

SOUTH AFRICA / JUDGMENT

Mashigo v South African Airways (Pty) Ltd (JS488/12) [2014] ZALCJHB 366 (25 September 2014) [2014] ZALCJHB 366

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS488/12

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

Not

reportable

CASE

NO: JS 488/12

In

the matter between:

KGAPELETSO

VIOLET

MASHIGO

APPLICANT

and

SOUTH

AFRICAN AIRWAYS (PTY)

LTD

RESPONDENT

Date

of trial: 25 -28 August 2014

Heads

of argument submitted: 13 September 2014

Date

of judgment: 25 September 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is a referral in terms of Rule 6 of the Rules of this Court in which the applicant contends that she was dismissed for a reason that is automatically unfair. In particular, the applicant claims that she was dismissed by the respondent (SAA) because she played a leading role in the lodging of a grievance concerning conditions of employment and the later referral of a dispute to the CCMA. SAA on the other hand contends that the applicant was dismissed for misconduct, in particular, for fraudulent activity relating to the issuing of tickets.

The

facts

- [2] The applicant was employed by SAA in November 2000, as a consultant for Voyager, SAA's loyalty programme. During 2007, the administration of the Voyager programme was outsourced, and some of the Voyager consultants were absorbed into the ticket sales section of SAA's business. Although the applicant assumed responsibilities as a ticket sales agent, she was required to continue to discharge certain responsibilities in respect of Voyager-related functions.
- [3] The applicant and some of her colleagues took the view that the requirement that they continue to discharge Voyager-related

responsibilities in addition to their new duties was unfair. On 18 October 2008, a meeting was held with SAA management where this issue was discussed. Nothing materialised, and in September 2010, a memorandum outlining the employees' concerns was tabled. In this document, the employees expressed the view that they were not being fairly remunerated, given the additional functions that they had been obliged to assume. On 19 January 2011 the applicant and a number of her colleagues wrote a letter to SAA's chief executive officer in which they demanded that their grievances be addressed. There was no response to this letter. On 3 March 2011, the employees referred a dispute to the CCMA, contending that their terms and conditions of employment had been unilaterally amended by the respondent.

- [4] For present purposes, what is significant about these developments is the role played by the applicant. It is not disputed that she played a leading role in drafting correspondence and documentation, to the extent that the referral to the CCMA is reflected as a case concerning "Violet Mashigo and 64 others".
- [5] On 2 June 2011, at the conciliation meeting, the presiding commissioner directed that SAA undertake a job evaluation process. A study was conducted by Hay Consultants, which concluded that the applicant and her colleagues were correctly graded given the nature and

extent of their responsibilities, and that they were in fact overpaid in relation to market norms for the work that they performed. The applicant and some of her colleagues were not satisfied with this outcome and the matter was once again referred to the CCMA. On 18 October 2011, the CCMA enrolled the dispute for an arbitration hearing on 10 November 2011.

- [6] Parallel to this dispute, another series of events were running their course. During February 2011, the applicant was asked for information regarding the issuing of a ticket to a Mr. Ambrose Oguchukwu Nwabueze, a Nigerian national, after a complaint by a Voyager member resident in Brazil. In particular, the applicant was asked to respond to an allegation that she had issued the ticket to Nwabueze in the absence of a Voyager certificate. The matter was investigated by Mr. Rajah, a member of the respondent's

security department, who made an informal report to the applicant's immediate supervisor, Ms. Phumi Khumalo. It is not disputed that Khumalo was subsequently suspended and dismissed from SAA's employ and that the matter concerning the issuing of the ticket was initially at least, taken no further.

- [7] Ms. Choonara, the applicant's team leader, testified that during September 2011 she received what was referred to as an E & O debit in an amount of R 3900.00, in respect of a ticket issued by the applicant. She asked the applicant to explain the under recovery. Ultimately, an investigation was commissioned, conducted by Rajah. Rajah testified that he recalled the investigation that he had undertaken earlier that year and that he noticed that the same passenger was involved. He conducted a formal investigation and concluded that the applicant and Leboho had committed fraud, and that disciplinary action should be taken against them. The applicant was subsequently charged with inter alia fraud and after a disciplinary hearing, she was dismissed on 9 February 2012.
- [8] I do not intend for present purposes to repeat the content of Rajah's report, save to say that the applicant was identified as having committed misconduct in respect of three separate tickets, all issued to Nwabueze. The first was the ticket that had been the subject of earlier investigation. Rajah's investigation revealed that Leboho had activated the Voyager account of a Mr. Da Silva, resident in Rio de Janeiro, and that a withdrawal had been made from his account partially to fund a ticket issued to Nwabueze. Da Silva had not authorized the withdrawal. Rajah found that Leboho had issued Voyager certificates (using miles to Nwabueze's credit and those of Da Silva to make up the shortfall). In breach of SAA's policy and procedures, there was no written authorisation by Da Silva for the redemption, nor was there any record of an identity document. While Leboho had issued the redemption certificates, the ticket itself was issued by the applicant, two minutes after the redemption of the Voyager miles, but without the Voyager certificate number being inserted in the reservation. Rajah also found that during February 2011, Nwabueze had been listed as Leboho's beneficiary on the respondent's rebate travel benefits programme. Rajah drew the conclusion that in the light of the relationship between the applicant and Leboho and the proximity of the various transactions

related to the Voyager ticket, the two had colluded to defraud SAA in respect of the Voyager ticket.

- [9] The second ticket investigated by Rajah was issued by the applicant to Nwabueze on 14 January 2011. The documentary evidence attached to Rajah's report reveals that the applicant booked a T class fare for a flight from Johannesburg to Lagos in favour of Nwabueze, and an L class fare on the return leg. It is not disputed that these are references to different bucket fares, i.e. different classes of tickets with different prices. The G bucket fare is the cheapest fare. It is also not disputed that fares are fixed in respect of specific flights, and that ticketing sales agents are able, on enquiry, to access a fare table which reflects the fares in respect of each class. It is also not disputed that the booking was made by the applicant, using her unique user code, 8706VM. In short, what Rajah discovered (and this was confirmed by Choonara in her evidence) was that the applicant forced the system to charge the fare applicable to the G bucket although the ticket had been issued in respect of more expensive class. The prejudice to SAA is represented by the difference between the sale applicable to the G bucket and in this instance, the T and L buckets respectively.
- [10] The third ticket investigated by Rajah was issued by the applicant on 17 January 2011. The booking was made in favour of Nwabueze and made by the applicant, identified by her user code 8706VM. A V class fare was booked for the Johannesburg to Lagos leg, and a T class fare on the return leg of the flight. Rajah testified that the applicant manually forced a G class fare (the louse possible fare), using an override entry identified by the Fare Calculation Mode Indicator (FCMI3). Despite the fact that another agent, Desiree Kannemeyer, had issued the ticket, his investigation had absolved her of any wrongdoing – she had merely collected payment for the ticket and did not generate the impermissible fare.
- [11] Choonara's evidence regarding the timing of the disciplinary action against the applicant is obviously significant. As I have indicated, her undisputed testimony was that at the beginning of September 2011, she received what is referred to as an error and omissions debit (E & O debit) from SAA's Finance department. In this instance, the debit indicated an under recovery on a ticket as a result of the manual manipulation of a fare. Choonara explained the delay of about six months between the issuing of the ticket and the notice; the manner in which SAA collects revenue on its tickets involves a system of clearing by IATA in Geneva and results in discrepancies between fares charges and class flown being detected only sometime after the flight. Choonara reported the matter to the SAA's management which then commissioned Rajah's investigation.
- [12] The applicant's defence in relation to the issuing of the Voyager redemption certificates is that she simply issued the ticket on the basis of certificates issued by Leboho. Her defence to the allegations concerning the issuing of the tickets on 14 and 17 January 2011 (and her evidence in this court) was that the tickets were 'system generated' and that she was not in a position to manipulate the fares as alleged. Under cross examination, the applicant conceded that she was not aware of the FCMI code or what it meant, or why it appeared on each of the tickets.

[13] There was no evidence placed before the court to challenge the evidence by both Rajah and Choonara that the FCMI-3 code indicated

that the applicant had manually generated fares in contravention of established policies and procedures. The evidence by both Rajah and Choonara is that it was not possible that the tickets issued by the applicant were system generated. Their evidence was that in at least three different respects, the terms of the tickets issued and the audit established that there had been a manual override, in each case effected by the applicant. First, the code FCMI-3 indicates a manually issued fare. Second, the code FXP/L-GRTS indicates a manual override and the forcing of a G class fare. Thirdly, the *M* code indicates a manual override of the system. Rajah stated that he was not supposed by the applicant's assertion that she was unaware of any of the codes referred to. These were generally unknown to customer sales agents such as the applicant, and were used for audit purposes specifically to identify customer sales agents who forced fares instead of issuing tickets at the automatically generated fare, as they were required to do. As I have indicated, there is no basis to call this evidence into question.

Applicable principles

[14] An automatically unfair dismissal is identified by the reason that prompted the employer to dismiss the employee. Most employers are sufficiently astute to avoid dismissing an employee for a reason that is automatically unfair - matters such as the present, more often than not, concern a real and an apparent reason for dismissal. Here, the employee is dismissed for a reason that on the face of it is valid, but which serves to mask the true reason that is to be found amongst those listed as automatically unfair, or in which the automatically unfair reason played some significant role. The Court must assess the extent, if any, to which the automatically unfair reason played a role in the decision to dismiss the employee. This is ultimately a question of causation; a matter to be determined objectively, having regard to all of the relevant facts.

[15] While there are no specific statutory provisions relevant to the onus of proof, it is a well-established rule that there is an evidentiary burden on an applicant in a matter such as the present to adduce sufficient evidence to cast doubt on the reason proffered by the employer or, put another way, to raise a credible possibility that the reason for dismissal was automatically unfair. It then remains for the employer to show that the reason for dismissal is not one listed in s 187 as automatically unfair.

[16] In the present instance, despite the significant volume of evidence regarding the investigation initiated by SAA into the allegations of fraud against the applicant, it is not for the Court to decide whether the applicant is guilty of those charges. The investigation

and the disciplinary charges subsequently brought against the applicant are relevant only in as far as they might indicate (or not) that the true reason for dismissal was the applicant's misconduct.

[17] The evidence of Rajah and Choonara boils down to this - the Amadeus reservation and ticketing system records all manual interventions,

and reflects these by means of various codes. In the case of the tickets issued by the applicant on 14 and 17 January 2011, the codes reflected on the face of the ticket and the audit trail establish that the applicant overrode the system and charged the lowest possible fare in respect of each ticket, a fare that was not available in the ordinary course.

[18] In regard to the charge relating to the redemption of Voyager miles and the use of those miles to purchase a ticket for Nwabuezi, the applicant states that the certificates were redeemed by Leboho and that she simply issued the certificate. Both Rajah and Chonaara

testified that before issuing and printing the ticket, it was incumbent on the applicant to have checked that the redemption certificate numbers had been entered on the reservation. This the applicant patently failed to do. Rajah testified that he drew the

conclusion

of collusion between the applicant and Leboho based on his knowledge of their friendship, that they shared an office and more fundamentally, that the records reflected that the certificates were redeemed at 8: 11 and the ticket issued by the applicant at 8:13. This is by no means an unreasonable conclusion.

[19] Choonara's evidence was particularly relevant in relation to the applicant's averment that the investigation and

disciplinary proceedings against her were contrived. Choonara supported the applicant's campaign to have working conditions

reviewed following the outsourcing of the Voyager programme; indeed, she was part of the campaign, since she thought that the employees'

efforts would benefit team leaders. She contributed to the costs of engaging an attorney to represent the employees' interests. She testified that the campaign ran out of steam when it became apparent that the attorney was not getting the desired results, and that the review conducted by Hay Consulting had revealed that the employees were more than fairly remunerated. Choonara's sympathies lay with the applicant. She had no ulterior motive to testify, as she did, that the disciplinary proceedings against the applicant were initiated solely on account of the report received from the finance department (and in particular, the E & O debit) and the results of Rajah's investigation,

[20] The high water mark of the applicant's case is a temporal coincidence between developments in her on-going dispute with the respondent and the bringing of charges of misconduct against her. I am satisfied with Choonara's explanation for the delay between the issuing of the tickets concerned and the convening of a disciplinary hearing, In any event, the applicant was informed by the CCMA on 10 November 2011 what was required of her to

prosecute the dispute concerning the alleged change to terms and conditions of employment. She was required to comply with the CCMA's order by 17 November 2011. The applicant was charged with misconduct on 16 November 2011. The sequence of events does not support the applicant's submission that SAA deliberately filed charges of misconduct only because it wished to distract or prevent her from prosecuting the claim before the CCMA.

[22] In short: in my view, the applicant has failed to cast any doubt on the reason proffered by the respondent for her dismissal on 9 February 2012, i.e. that she was guilty of fraud and related offences. Put another way, she has failed to establish a credible

possibility that the reason for her dismissal was an act of victimization by her employer. Her referral accordingly

stands to be dismissed.

Costs

[23] This court has a broad discretion in terms of s 162 to make orders for costs according to the law and fairness. Ordinarily, the court is reluctant to make costs orders against individual litigants who might be reluctant, in the face of the prospect of an adverse order for costs, from pursuing their grievances. However, in the present instance, on the evidence before me, the applicant's conduct borders on the mendacious. She pursued a claim of automatically unfair dismissal in the face of a damning report in which she was found to have committed a number of acts of dishonesty. Her challenge to the integrity of that report and the person who compiled it was entirely without foundation, as was her assertion that Choonara was part of the conspiracy against her. The applicant was obviously taken by surprise by the evidence of Rajah and Choonara, at least to the extent that it revealed an audit trail that disclosed the extent of her dishonesty in respect of the conduct that resulted in her dismissal. In this Court the applicant persisted with a version that on the face of it, is simply false. For these reasons, in my view, there is no reason why costs should not follow the result.

[24] Finally, it concerns me that Choonara was unaware of any fact of any criminal charges being laid by SAA against the applicant, or of any discussion in that regard. Given that SAA is effectively funded by the public purse, and the overwhelming evidence to the effect that the applicant committed an act of fraud against her employer, this is a matter that ought properly to receive the attention of SAA's senior management. I therefore direct that a copy of this judgment be placed before SAA's chief executive officer for such consideration.

I make the following order:

1. The applicant's referral is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Representation

For the applicant: Adv. DZ Kela, instructed by Ndumiso Voyi Inc

For the respondent: Adv. M Seape, Instructed by Poswa Inc.

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