IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case NO: JR 2404/03

2005-10-24

In the matter between

AFROX LIMITED Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY 1st Respondent

ASHMINI SINGH 2nd Respondent

PETRUS JACOBUS VILJOEN 4th Respondent

JUDGMENT

REVELAS, J

[1] This is an application for the review of an award by the second respondent (Ashmini Singh NO) made in favour of the fourth respondent (Petrus Jacobus Viljoen).

[2] The second respondent ("the arbitrator") held that the dismissal of the fourth respondent ("Viljoen") by the applicant ("Afrox Limited") was procedurally and substantively unfair. The arbitration hearing was conducted under the auspices of the first respondent ("The National Bargaining Council for the Chemical Industry").

[3] The facts which gave rise to this matter were the following. On 13 February 2003 the fourth respondent ("Viljoen") was involved in an altercation with two employees of Gas and Lube, one of the applicant's larger clients. During the course of the altercation Viljoen exposed his buttocks to two of the employees of Gas & Lube. As a result of this escapade, disciplinary proceedings were instituted against Viljoen and a hearing was held on 26 February 2003.

[4] At the hearing Viljoen did not dispute that he exposed himself to the employees from Gas and Lube and claimed that he had been provoked to such a degree, that he did not think about what he was doing. It was the undisputed evidence before the chairperson of the disciplinary inquiry, that the applicant had, on the day before, reported the two employees of Gas and Lube in question, for breaching safety regulations. In what appeared to have been a revenge attack, they approached Viljoen and swore at him and an argument followed. Apparently the whole incident, during which he subsequently dropped his trousers and exposed his buttocks to them, was no more than five minutes in duration. The chairperson of the hearing found Viljoen guilty of misconduct and dismissed him.

[5] Viljoen then referred a dispute about an unfair dismissal to the National Bargaining Council for the Chemical Industry ("the Council") and subsequently the arbitrator arbitrated the dispute.

[6] In her award, the arbitrator found that there were several procedural irregularities in the disciplinary hearing. She firstly found that the inquiry was fatally flawed because, although the chairperson commenced the inquiry in an objective and impartial manner, he later began interrogating the applicant about the implications of his actions. Secondly, she found that the chairperson appeared to have arrived at a decision prior to having heard the summation or closing arguments of the parties. She also based the conclusion upon reading some of the questions posed by the chairperson. (A transcript of the entire proceedings was available to the arbitrator at the arbitration hearing.) Thirdly, the arbitrator found that after having delivered a guilty finding, the chairperson further failed to ask the applicant and Viljoen as to what sanction they would recommend. Thus, she found that Viljoen was not given the opportunity to plead for a lesser sanction than dismissal. She held that whilst the aforesaid might be minor infringements, the most striking problem with the inquiry was the fact that the applicant was not afforded the opportunity to cross-examine the applicant's witnesses, namely the two employees of Gas and Lube.

[7] Although the two employees of Gas and Lube had made a complaint against Viljoen, they nonetheless did not testify at the hearing or at the arbitration hearing. Consequently no proper cross-examination was conducted.

[8] The applicant argued that it would have served no purpose to call these two witnesses and that the arbitrator's criticism in this

regard was irrational, since their testimony would only have weakened Viljoen's case.

[9] In my view, the irrationality in this regard does not lie at the door of the arbitrator, but rather at that of the applicant. Cross-examination is fundamental, and this argument overlooks the fact that it was undisputed at the disciplinary hearing that Viljoen, was very much provoked and that the two employees acted out of revenge. Cross-examination of them could have led to establishing serious mitigating factors, which could have prevented the dismissal. On the other hand, it is quite probable that their evidence could have bolstered the type of facts which would render the sanction of dismissal, appropriate. The fact that the latter was a possibility, does not mean cross-examination should be disallowed. Such reasoning is irrational.

[10] A further complaint levelled against the arbitrator is that in this instance she wrongly interpreted the case of *Metro Cash & Carry Ltd v Le Roux NO & Others* [1999] 4 BLLR 351 (LC). In that matter an employee had assaulted a customer, after the customer had accused the employee of shortages, had sworn at him and slapped him. He was subsequently dismissed and a CCMA commissioner stated as follows in his award:

> **"In considering how the employee should have reacted to the situation, the employee's action should be considered in a very realistic manner. Certainly the employee was under an obligation to treat all customers courteously, even when the behaviour of certain customers left much to be desired. Undoubtedly it is fair to expect of employees to attempt to minimise conflict with customers, even if that means having to withdraw from an argument despite being in the right. It may also be that it was ill**

advised of the employee not to withdraw from the situation at the earliest possible opportunity. However, that is not the primary question. How should the employee have reacted to being slapped through the face? It is difficult to see how anyone would have been able to refrain from retaliating in self-defence. It is similarly difficult to see how the incident could have ended there and then, given that the parties grabbed each other and fell on the floor. It seems excessive for the employee to have kicked Ms Ncgobo (customer) and in doing so (only) he exceeded the boundaries of self-defence. On the whole, however, I find that the actions of the employee should be approached with due appreciation of the extreme provocation on the side of Ms Ncgobo."

"Against the background of that evaluation of the facts, I am of the view that the sanction of dismissal was excessive. I hasten to point out that I am by no means seeking to lay down the general rule in terms of which assault on customers or fellow employees (or anyone else for that matter) should be approached as something other than a dismissable offence. There would have to be very compelling circumstances to justify departure from that approach. Such circumstances are present in the present matter."

[11] The employee in the *Metro Cash* matter was re-instated, but not with full retrospectivity, as it was held that the employee ought to [be penalized in this manner] for his actions. The award was then taken on review to the Labour Court where the learned judge at page 354 held as follows:

> **"In view of the fact that there was provocation in the present matter and in view of the fact that the arbitrator had warned himself that, as a general rule, assault will be held to be a dismissable offence, and in view of the fact that the arbitrator also sought to express his disdain for the actions of the employee and held it to be a dismissable offence, and in view of the fact that the arbitrator also sought to express his disdain for the actions of the employee by reinstating him from only a later date, I cannot find that the award is not justifiable in relation to the reasons given for it. In the event the award will stand and the application is dismissed with costs."**

[12] The arbitrator held that this matter is distinguishable from the *Metro Cash* case in that the applicant did not physically assault the customers, as the employee in that matter did. The arbitrator was of the view that Viljoen's actions were not as harmful to the applicant as that of the employee in the *Metro Cash* matter. She also found that if the chairman of the disciplinary inquiry had conducted the hearing in a fair manner, and had probed into the

provocation issue, he would in all probability have realised that it was indeed a strong mitigating factor. Viljoen did during the inquiry, and at the arbitration hearing, state that he had not been thinking clearly as he had been consumed with anger. He acknowledged that he was aware of the fact that his actions were wrong and he displayed considerable remorse.

[13] The arbitrator stated that even though she was reluctant to interfere with a sanction imposed by an employer, as she believed businesses should run with "as little outside interference as possible", the facts of this case called for interference. She commented that she was well aware of the judgments in the cases *Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC) and *County Fair Foods (Pty) Ltd v CCMA & Others* [1999] 11 BLLR 1117 (LAC), where the labour Appeal Court warned against such interference. However, she believed that if the inquiry was conducted in a fair manner, the chairperson would have arrived at a different sanction. She did not find Viljoen's behaviour acceptable. As a matter of fact, she also found it unacceptable behaviour. She, however, believed that dismissal was not the appropriate sanction.

[14] She then held that the dismissal was procedurally and substantively unfair. She ordered the respondent to retrospectively reinstate Viljoen only as of 1 June 2003. He is thus penalized with a loss of wages for the months March, April and May 2003, as a disciplinary measure against indecent exposure. The reinstatement is to take place on or before 25

November 2003. She further ordered that Viljoen should receive a final written warning valid for 12 months, commencing on 25 November 2003.

[15] In the fourth paragraph of her award the arbitrator ordered the respondent to pay Viljoen compensation equivalent to six months' wages for the months June to November 2003 in the amount of R27 340,00 less the relevant tax deductions.

[16] The aforesaid order contained in paragraph 4 (four) of the award, is clearly wrong. Section 193(1) of the Labour Relations Act 66 of 1995, as amended, provides that compensation cannot be awarded in addition to reinstatement. Therefore that part (paragraph 4 of the arbitrator's award) should be deleted.

[17] The award is a well reasoned award which takes due account of all the evidence which was led before the arbitrator. The company called only one witness and that was the applicant's branch services manager, Mr Van der Merwe.

[18] He also testified about an incident which had taken place between the applicant and a customer from Vaalmed at a previous occasion which had resolved itself. That was about a conflict with a co-employee called Quinton Colburn. Here it is of further note that Quinton Colburn was the person who attended to Viljoen's unsuccessful appeal in the present matter. In my view that was a further serious irregularity which the arbitrator was bound to take into account, and if she did not, I most certainly do.

[19] The representatives on behalf of Viljoen and Solidarity argued that a stricter test should be applied to this review than in other cases and that I should be led by the test as set out in section 145 of the Labour Relations Act. At this stage I may just say that the appropriate test in a review application of this kind, is to establish whether the arbitrator had rationally applied her mind to the evidence before her. She did. Whereas the conduct complained of is most certainly serious, it is not dismissible conduct *per se,* in all circumstances. The arbitrator cannot be faulted for taking the surrounding circumstances into account, namely the provocation and the evidence which was led regarding the revenge motive of the two employees in question.

[20] Furthermore, one must also look at the nature of the charge against the applicant. He had been charged in terms of the applicant's disciplinary code, Rule 14, which reads:

> **"Any deliberate action which does or has potential to disrupt industrial relations between management and employees, individuals and groups, for example abusive language, in this case towards a customer, abusive language and obscene behaviour."**

[21] He was found guilty of obscene behaviour only. There was no evidence that the relationship between the applicant and its client, Gas and Lube, was disturbed by the incident. There was also no indication that the incident in question destroyed the relationship of trust between the applicant and Viljoen. There is

no evidence, further, that he would not be able to perform his duties as before.

[22] In my view the applicant has not put forward a cogent case which could persuade me to interfere with the arbitrator's award, in so far as the substantive and procedural fairness of the dismissal is concerned.

[23] However, I wish to interfere with her award in one respect, and that is to delete paragraph 4 therefrom, so that it accords with the arbitrator's powers as conferred upon her by the Labour Relations Act.

[24] Consequently, I make the following order:

1. The application for review is dismissed with costs; and

2. Paragraph 4 of the arbitrator's award should be deleted there from.

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Judge Elna Revelas
Judge of the Labour Court

Date of hearing: 21 October 2005
Date of Judgment: 24 October 2005

On behalf of the applicant:

Webber Wentzel Bowens Attorneys

On behalf of the respondents:
Serfontein Viljoen & Swart Attorneys