v Tsabadi NO and Others* (2012) 33 ILJ 2117 (LC) where an employee resisted a transfer despite many instructions to take up the new post.

[19] Therefore, defiance of authority can be proven by a single act of defiance.[5] There is no necessity for high drama and physical posturing to be present.[6] The employer prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled "insubordination" and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur.[7]

[20] The upshot is that the arbitrator's findings of insubordination is wholly consistent with the evidence adduced and therefor no criticism can be advanced in that regard.

The severity of the misconduct and the appropriate sanction

[21] The framework of the Labour Relations Act 66 of 1995 (LRA) accords to different decision-makers authority to make certain decisions. Adjudging the severity of misconduct in context, is a power conferred on an arbitrator. It is partly, at least, a value judgement. The choice made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion.

[22] In this matter, the evidence demonstrates a contrived, and indeed devious manipulation by Lungile to achieve a deferment of the meeting. It involved the defiance of an express direct and unequivocal instruction. The employer/employee relationship dynamic is premised on instructions being obeyed. It is intolerable that an employer is forced to negotiate day to day organisational arrangements with employees. The effect of the refusal was to undermine the working relationship with Stols whose trust she forfeited. The arbitrator took the view that dismissal was appropriate.

[23] However, the question arises whether a corrective measure was not appropriate, rather than dismissal, eg a written warning as a form of progressive discipline,

[5] See the *Old LAC decision in Acrylic Products (Pty) Ltd v CWIU and Another* [1997] 4 BLLR 370 (LAC).
[6] An example is the case of *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) where a managerial employee defied an instruction to cease advising and representing workers in disciplinary matters and in response to such instructions dared his superiors to try their luck enforcing the instruction.
[7] See: Scoble, Law of Master and Servant in South Africa, Butterworth, Durban (1956) p145.

and if not, why not. The aborted meeting was rescheduled, Lungile attended and its objectives were soon afterwards accomplished. The Code of good conduct in the LRA requires progressive disciplinary options to be considered. The episode of defiance was an isolated event. The defiance seems to have been triggered by apprehension rather than malice. The notice period to meet was a mere matter of hours and although not unreasonable in the circumstances, plainly unsettled Lungile. Subjectively, being unnerved, whether objectively justifiable or not, is an indication that her motives were self-preservation rather than a conscious desire to disrupt the orderly running of the business.

[24] These factors need to be weighed together with the aggravating features of her conduct referred to above. Caution must be exercised when treading this path to maintain the integrity of the *Sidumo* Test. Would these factors have unequivocally inclined a reasonable arbitrator to have concluded that the conduct, though deliberate, devious and serious, would not warrant dismissal? The arbitrator was addressed on progressive discipline and took note of that consideration.

[25] The test to apply is higher than simply could a reasonable arbitrator have imposed a lesser sanction; rather the question is could no reasonable arbitrator have concluded dismissal was appropriate. Unless that threshold is exceeded, the award must stand. The weighing of the manipulative dimension of the conduct was appropriate in the circumstances. In our view, the award cannot be criticised on the basis that no reasonable arbitrator could have reached that conclusion.

[26] The review court thought otherwise. We cannot agree. The Labour Court was unduly impressed by the notion that the arbitrator had imposed a reverse *onus* on Lungile and therefore because this was wrong the award had to be set aside. This finding by the Labour is incorrect. The question of a shift in *onus* to prove a fair dismissal cannot arise and in this case does not arise. What happened in this case, is that an *evidential burden* lay on Lungile to prove she could not have

received the early morning message on her cellphone, that being her averment. All she offered was her sayso. In the context of the probabilities, and the considerations on this aspect already dealt with, an adverse finding was made. In our view, the adverse finding was wholly appropriate.

[27] In regard to sanction, the Labour Court conflated an appeal with a review. The rationale of the award was that the deliberate manipulation of the situation by Lungile and the defiance of managerial authority was the dominant factor, and thus dismissal was appropriate. The arbitrator has not misdirected himself by reaching that conclusion, one which a reasonable arbitrator could certainly reach.

Conclusion

[28] Accordingly, the appeal should succeed.

[29] Neither party sought costs and no such order shall be made.

The Order

(1) The appellant's application for condonation of the late filing of the notice of appeal is granted.

(2) The appeal is upheld.

(3) The order of the Labour Court is set aside.

(4) The award of the Arbitrator is confirmed.

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Sutherland JA

Sutherland JA (with whom Waglay JP and Phatshoane ADJP concur)

APPEARANCES:

FOR THE APPELLANT:	Adv M A Lennox,
	Instructed by Snyman attorneys.
FOR THE RESPONDENT:	Adv E M Masombuka,
	Instructed by Madlela Gwebu Mashamba Inc