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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JR152/04

2005-02-24

In the matter between
TIBBETT & BRITTEN (SOUTH AFRICA)
(PTY) LIMITED Applicant

and

MARILYN MARKS 1st Respondent

NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY 2nd Respondent

MAPALO TSATSIMPE NO 3rd Respondent

J U D G M E N T

REVELAS, J: This is an application for review in terms of section 32 of the Arbitration Act, 42 of 1965, to review an arbitration award of the third respondent in favour of the first respondent. There is also a condonation application before me, as the application for review was filed three days out of time.

The first respondent, Marilyn Marks, was dismissed by the applicant following charges of the unauthorised use of the applicant's credit card (strictly issued for use in the furtherance of the applicant's business) for her personal benefit and the irresponsible use thereof, she being an employee in a senior position.

The appeal against the dismissal imposed by the disciplinary inquiry chairperson, was unsuccessful. The first respondent then referred a dispute about an unfair dismissal for misconduct to the second

respondent where it was eventually arbitrated by the third respondent ("the arbitrator") who held that the dismissal was substantively and procedurally unfair.

In terms of the award, the applicant was directed to pay the first respondent compensation in an amount equal to 12 months' salary. Costs was also awarded against the applicant on an attorney and client scale of the High Court, despite the fact that a Bargaining Council is precluded from awarding costs on that scale.

The applicant seeks to review this award. Before setting out the factual background which gave rise to the application, I will list certain preliminary issues raised by the applicant.

The applicant raised the point that the Bargaining Council did not have the necessary jurisdiction to arbitrate this particular dismissal dispute because the dismissal was essentially one about an automatically unfair dismissal, since the first respondent consistently raised victimisation as the actual reason for her dismissal. She had done so in the disciplinary inquiry and during the arbitration proceedings. However, the dispute which she referred to the arbitration was not one based on victimisation.

I do not believe there is any merit in this point, since the victimisation was one factor in the first respondent's version of events which resulted in her dismissal. Ultimately she was dismissed for misconduct, the nature of which was common cause. The automatically unfair dismissal definition in section 187 of the Labour Relations Act, 66 of 1995 ("the Act") can be relied on only in circumstances where the exercise of the employee's rights results in the employer takeing action in the form of victimisation or dismissal. That is not applicable to the case in question. The applicant had taken no steps to exercise her rights when she was dismissed. In my view, the arbitrator committed no irregularity nor exceeded her powers when she assumed jurisdiction in this matter.

A further point raised by the applicant was that the first respondent was represented during the arbitration proceedings by a person who held himself out to be a labour consultant and a legal representative. The person employs the title of "advocate" before his name in his correspondence. In this regard the applicant relied on section 161 which prescribes who may appear on behalf of parties before the Labour Court. In the respect of an employee, only a trade union or a legal practitioner may appear.

No trade union was involved in this case and in so far as Advocate Leffler was actually a legal practitioner on behalf of the first respondent, the applicant relied on the case of *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC). In that matter Mlambo J held that for an advocate to appear in this court he had to be briefed by a practicing attorney. The applicant contended that in the absence of a brief from an attorney, Mr Leffler had no right of appearance.

There was not enough evidence before me to find, or to determine,

what Mr Leffler's status was at the time he appeared on behalf of the first respondent. The matter proceeded without any serious attempt made by any party to discredit Mr Leffler's status. To determine this issue now, would be rather technical and this is not a matter which calls for such an approach.

I now return to the merits and factual background of the application.

The relevant common cause facts were that the applicant was a private company and carried on business in the warehousing and distribution industry. It employed the first respondent as a sales and administration manager since 1 February 2001. She was initially employed as a sales executive on 1 March 2000.

The first respondent's functions included managing new business sales, overseeing customer service and she was also authorised to sign cheques on behalf of the applicant. She authorised payment requests and the payment of petty cash. She managed suspended bills of entry whilst also being responsible for debtors' control and several human resources related matters.

On 23 January 2003, the first respondent was suspended without loss of benefits pending the disciplinary inquiry in question. She was given notice of a disciplinary hearing which was scheduled for 30 January. Pursuant to the disciplinary hearing she was found guilty and dismissed on 5 February 2003. She was found guilty on charges of the unauthorised use of a company credit card for personal benefit and the irresponsible use of a company credit card, she "being a person in a senior position."

Both chairmen in the appeal hearing and the disciplinary inquiry in effect found her guilty of fraud and made specific reference to "fraudulent" behaviour. The applicant appears to regard this as mere observations. However, the arbitrator held this to be a serious procedural defect in the proceedings in that the charges were totally unrelated to the findings of fraud. I will return to this question later in this judgment.

The arbitration hearing was concluded on 10 September 2003. During the arbitration proceedings it was common cause that the card in question was a company credit card, that it was to be used solely for company purposes (that is to further the applicant's business) and that the usage was unauthorised. The first respondent knew she had to repay the applicant after the use of her card. She also did not take any necessary precautions to ensure that, what she termed "confusion" over the company's card and her own credit cards, did not occur again.

The applicant called three witnesses, Mr Parton, Ms Singh and Mr

Austin King. The latter person was the chairperson of the disciplinary hearing. The chairperson of the appeal hearing was not called.
The applicant led evidence to the effect that the chairperson of the disciplinary inquiry hearing was specifically appointed to that position because he was employed in a different business unit and had no prior dealings with the first respondent or any of the witnesses in connection with the matter and had no prior knowledge of it.

What is very important in this regard, and this probably explains the wording of the charges, is that the first respondent reported herself to Ms Singh of the financial department in an "e-mail" letter, wherein she advised that she had used the company credit card for her own personal expenses and that she wanted to know how she could effect repayment.
Thereafter (the "e-mail" letter was sent on 25 October 2002) she continued using the card, though not on many occasions. The extent to which the first respondent used the credit card was an agreed figure of R1 000,00, although mention was made of an amount of R7 000,00 at one stage and R2 000,00 at another stage of the proceedings.
The first respondent argued that there was no written policy explicitly dealing with the use of company credit cards. The applicant contended that it was expected of managers to show the necessary discretion and trustworthiness in relation to the applicant's credit facility and to use it for business purposes only. The use of the company credit card was always subject to the condition that it should be used only to pay for client expenditure and business related expenses. There was a business and ethical value policy signed by the first respondent which made it clear that all financial transactions should be ethically correct.

The applicant further argued that even if there was no written rule regarding the limitations or use of the company credit card employees who were extended the privilege of a company credit card were inherently senior and considered responsible enough not to abuse the privilege.

Once the card in question was allocated and entrusted to a senior employee, there was no method of monitoring or ensuring that the credit card was only used for business purposes. However in this context the respondent still used the card for *inter alia* making personal purchases at Edgars and Woolworths.
I do not accept that it was reasonably true that she confused her

personal card with the applicant's credit card. She should have kept these cards separate, even though they are similar or perhaps exactly the same in appearance. Furthermore, once she had become aware of her mistake and had even gone the extra mile to report it, she should then have made very sure that the so-called confusion did not recur. Counsel on behalf of the applicant conceded that the fact that she reported her conduct to her employer made a difference to the type of misconduct, and alerted me to the fact that, for precisely that reason, the charges levelled against the first respondent were couched in the terms that they were. (Not referring to fraud).

I do not agree with the arbitrator's finding on the wording of the charge sheet and that they did not find their origin, or were not sourced, in the disciplinary code. There was a standard form of ethical behaviour and the first respondent was a senior employee and need not be reminded that personal purchases with the applicant's credit card was wrong. The fact that that misconduct is not specifically described in the code is of no consequence in this particular matter and on these facts.

The findings of the disciplinary enquiry chairperson falls to be criticised on the basis that the first respondent was not specifically charged with fraud or dishonesty and on the facts of the matter, which were common cause, she was not guilty of fraud and she should not have been found guilty thereof. I do not agree that the chairperson made a mere observation that her behaviour was fraudulent. It was a specific finding which he was not entitled to make on the facts before him. Yet this error does not detract from the fact that dismissal was appropriate in this case.

The first respondent's possession of a personal credit card supports the conclusion that the applicant's credit card was to be used for the applicant's business only. If the first respondent were free to use the applicant's credit card at all times irrespective of whether the expenses were personal or not, it would make no sense for her at all to have a personal credit card. It was brought to her attention that the credit card was for business purposes only. Her behaviour was unethical, albeit not fraudulent and therefore dismissal was appropriate. She was not entitled to use the credit card for her own personal use and I believe that the arbitrator had misdirected herself in finding that the dismissal was substantively unfair.

However, there were certain procedural irregularities which warrant some form of compensation.

The third respondent, ultimately found that the chairpersons of the disciplinary and the appeal hearings ignored the issue of victimisation raised by the applicant.

The first respondent did raise the issue of victimisation at the disciplinary hearing but was told that these were separate issues. There is a suggestion that there was an agreement on this aspect but that is not clear. There was no unequivocal waiver on this point.

At the appeal hearing the first respondent again raised the issue of victimisation but was told that the two processes were not to be "mixed up", or in other words, conflagrated.

Neither chairperson should have adopted such an approach. The question of victimisation could have had a bearing on the sanction imposed by them. It tends to support a suggestion of bias on their part, or a justified perception of bias. The arbitrator also found that the allegations of bias were true. It was also brought to my attention that the appeal chairperson was not appraised of the record of what had occurred at the disciplinary hearings. I believe that it is probably correct that he merely rubberstamped the disciplinary inquiry's findings, if he did not have any record.

In my view, there is no basis to interfere with the findings of the arbitrator with regard to the unfair procedure. I may just add, that the defects in the procedure could also have had an impact on the substantive findings and therefore, that should also be taken into account in awarding the compensation.

The arbitrator also held that it was necessary to call the chairperson of the appeal hearing to testify at the arbitration in order to refute the allegations of bias. This was not done and therefore the proceedings were not proved to be in accordance with fairness. In the normal circumstances where bias is found, it is usually based on a perception and if the first respondent had justifiably had such a perception the proceeding are deemed to have been unfair.

The first respondent was thus entitled compensation. Before I return to that question, I wish to deal with the question of condonation.

<u>Condonation</u>

It was suggested that because this matter was dealt with in terms of the Arbitration Act that different considerations should apply whether to grant condonation or not.

In my view, all condonation applications for a delay in time for the filing of applications and the like, should be dealt with in the manner suggested in *Melane v Santam Insurance Co Ltd 1962(4) SA 531 AD* wherein it was held that what a court when granting condonation should take into account the degree of lateness, the explanation for the delay and the prospects for success. In this case the degree of lateness was negligible in that it was three days. The prospects of success would to

some extent appear from the judgment herein and the explanation for the delay was acceptable. Therefore condonation for the late filing of this application is granted.

I now return to the question of compensation.

Compensation

The arbitrator made no attempt to justify how the substantial compensation award, equal to 12 months' salary was arrived at, and that indeed calls for an explanation. The first respondent used a business card for buying personal goods to the amount of at least R1 000,00 for herself with the applicant's money. She knew that her conduct was irresponsible. Even though she reported herself to Ms Singh she continued to use the card and never, until the arbitration hearing, made any attempt of repaying it. By granting such an employee compensation equal to 12 months' salary is indeed rewarding her for misconduct.

In the absence of any rational justification for the award, I must accept that the arbitrator did not exercise her discretion in a judicial manner, or at all, and the award ought to be set aside on this ground.

In my view it would be a waste of time and effort to remit the matter to the Bargaining Council to determine the question of compensation afresh. I believe I have been appraised of sufficient facts to substitute the arbitrator's award with my own. I take into account the following factors:

(1) The first respondent found new employment five months after her dismissal, albeit it at lesser remuneration.

(2) The amount spent by her with the applicant's business card will apparently be set off against the award made.

(3) I do believe that the conduct of the chairpersons in both the disciplinary enquiry and the appeal invites a certain measure of censure.

In my view compensation in an amount equal to six months salary will meet the case fairly.

In the circumstances I make the following order:

The award of the third respondent is hereby set aside and substituted with the following:

"1. The applicant is to pay the first respondent compensation equal to six

months' salary."

I decline to make any costs order as the applicant was only partially successful and since I have effectively halved the compensation awarded it would be unfair to make a cost order against either party.

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E. REVELAS

DATE OF HEARING:	23 February 2005
DATE OF JUDGMENT:	24 February 2005
APPLICANT'S COUNSEL:	Adv Chris Orr
INSTRUCTED BY:	Bowman Gilfillan Inc.
RESPONDENT'S ATTORNEY:	Mr David Short