THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable
CASE NO 211/2006

In the matter between

OLD MUTUAL LIFE ASSURANCE CO SA LTD Appellant

and

THAMELA ADVOCATE GUMBI Respondent

Coram: Howie P, Cameron, Brand, Cloete and Jafta JJA
Heard: 23 MARCH 2007
Delivered: 17 MAY 2007

Summary: Dismissal – procedural fairness – employee's deliberate absence from a disciplinary enquiry not affecting validity of ensuing dismissal

Neutral citation: This judgment may be referred to as *Old Mutual v Gumbi* [2007] SCA 52 (RSA)

JUDGMENT

JAFTA JA

[1] The central issue in this appeal is whether the termination of the respondent's employment by the appellant (Old Mutual), was procedurally fair. The respondent (the employee) does not contend that the employer lacked a fair reason to dismiss him. His attack was confined to the process that culminated in his dismissal. Initially Old Mutual raised jurisdictional and other challenges to the claim, all of which it has abandoned. The sole focus of the appeal – given that the employee eschewed his statutory remedies under the Labour Relation Act, Act 66 of 1995 (the LRA) (compare *Transnet Ltd v Chirwa* 2007 (2) 198 (SCA)) – was therefore the employee's right to a pre-dismissal hearing under the common law.

[2] On 29 April 2004 Old Mutual dismissed the respondent following a disciplinary enquiry in which he was found guilty of misconduct and dismissal was recommended as the appropriate sanction. He instituted an application in the Transkei High Court challenging the dismissal on the basis that the enquiry was held in his absence, and as a result he was denied a hearing before the decision to dismiss was taken. Miller J dismissed the application on, inter alia, the ground that the employee had 'wilfully and voluntarily excluded himself from the disciplinary hearing' because he failed to return to it after a short adjournment.

[3] The employee appealed to the Full Court. Maya J (Kemp AJ concurring) reversed the decision of the court of first instance. The learned Judge held that the employee's absence from the disciplinary hearing was neither wilful nor voluntary, and that the medical certificate, handed to the disciplinary tribunal by his representative, could not be rejected when its authenticity and correctness

had not been disputed at the hearing. In a dissenting judgment Somyalo JP found that the employee 'evinced a determination to postpone, stampede and/or derail the disciplinary enquiry', and that his absence from the hearing was wilful and voluntary. The present appeal is with the special leave of this court.

[4] An employee's entitlement to a pre-dismissal hearing is well recognised in our law. Such right may have, as its source, the common law or a statute which applies to the employment relationship between the parties (*Modise and Others v Steve's Spar, Blackheath* 2001 (2) SA 406 (LAC) at para 21 and the authorities collected there). In cases such as the present, the parties may opt for certainty and incorporate the right in the employment agreement (*Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 668).

[5] In *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others* 1995 (1) SA 742 (A) this court stated the principle in the following terms at 755B-C:

'It is within the province of the employer who holds a disciplinary enquiry to determine its form and the procedure to be adopted, provided always that they must be fair. Fairness requires, inter alia, that the employee should be given an opportunity of meeting the case against him: the employer must obey the injunction *audi alteram partem.'*

Slagment and other previous cases in this court concerned the right to a hearing developed under the old Labour Relations Act, 28 of 1956. It is clear however that coordinate rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2)) to harmonise the common law into the Bill of Rights (which itself includes the right to fair labour practices (s 23(1)).

[6] In recognising this right our law is consistent with international law

relating to pre-dismissal hearings as set out in Article 7 of the International Labour Organisation (the ILO) Convention on Termination of Employment 158 of 1982. It provides:

'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.'

Two observations may be made in this regard. The first is that South Africa is a member of the ILO and our Constitution requires the courts to have regard to international law when interpreting legislation, including the common law (s 233). The second is that the convention itself recognises that the right is not absolute: there are circumstances where it may not apply.

[7] Of importance is the fact that by extending the requirement of the *audi alteram partem* principle to employment relationships, our law promotes justice and fairness at the workplace. In doing so, the law promotes the primary objects of the LRA, namely, giving effect to South Africa's obligations as a member state of the ILO and promoting social justice at the workplace (s 2 of the LRA). In this context fairness must benefit both the employee and the employer. The process of determining the actual content of fairness in matters such as this involves the balancing of competing and sometimes conflicting interests of the employee, on the one hand, and the employer on the other. The facts of a particular case determine the weight to be attached to such interests on each side of the scale. Expressing the view of this court on this topic in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577(A) Smalberger JA said at 589C-D:

‘Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances….
And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.’

[8] The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer’s decision to dismiss cannot be challenged on the basis of procedural unfairness (*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & Others* (1991) 12 ILJ 806 (LAC) at 813C-D).

[9] In the present case Old Mutual had offered the employee a chance to defend himself against the allegations of misconduct which led to his dismissal. The employee did not take the opportunity. The crucial question is whether his absence from the hearing was, in the circumstances of this case, justified; or, differently put, whether fairness to both parties demands that his dismissal be set aside or not. In order to determine this issue a comprehensive summary of the facts is necessary.

[10] Old Mutual appointed the employee as a sales advisor on 1 February 1995. He was stationed at its branch in Mthatha and Mr Sandile Ntombela, the sales manager, was his superior. The evidence led at the hearing held on 29 April 2004 reveals that on 5 March 2004, the employee submitted claims for subsistence and travelling expenses which had to be perused by his superior before payment could be authorised. His superior spotted a discrepancy

in the distance allegedly travelled by the employee from Mthatha to Mqanduli. He then invited the employee to his office to discuss the matter. The latter refused to have any discussion with him. Later in the day the employee confronted him in his office about why he had not authorised payment of the claim. When he said he needed some explanation regarding the claim, the employee became aggressive, shouted and threatened him with assault.

[11] Following this behaviour, charges of misconduct were preferred against the employee. He was notified of the charges and invited to a disciplinary hearing set down for 31 March 2004. The employee produced a medical certificate before the enquiry commenced and he failed to attend. He was summarily dismissed following the hearing which proceeded in his absence. His representative made written representations to Old Mutual for his reinstatement. In the light of the fact that he did not attend the hearing, apparently due to illness, Old Mutual withdrew the dismissal and reinstated him but with a view to recharging him. He returned to work on 25 April 2004 and on the next day he was given notice of a disciplinary enquiry to be held on 29 April.

[12] At the enquiry the employee was represented by Mr Balekile Mbebe, who described himself as a public defender. From the moment the hearing started, the employee's representative adopted an aggressive and combative attitude towards the disciplinary tribunal. He raised spurious objections which were designed to stop the tribunal from proceeding with the hearing. First, he demanded that the chairman should produce a letter by the employer appointing him to preside over the hearing. When this was overruled he complained that the employee was given short notice and that he had not been furnished with the information he had requested from the employer. The information in question included copies of statements by the employer's witnesses and a document authorising that the employee be recharged.

[13] Displaying contempt for the tribunal, Mbebe stated that the hearing could not proceed without him being furnished with statements. In this regard the oral exchange between him and the chairman went as follows:

'Mr Mbebe: We don't continue if there are no statements, we can't hide information.
Mr Mfaise [the chairman]: I don't think we can deny witnesses the right to give evidence verbally.
Mr Mbebe: They must give statements and then come verbally. [If] you refuse to give us those statements then I will ask for 10 minutes.
Mr Mbebe: You know why we came here; we said we wanted to go to court, that is real law.
Mr Mbebe: If you call your witnesses then we will just keep quiet and we will take this matter to court.'

[14] The chairman granted an adjournment for the employee to consult with Mbebe. The employee failed to return and because of Mbebe's lateness the hearing resumed half an hour late. He produced a medical certificate the contents of which I refer to more fully below. It referred to 'tension headache and enteritis'. Having perused it the chairman adjourned the hearing further for about an hour to enable the employee time to recover. The chairman had hoped that the hearing could resume provided that the employee had recovered from the alleged tension headache.

[15] Mbebe, whose intention was clearly to prevent the hearing, was unimpressed by the chairman's gesture. He made it plain that neither he nor the employee would return. At that stage of the proceedings the following oral exchange occurred between him and the chairman:

'Mr Mfaise: Welcome back, thank you Mr Mbebe for coming back, according to this medical certificate Mr Gumbi is suffering from tension headache and I will give you until 14h00 for

your client to take headache tablets, so that by 14h00 we may come back, hopefully he would have recovered as that is an hour from now.
Mr Mbebe: I won't be coming back as my client is booked off sick, so you may continue without me.
Mr Mfaise: You say we may continue without you?
Mr Mbebe: Yes you may continue.'

[16] The court below held that the representative's 'consent' that the hearing should continue in their absence did not constitute waiver of the right to a hearing. I agree. The employee's conduct as a whole was inconsistent with waiver. At the moment he challenged the first dismissal, the employee's complaint was that he had been denied a hearing and therefore that the dismissal was invalid for that reason alone. In essence what he was saying was that he was denied a chance to defend himself. However, when Old Mutual offered that opportunity to him, the employee had a complete change of heart which was evidenced by the following facts. He refused to take the notice for the second hearing; and with the intention of stopping the hearing, his representative raised spurious objections of all sorts and was guilty of aggressive and contemptuous behaviour towards the tribunal, threatening it with legal action. All these facts ineluctably lead to the conclusion that the employee wanted to have the hearing aborted so as to prevent the fulfilment of the condition – a fair disciplinary hearing – upon which dismissal by the employer was contractually dependent. In our law a contractual condition is deemed to have been fulfilled where a party deliberately frustrates its fulfilment. By analogy this may also be the position in a statutory setting. In *Scott and Another v Poupard and Another* 1971 (2) SA 373(A) Holmes JA said at 378G-H:

'I come now to the issue of fictional fulfilment of the condition upon the occurrence of which the money was to be paid and the shares to be transferred to Poupard and Lobel, ie to say, the grant of mining rights….

In essence it is an equitable doctrine, based on the rule that a party cannot take advantage of his own default, to the loss or injury of another. The principle may be stated thus: Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him.'

See also *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) in paras 33-36.

[17] Returning to the medical certificate, I agree with the finding by Somyalo JP that little evidential value can be attached to it. It does not reflect an independent medical diagnosis of the illness or an opinion as to the fitness of the employee to perform his normal work, let alone his fitness to attend a disciplinary hearing. The certificate appears to be in standard form containing printed and handwritten parts. It reads:

'MEDICAL CERTIFICATE

Undersigned hereby certifies that
THAMELA GUMBI
was examined by me on **2004/04/29** (date of first examination)
and again on
_____ (date of last examination)
According to my knowledge, as I was informed he/she was unfit to work
from **2004/04/29** to _____
due to ILLNESS / OPERATION / INJURY
Nature of illness / operation / injury
TENSION HEADACHE
ENTERITIS'

The printed words are in ordinary script and the handwritten insertions are in bold.

[18] As was found by Somyalo JP with whose finding I agree, as I have said, the chairman of the inquiry justifiably doubted the reliability of the medical certificate and inferred that the employee was malingering. The question whether the employee was really so ill that he could not attend the hearing must also be assessed against his entire conduct towards the inquiry. I have already found that both his conduct and that of his representative at the hearing established clearly that he intended to prevent the hearing from being held. This must be considered together with the fact that he and his representative contradicted each other about the time at which he became affected by illness. The employee said he was already ill when he woke up on the morning of the hearing whereas his representative said he fell ill during consultation after the first adjournment. The employee also said he was taken home by his representative after seeing the doctor but the latter said he did not know where the employee went. The employee made this allegation in his founding affidavit, contrary to what was said by his representative in the record of the enquiry, which he attached as an annexure to the same affidavit. The relevant part of the record reads as follows:

‘Mr Mfaise: Welcome back from this recess, which was supposed to take 30 minutes.

Mr Mbebe: We were still consulting as we requested and my client felt sick and most unfortunately I had to rush him to the doctor and here is a medical certificate he is booked off.

Mr Mfaise: When did he get sick?

Mr Mbebe: Today.

Mr Mfaise: Where is he now?

Mr Mbebe: I don’t know, hasn’t he got home? May be he went home.’

[19] It was the duty of the employee to ask for a postponement of the hearing if he was unable to attend due to illness. This he failed to do despite the matter having been adjourned for the second time due to his absence. Instead, his representative dared the chairman to continue with the hearing in their absence. A mere production of the medical certificate was not, in the circumstances of this case, sufficient to justify the employee's absence from the hearing. As the certificate did not allege that he was incapable of attending at all, the chairman was entitled to require him to be present at the resumed hearing so as to himself enquire into his capacity to participate in the proceedings. These facts play a major role in determining unfairness when the interests of both parties are taken into account.

[20] Before us the employee (through counsel) attempted to distance himself from the unacceptable behaviour of his representative. In my view, he cannot do that at this stage. He did not disapprove of the representative's conduct at the hearing while he was present nor did he do so in his founding affidavit after reading the record of the enquiry. Moreover, the representative was his agent of choice and when he appeared at the tribunal he was acting on his behalf. His conduct must be attributed to him (cf *Saloojee and Another v Minister of Development* 1965 (2) SA 135 (A) at 141C-E).

[21] When all these facts are viewed objectively, it cannot be said that Old Mutual has acted procedurally unfairly in continuing with the hearing in the employee's absence and dismissing him for the misconduct of which he was found guilty. The employee and his representative are the only persons to blame for his absence. It follows that the appeal must succeed.

[22] The following order is made:

1. The appeal is upheld with costs.

2. The order of the court below is altered to read:

‘The appeal is dismissed with costs.’

C N JAFTA
JUDGE OF APPEAL

CONCUR:) HOWIE P
) CAMERON JA
) BRAND JA
) CLOETE JA