

IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Reportable

CASE NUMBER: JR469/09

In the matter between:

FAIRY TALES BOUTIQUE t/a BABY CITY

CENTURION

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

**COMMISSIONER L DREYER (cited in her
capacity as Commissioner of the Commission**

for Conciliation Mediation and Arbitration)

Second Respondent

WINNIE SITHOLE

Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant seeks an order

- a. Reviewing and setting aside, in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (“the LRA”), the rescission ruling of the second respondent (“the commissioner”) under case number GATW 1604/08 dated 31 January 2009.

- b. Reviewing and setting aside or correcting, in terms of section 145 of the LRA, an arbitration award dated 31 January 2009, issued by the commissioner under case number GATW 1604-08, and in terms of which she found that the third respondent had been unfairly dismissed and ordered the applicant to compensate her in the sum of R35 400-00, which is equivalent to 12 month's salary.

[2] After hearing the parties on 5 August 2010 I made an *ex tempore* order dismissing the review with costs. These are my reasons.

Background facts

[3] The third respondent commenced employment with the applicant on 17 March 2001 as a cashier. At the date of her dismissal she earned R2950-00 per month. On 5 February 2008 she received news that her mother-in-law had passed away and approached her immediate superior, Ragani Chetty ("Chetty") for leave in order to arrange the funeral. She was denied leave on the basis that she had exhausted all her family responsibility leave and was required her to be present for stock-taking at the applicant that weekend. The applicant's further reason for denying her family responsibility leave was that, in its view, the provision for such leave in the Basic Conditions of Employment Act 75 of 1996 ("the BCEA"), did not extend to a parent-in-law. The third respondent informed Chetty that she would nevertheless not be at work for the next few days. She was responsible for the care of her mother-in-law and proceeded to make the arrangements for the funeral (which took place on Saturday 9 February) and also conducted the post-funeral rituals on the Sunday. She returned to work on Monday 11 February and was issued with a notice to attend a disciplinary enquiry. At the enquiry on 13 February 2008 she was dismissed on a charge of gross insubordination.

[4] The third respondent's disciplinary record reflects eight written warnings for *inter alia*, late coming and till mistakes, the final warning having been issued on 21 September 2007.

[5] The third respondent referred a dispute to the first respondent and a conciliation was conducted on 4 March 2008. Thereafter an arbitration was held and a default award was granted by Commissioner Siavhe ordering the applicant to pay the third respondent the sum of R17820-00, being 6 months' salary as compensation

for her unfair dismissal.

[6] On 27 June 2008 the applicant received the default arbitration award and brought a rescission application on the grounds that the award had been erroneously made in its absence since it had not been advised of the set down of the arbitration. On 17 November 2008 Commissioner Maree rescinded the award and proceeded to hear the merits. Since the third respondent was not present Commissioner Maree dismissed her claim and issued a ruling to this effect (“the dismissal ruling”).

[7] The third respondent, unaware of the dismissal ruling, approached the first respondent to enquire about the progress of her matter. She was advised of the dismissal ruling and since she had no knowledge of the set down of the arbitration, she approached a senior commissioner at the first respondent (Commissioner Mohala) to seek re-enrolment of the matter. Commissioner Mohala appears to have investigated the matter and concluded that no notice of set down was sent to the third respondent.

[8] The matter was then re-enrolled for arbitration before the second respondent. At the commencement of the matter she rescinded the dismissal ruling and proceeded to hear the merits of the claim.

Grounds for review

[9] Mr Levin, appearing for the applicant, submitted as follows in respect of the grounds for reviewing the decision to rescind the dismissal ruling:

- a) The commissioner committed a gross irregularity in her conduct of the proceedings when she failed to inform the third respondent that no formal application for rescission had been made to her in compliance with rule 31 (2) of the Rules for the Conduct of Proceedings before the CCMA;
- b) The commissioner failed to provide a reasonable explanation for not requiring a formal rescission application from the third respondent;
- c) The commissioner exceeded her powers in that she did not allow parties to make formal representations at the arbitration on the basis for rescission and merely rescinded the award thereby disregarding the applicant’s right to

oppose such application;

- d) The third respondent had not proven that she had a reasonable explanation for not attending the previous arbitration and that she had good prospects of success. The failure by the second respondent to take this into consideration constitutes a gross irregularity.

[10] On the merits Mr Levin made the following submissions in amplification of the grounds for review:

- a) The commissioner unjustifiably and/incorrectly implied and/or committed a gross irregularity when she found that *“the applicant was indeed dismissed for attending her mother-in-law’s funeral. Any employee is entitled to disobey an unreasonable instruction”*. This disregards the fact that the third respondent was clearly instructed to attend work in preparation for stock take and she failed to obey such instruction. Gross insubordination is regarded as a serious offence and should not be dealt with in such a light manner as the commissioner had done. Furthermore, it was submitted that an employee is only entitled to disobey an unlawful instruction and one she is not qualified to perform. Under the circumstances it was not unlawful or unreasonable to instruct her to attend to her normal duties. Stock-taking is an annual event at the applicant and all employees are aware that it is compulsory to attend. Not only had the third respondent exhausted her family responsibility leave but she was told that it was not permitted to take leave for the death of her mother-in-law. Moreover although the funeral was held on the Saturday she failed to attend work on the Sunday without a valid reason.
- b) The commissioner unjustifiably and / incorrectly implied and / or committed a gross irregularity when she found that *“[i]t was entirely unreasonable to reject her request especially after her husband phoned and further explained the situation”*. In this regard it was submitted that the commissioner was biased towards the third respondent in that the evidence was that the third respondent’s husband had called merely to inform Chetty that she would be going to the bank to sign documents. He did not explain that she would be attending the funeral despite the applicant’s instructions and would only return to work on the Monday after the funeral.
- c) The commissioner unjustifiably and / or incorrectly implied and / or committed a gross irregularity when she found the dismissal to have been substantively unfair. The same standard of discipline needs to be applied to all employees and other employees who fail to attend work and carry out lawful instructions are similarly disciplined by the applicant.

- d) The commissioner unjustifiably and / or incorrectly implied and / or committed a gross irregularity when she found that the dismissal was procedurally unfair in that her reasoning was that the third respondent had been prevented by Chetty from calling a representative to the enquiry. The chair of the enquiry had asked her whether she would require assistance to which she responded in the negative. Moreover, the third respondent had never raised a procedural concern and Commissioner Siavhe (in the rescinded award) had found the dismissal, in the absence of the applicant, to be procedurally fair but awarded only 6 months' compensation. The commissioner's finding is therefore based on incorrect facts.
- e) The commissioner unjustifiably and / or incorrectly implied and / or committed a gross irregularity when she found that the maximum compensation was justified. It was submitted that such an award is excessive under the circumstances and she moreover failed to furnish reasons for it.

[11] Mr Levin therefore submitted that the commissioner had grossly misconducted herself in making such an inappropriate award. She had not judiciously applied her mind in coming to her findings and did not take the seriousness of the offence into consideration, thereby arriving at a decision that a reasonable decision maker could not reach in terms of the *Sidumo* test (see *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC)) as applied by the Labour Appeal Court in *Phalaborwa Mining Co Ltd v Cheetham and others* (2008) 29 ILJ 306 (LAC).

The arbitration award

[12] The award sets out a comprehensive summary of the evidence before the commissioner. In essence the evidence presented to the commissioner was as follows:

- a) The respondent's National Operations Manager, Grant Caminsky, testified that the applicant was denied family responsibility leave as she had exhausted her family responsibility leave and that in any event the BCEA did not provide for leave in respect of parents-in-law. The applicant would not have denied her leave for the day of the funeral, which was on Saturday 9 February 2008, and she had only been dismissed for taking leave from 7 to 10 February, which was the annual stock-taking weekend and was a critical time for the applicant.
- b) The chair of the disciplinary enquiry, Clifford Levin (who is also the applicant's

attorney of record *in casu*), testified that a proper disciplinary enquiry was held. The third respondent did not have a representative but assured him that she “*could stand for herself*”. Attendance was vital at the stock-taking and extra staff had been brought in from other branches to assist. The Sunday of the stock-taking weekend was the most crucial day. The third respondent had apologised for her conduct but the trust relationship had irretrievably broken down and he considered no sanction other than dismissal to have been justified. The applicant had applied its rules consistently and fairly and had considered the third respondent’s conduct to constitute gross insubordination. He also took into account the fact that the third respondent had numerous previous warnings on her record.

- c) Chetty had been the third respondent’s manager for about 3 or 4 years. She testified that when the third respondent requested leave on 6 February she discussed the matter with Caminsky and then advised her that family responsibility leave did not apply to in-laws and moreover that her attendance at the stock-taking weekend was important. The following day the third respondent’s husband called to advise that she had to go to the bank to sign papers. The third respondent only returned to work on Monday and brought a copy of the death certificate. Attendance of all staff at the stock-taking and the preceding days of preparation was compulsory. She had brought in 10 staff from other branches to assist her on the Sunday. The third respondent was disrespectful towards her and she would not be able to work with her again. She admitted that she had not permitted the third respondent’s representative (Frieda) to attend the enquiry because she had assumed that she would only be required at a later stage.

- d) The applicant’s case was that when she informed Chetty of the funeral the latter undertook to contact Caminsky and revert to her. When she enquired again later that day Chetty informed her that her request for leave had been denied on the grounds that she had no family responsibility leave due to her. She requested annual leave or unpaid leave as she had 23 days’ annual leave to her credit, but this too was refused. She went home and informed her husband who undertook to call Chetty to explain the situation. She took care of her mother in law and was the primary householder, and as such had to attend to all the funeral arrangements as well as the post-funeral rituals, which included feeding mourners and cleaning the house. When she handed in a copy of the death certificate on the Monday she was given notice to attend a disciplinary enquiry. She had arranged with Frieda to assist her, and when she was called in to the enquiry she asked Chetty to call Frieda but Chetty informed her that Frieda was busy. The enquiry proceeded and she explained the tradition of funerals in her community and what her duties as a daughter were. Chetty’s evidence was that she could no longer trust her as she did not

respect her. She was informed of her dismissal at the end of the enquiry but was never issued with a notice of dismissal. This was her first disciplinary enquiry and she had been made to feel like a thief. It was put to her in cross examination that the applicant's policy required her to inform them personally if she was not coming to work, and that she had not complied with the policy when she arranged for her husband to call her employer. Her evidence was that he had offered to call Chetty to explain the nature of the funeral and the obligations that she was required to perform. She explained the type of rituals that followed the funeral and which had to be performed on the Sunday. She also testified that when Chetty had refused her request for leave she had informed Chetty that she would not be coming to work. Under the circumstances she was afraid of returning to work and sought compensation instead of reinstatement as a remedy for her unfair dismissal.

[13] The commissioner then proceeded to set out her findings. She rejected the applicant's version that the third respondent had been dismissed for disobeying an instruction, but held that in any event an employee is entitled to disobey an unreasonable instruction. This was particularly so in circumstances where *"there was a family emergency and the applicant was needed, according to her custom, to make the myriad of arrangements associated with an African funeral"*. She accordingly concluded that the third respondent had not been dismissed for gross insubordination, but for taking (unauthorised) leave to attend the funeral. This conduct was justified given that the primary responsibility for making all the arrangements fell to her. The commissioner found that whilst it may be that the third respondent was not eligible for family responsibility leave, this did not prevent the applicant from permitting her to take annual leave or unpaid leave (or offering this if she had not asked for it herself). In the circumstances it had been entirely unreasonable to reject her request especially after her husband phoned and further explained the situation¹. She found further that the applicant had not been unduly inconvenienced by the third respondent's failure to attend the stock-taking that weekend as it was common practice that employees from other stores would be brought in to assist. Indeed the applicant's evidence was that 12 employees had been brought in from other stores to assist. Moreover, Chetty would have been aware as from the Wednesday preceding the stock-taking that the third respondent would not be present for the weekend and she had sufficient time to arrange for further assistance if this had been necessary.

1 Insofar as the applicant alleges that there was no evidence before the commissioner that he had provided an explanation for the third respondent's absence, it would appear that the commissioner rejected Chetty's evidence that the husband simply said she was going to the bank to sign papers, and accepted the third respondent's version that he offered to explain why her presence at home for the entire weekend was necessary.

[14] The commissioner therefore found that the applicant's conduct displayed "*a callous disregard for the cultural practices of black employees and the family circumstances of the applicant*". She also rejected the evidence of Levin that he took her disciplinary record into account, finding that the warnings were irrelevant to the current offence with which she had been charged, and all but one would have expired and should have been expunged from her record. Moreover, even if the third respondent had a current warning for absence without leave, in the circumstances her dismissal would still have been unfair. There was no evidence that mitigating circumstances (including that she was the sole breadwinner of a family of four) had been considered by Levin, and she found the dismissal to be substantively unfair.

[15] In regard to procedural fairness the commissioner found, based on Chetty's admission and Levin's failure to ensure that the third respondent was represented, that the decision to dismiss was procedurally unfair. Levin's testimony was that "[i] *did put to Winnie does she require somebody to represent her and I made it in simple English or do you want to represent yourself, stand for yourself, she indicated that she wanted to represent herself as she is doing today*".

[16] The commissioner then proceeded to award the third respondent maximum compensation of 12 months' remuneration, commenting as she did that the applicant should have regard to the Code of Good Practice: Dismissal as well as *Sidumo* in which the Constitutional Court clearly set out the requirements for a fair dismissal.

Analysis of evidence and submissions

[17] On the first ground of review it would appear that the second respondent exercised her discretion under s 144 of the LRA, as Mr Chaane correctly submitted on behalf of the third respondent, to rescind the dismissal ruling. She would have been entitled to do so of her own accord even in the absence of submissions from the parties. Her decision to proceed with the arbitration *de novo* cannot be said to have been prejudicial or to constitute an irregularity given that both parties were present.

[18] In regard to the review of the procedural fairness finding it is incontrovertible that the third respondent was denied the right to representation at her disciplinary enquiry. Chetty's concession in this regard would on its own have been dispositive of

the matter, although it is further self evident from the fact that the enquiry was chaired by the applicant's attorney and the applicant was represented by a senior manager. In his submissions *in casu* Mr Levin sought to persuade the court that the third respondent had refused representation in that when he had asked her if she wanted to be represented she had answered "no". This is a somewhat disingenuous submission and is not borne out by the record, and which he correctly retracted.

[19] In regard to substantive fairness neither the approach adopted by the commissioner nor her conclusion can be faulted. She was justified in finding that in the circumstances an attempt should have been made by the applicant to accommodate the needs of the third respondent. In my view the evidence presented established that the applicant had displayed a callous disregard for the third respondent's personal circumstances. There was no insinuation that the request for leave was not genuine or that the third respondent had abused the applicant's leave policy. The submission that she was indispensable to the stock-taking and that her absence caused prejudice to the applicant was further correctly held to be unsustainable on the evidence. The commissioner accordingly complied with the obligations of a decision-maker post-*Sidumo* in respect of both the conduct of the proceedings and the outcome.

[20] The commissioner's award reflects a circumspect and analytical approach to the evidence, and her conclusion is justified and reasonable. It is based on a careful consideration of all the evidence and submissions presented, and the submission that it was tainted by misconduct or gross irregularity in her having regard to extraneous evidence or failing to apply her mind to relevant evidence cannot be sustained. Moreover there is no factual substantiation for the submission that the commissioner was biased, and insofar as the applicant sought to rely on the finding of Commissioner Siavhe as a benchmark, his award and the proceedings before him have no relevance *in casu*. In considering the arbitration proceedings and the award in the light of the *Sidumo* test therefore, it is my view that the review is manifestly without merit and must fail.

[21] In the premises, I make the following order:

The application for review is dismissed, with costs

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing and ex tempore order: 5 August 2010

Date of reasons: 20 August 2010

Appearance:

For the Applicant: Mr C Levin, Clifford Levin Attorneys

For the Third Respondent: Mr H Chaane, Gildenhuys Lessing Malatji Inc.