REPUBLIC OF SOUTH AFRICA

Reportable/of interest to judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C309/2011

In the matter between:

PLASTICWRAP, A DIVISION OF CTP LIMITED	**Applicant**
and	
THE STATUTORY COUNCIL FOR THE PRINTING,	
NEWSPAPER AND PACKAGING INDUSTRY	**1ST Respondent**
VAN ROOYEN, MARIEKE N.O.	**2ND Respondent**
PARENZEE, ADRIAN	**3RD Respondent**

Heard: 15 February 2012

Delivered:

Summary: Review in terms of section 145 - incorrect approach to award of compensation in terms of section 194(1) for substantively unfair dismissal.

JUDGMENT

RABKIN-NAICKER J

Introduction

[1] This is an application in terms of section 145 of the LRA in which the applicant company seeks the reviewing and/or setting aside of the arbitration award made by the second respondent under case number PNP11507.

[2] Third respondent (Parenzee) commenced employment with the company in 1989 as a dispatch clerk, and over a period of 20 years rose to become operations director. At the time of his dismissal he was earning a basic salary of R 62,000,00 a month.

[3] Three charges of alleged gross misconduct were levelled against Parenzee. He was found guilty of these at a disciplinary hearing and dismissed as a result. In the arbitration proceedings, second respondent found him not guilty of all but the second charge.

[4] The review application before me was confined to a challenge to the finding that the sanction of dismissal imposed on Parenzee, in respect of the second charge against him, was too harsh a sanction. Further, the company submitted that second respondent's award of 8 months compensation stands to be set aside. The second charge against Parenzee read as follows:

> "Gross misconduct: despite you been placed on a final written warning for abuse of power, intimidation and verbal abuse you have once again allegedly committed similar acts in as much as that on the morning of 23 April in the presence of your subordinates you once again used foul language in total disregard of your final written warning."

[5] The charge was laid in the wake of an instruction by a member of the company's new top management team, Mr Timothy Holden, (Holden), to the company's attorney to investigate the alleged disenchantment of certain employees with management. The attorney was given the names of approximately 12 employees to interview. He conducted interviews with them on the 15th and 16th of March 2010.

[6] The common theme which emerged during the interviews according to his evidence at the arbitration, was that the workforce was fearful of management and that the management style was abusive in that employees were shouted and sworn at. Parenzee was implicated in this management style.

[7] On the 18 March 2010, Holden addressed a letter to Parenzee dealing with this problem. Second respondent found that the letter constituted a final written warning. The letter stated that the use of abusive and vulgar language in the workplace and bullying and aggressive management was not condoned and must stop with immediate effect. The letter emphasised that in the event of a breach of this instruction, immediate disciplinary measures would be taken and "no further forms of corrective measures will be implemented". Parenzee called his subordinates together and advised them that there would be no further use of abusive or foul language and that "everybody would wipe the slate clean".

[8] On the 22 April 2010, Parenzee's subordinates were involved in a trial run for the company's Coca-Cola account and it was not up to standard. The next day he called the production team together. What he said exactly during the meeting was in dispute in the arbitration proceedings, as was the issue as to whether he directed his words at one particular employee or at the team in general. However, it was common cause that he was very angry and he admitted that he swore.

[9] On the next day, Parenzee reported to the managing director (Seale) that he had lost his cool and he had shouted at his subordinates. Thereafter the managing director received complaints and eight employees made statements. In her award, the second respondent recorded that Parenzee admitted using foul language and told the production team: "he will not be f-ed over for other people's f-ups". Second respondent states in her Award:

> " when a senior manager calls a meeting of subordinates when he rants and raves at them as a group and swears while doing it, surely this in itself is sufficient to cause offence, whether he swore at any particular employee or not. I therefore conclude that the applicant is guilty of charge two."

[10] As regards her finding that despite Parenzee's guilt, dismissal was too harsh a sanction, the second respondent had this to say in the award:

> "It is relevant that the applicant gave his full cooperation when he was asked by Seal to have a meeting with his subordinates about the letter

he received from Holden; it could not have been easy for him. It is also relevant that Swartz testified the applicant was justifiably angry about the Coke trial run. Without having to make any findings on whether the applicant's complaints of him having been marginalised after Williams' resignation were justified, I can accept the applicant would at the time have been under more pressure than normal due to him having to forge relationships with the new management team. It is also relevant that the use of foul language had been a long-standing practice in the workplace and that changing a long-standing habit may not happen overnight. This was the first incident in approximately a month after Holden's letter.

Given the above factors, the applicant's long years of service and his clean disciplinary record, I conclude that the sanction of dismissal for this charge in these circumstances is a decision that is too harsh and must therefore be set aside."

[11] Having found that the applicant was not guilty of the other two charges preferred against him, second respondent approached the remedy to be awarded as follows:

"As remedy the applicant asked not to be reinstated; this leaves compensation as the only other available remedy. Compensation must be just and equitable in all the circumstances and may not exceed the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal (section 194 of the LRA). In deciding on an appropriate amount of compensation to award I have taken the applicant's length of service (20 years) into consideration, his unblemished disciplinary record as well as his personal circumstances. The applicant's baby daughter was born about a month before his dismissal. The applicant was the family's breadwinner as his partner was retrenched from her job shortly before the birth of their daughter. The applicant has a son from a previous marriage who has special needs related to cerebral paulsy for whom he pays maintenance. The applicant has a heavily bonded home. The applicant found an alternative job soon after his dismissal in June 2010, but at a much lesser salary. He now earns R22,125.00 gross and R17,160.22 after deductions with no pension, medical aid or other benefits……

> I have also considered that the applicant is guilty of charge two but that dismissal was an unfair sanction.
>
> In the circumstances I am of the view it is fair and equitable to award the applicant compensation equal to 8 months' salary."

Evaluation

[12] The company's grounds for submitting the award is reviewable can be encapsulated as follows. First, the finding that Parenzee had been under pressure with the introduction of a new management team, was not a relevant consideration in determining the fairness of the sanction of dismissal. Secondly, that despite concluding that Parentzee was under a final written warning issued a month before the incident in question, the finding that dismissal was too harsh a sanction. The company also takes issue with the quantum of compensation awarded in the circumstances.

[13] For the company, it was submitted that the second respondent paid no heed to the ramifications facing the company if it decided to ignore the final written warning. Reference was made to the matter of NUM v Greenside Colliery [1995] 4 BLLR 29 (LAC) in which Nugent J (as he then was) held at 31B- C that:

> "A final warning as contemplated by the disciplinary code is precisely what its name suggests. It is a warning to the employee that he will receive no further warnings but will be dismissed if he again transgresses. The employer is of course not bound to carry out the threat, but an employee can have little grant for complaint if he chooses to do so. To hold otherwise would be to equate a final warning with any other warning, which clearly it is not."

[14] The test that this court must employ as to the finding of the Second Respondent that dismissal was too harsh in these circumstances, is that set out

in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others[1]:in which the court held :

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
>
> To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

[15] An important evaluation of the Sidumo judgment and its implications for the Labour Court's powers of review is contained in the judgment of Zondo JP (as he then was) in the case of Fidelity Cash Management Service[2] as follows:

> > "What is the difference between the approach enunciated in Carephone and that enunciated in Sidumo with regard to the grounds of review set out in s 145 of the Act? The difference seems to me to be twofold. Firstly, Carephone sought to construe s 145 so as to bring it in line with a constitutional imperative at the time which was to the effect that an administrative action had to be justifiable in relation to the reasons given for it, whereas

1 (2007) 28 ILJ 2405 (CC) at paragraphs 77-79

2 Fidelity Cash Management Service v CCMA & others (2008) 29 ILJ 964 (LAC) at para 102

> Sidumo seeks to construe s 145 so as to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. It seems to me that, even if there may have been a debate under Carephone and prior to Sidumo on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

[16] I am satisfied that Second Respondent took relevant considerations into account in her decision regarding the fairness of the dismissal, when she considered the pressure under which Parenzee was put by the new management team. His evidence to this effect in the disciplinary proceedings includes his testimony that he had considered resignation on two occasions due to this pressure. In addition Parentzee's contriteness after his outburst, his long service and unblemished disciplinary record are all factors which would have contributed to the value judgment made by the second respondent.

[17] However Second Respondent failed to rely on a valid reason as to why,

despite the issuing of a letter in the nature of a final written warning, she could still have found dismissal to have been an unfair sanction. In paragraph 79 of the Award she records that: "The Applicant testified he did not understand the letter to be a final written warning as the normal workplace procedures that precede written warnings were not followed. According to the applicant there was a company policy dealing with the correct procedures to be followed and this policy was also applicable to senior employees. It is trite that employers are expected to adhere to their own policies, but I was not given a copy of the policy referred to by the applicant and I am therefore am able to make any decisions about policy."

[18] It was put to the managing director of the company at the arbitration proceedings, that Parenzee: "…. will testify that the long-standing practice at the company was that final written warnings would only be issued after a formal disciplinary hearing had been held with the issuing of a notice to attend the hearing, a formal hearing taking place. It would not simply be a letter that would be sent from a member of the board of directors to an employee would you agree with me?" Seale merely replied: "I do not know the previous practice. I was not there." This reply amounts to a failure to dispute these allegations. Parenzee did indeed testify to this and further insisted, under cross-examination, that there was a relevant document on disciplinary process which had been drafted by the company's attorney and co-signed by Holden which applied to senior management. Taking this evidence into account I find that the company failed to establish that there would be ramifications to it and its disciplinary regime, if it failed to heed and act on the final written warning.

[19] In so far as the quantum of compensation awarded is concerned, section 194(1) of the LRA confers a wide discretion on arbitrators and judges when quantifying compensation. The Labour Appeal Court has considered how a reviewing court should deal with the discretion exercised by an arbitrator in terms of section 194(1) of the LRA, as follows[3]:

> "When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to

3 Kemp t/a Centralmed v Rawlings (2009) 30 ILJ 2677 (LAC) at para 55

> interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach."

[20] Given the factors taken into consideration by second respondent when awarding the amount of eight months compensation (more especially those concerning the bond on the employee's house, the health condition of one of his children and the need for him to pay maintenance for that child), it would appear that the second respondent adopted a wrong approach, blurring the distinction between the factors to be taken into account in exercising a discretion to award a specific quantum of compensation in terms of section 194(1) of the LRA, and those mitigating factors normally taken into consideration by a tribunal when it decides, having established guilt, on an appropriate penalty.

[21] As regards the determination that that an arbitrator or court makes in respect of compensation the Labour Appeal Court[4] had this to say:

> "The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act .The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good employee's loss and not to punish the employer. See M S M Brassey Commentary on the Labour Relations Act A8-155; also Ferodo (Pty) (Ltd) v De Ruiter (1993) 14ILJ 974 (LAC)".

[22] In the premises this court does not consider the finding that the dismissal of Parenzee was substantively unfair susceptible to review. However, paragraphs 108,109 and 112 of the award stand to be set aside. It would not serve any purpose to send the matter back to First Respondent. I consider it fair and equitable given that Parenzee's remuneration is now much less and he does not have benefits as before, and taking into account that he was found guilty of the misconduct in question (the scope of the wrongful action of the employer is pertinent here), as well as the principle that compensation should not be regarded as punitive to a party, that he be awarded an amount equal to

4Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & Others (2007) 28 ILJ 2238 (LAC)

six months of his salary at the time of his dismissal. I do not regard it appropriate to order costs in this matter. In the result I make the following order:

Order

1. The application to review succeeds to the extent that paragraphs 108,109 and 112 of the Award are set aside and substituted with the following:

   1.1 "The Respondent is ordered to pay the Applicant an amount equal to 6 months' remuneration (R62 000 x 6 =R372,000)."

2. There is no order as to costs

Rabkin-Naicker J
Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:	Mr A Soldatos of Fluxmans Attorneys
THIRD RESPONDENT:	Adv. M. O'Sullivan instructed by Chennels Albertyn Attorneys