

SOUTH AFRICA / JUDGMENT

Peremore-Oliver v Commission for Conciliation, Mediation and Arbitration and Others (PR301/22) [2024] ZALCPE 35 (1 August 2024)

[2024] ZALCPE 35

COURT

Labour Court Port Elizabeth

BEFORE

M Makhura

CASE / FILE NUMBER

PR301/22

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THE

LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

Case

No: PR301/22

In the matter between:

JENNILEE
PEREMORE-OLIVER
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
FAITH
NCUMISA BANTWINI N.O.
Second Respondent
ARENA
HOLDINGS (PTY) LTD
Third Respondent

Heard:

24 July
2024

Delivered: 1 August 2024
This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 1 August 2024.

JUDGMENT

MAKHURA, J

Introduction

- [1] The applicant brought these proceedings in terms of section 145 of the Labour Relations Act (LRA)[1] to review and set aside the arbitration award issued by the commissioner on 12 September 2022. In addition, she seeks an order of substitution in the form of a declaration that her dismissal by the third respondent was substantively unfair and the relief of retrospective reinstatement, alternatively that the unfair dismissal dispute be remitted to the first respondent for a de novo hearing. The application is opposed by Arena Holdings (Pty) Ltd, the third respondent.
- [2] The applicant also applies for condonation for the late delivery of her review application. This application is unopposed. The review application was launched one month outside the prescribed period. The delay is not excessive and has been fully explained. On that basis, I am inclined to grant this application.

The charges and factual background

- [3] The applicant was employed as a Marketing Manager with effect from 1 November 2018. On 21 January 2022, she was charged with two counts of misconduct and called to attend a disciplinary hearing on 26 January

2021. The allegations against her were formulated as:

‘Financial misconduct, in that

You intentionally disregarded instructions from finance by allowing a non-permanent employee to be given expense funds after communication that this was not allowed. This resulted in a financial loss to the company.

Negligence and dereliction of duty, in that

After disregarding procedure, no control measures were put in place over cash given to an employee, and you did not ensure that the expense was settled before the non-permanent employee left the company resulting in a financial loss to the company.’

- [4] On 16 November 2021, Thandiswa Petu (Petu), a temporary employee in the capacity of a marketing coordinator, completed a petty cash form for an amount of R2500.00 to be used for the fun run collection week to buy lunch for promoters and for data, airtime and stationery.
- [5] Petu sent the form to Lynette Kleynhans (Kleynhans) and Zimkita Vili. Kleynhans was employed as the Business Manager. After receiving the email and form from Petu, Kleynhans responded by asking Petu to discuss the request with the applicant. Kleynhans indicated that as the request was for R2500.00, the third respondent could not pay it from petty cash and that the funds could not be paid to her because she was not a temporary and not a permanent employee. Kleynhans suggested that a permanent employee should apply for the expense advance and take responsibility for submitting the claim.
- [6] Petu forwarded the email from Kleynhans to the applicant and requested advice. The applicant responded to Petu and suggested that she should ask Sabo Dlelengana (Dlelengana), a permanent employee in the capacity of a marketing coordinator, to apply for the expense advance. Petu forwarded the email from the applicant to Petu. Subsequently Dlelengana completed and submitted the expense advance form. The form stated that:
- ‘This advance is drawn on the understanding that if it is not accounted for within 30 days, the amount may be deducted from my salary pending settlement.’
- [7] The form was approved and the third respondent deposited the amount of R2500.00 into Dlelengana’s bank account on 18 November 2021. Dlelengana transferred the money into Petu’s account. The fun run took place on 28 November 2021. The applicant was on leave on 29 and 30 November 2021. Petu’s temporary employment with the third respondent ended on 30 November 2021.
- [8] On 2 December 2021, Dlelengana contacted the applicant to inform her that there were funds that were unaccounted for from the R2500.00. At the time, it was estimated that over R1000.00 was unaccounted for. Dlelengana also informed the applicant that Petu was not responding to her telephone calls and messages.
- [9] On the same day, the applicant sent messages to Petu and made telephone calls to her which were unanswered. She also sent an email to Petu and contacted her recruitment agency. The recruitment agency’s attempts to contact Petu telephonically also failed and they sent her an email. Nothing came out of these efforts as Petu did not respond to the messages and telephone calls.
- [10] The applicant was on leave for December holidays from 15 December 2021. She only returned to the office on 12 January 2022 after her leave was extended due to ill-health.

- [11] On 13 January 2022, Dlelengana sent the applicant an email advising her that she had recounted all the slips in her possession and that the unaccounted amount was R570.81. She attached proof of her reconciliation of the amount. The applicant sent an email to Dlelengana asking her to send the email and slips to finance department. She copied Kleynhans and the human resources department.
- [12] On 18 January 2022, Kleynhans took a decision to write off the unaccounted amount. On the same day, Kleynhans addressed an email to Ryan Megaw (Megaw), the third respondent's General Manager, stating that the reason she approved the write off was because Dlelengana was acting under the instruction from the applicant to give the money to Petu. Kleynhans did not include the applicant in this communication.
- [13] On 19 January 2022, Dlelengana sent an email to Megaw. Dlelengana confirmed that she was requested by Petu on the instruction of the applicant to apply for the advance of R2500.00. She confirmed that she applied for the advance by sending the expense advance form to the applicant for approval and that the applicant "was aware that the money will be used by [Petu]". Dlelengana explained that she received the money on 18 November 2021 and transferred it into Petu's account. She further explained that after the event she telephoned Petu and sent her messages but Petu ignored her. She thereafter escalated the matter to the applicant.
- [14] On 21 January 2022, the applicant was charged with misconduct and called to attend a disciplinary hearing on 26 January 2022.

The disciplinary hearing and chairperson's findings

- [15] The disciplinary hearing proceeded on 26 January 2022. The chairperson of the disciplinary hearing found the employee guilty on both allegations of misconduct. On the charge of financial misconduct, the chairperson found that the applicant was responsible

"for the actions that led to the mismanagement and theft of company money by a temp staff namely Thandiswa Petu". The chairperson concluded that the fact that money could not be advanced to a temporary employee was "further evidence of mismanagement" and that the applicant also instructed a permanent employee to apply for an advance and transfer the money to a temporary employee.

- [16] With regard to the second charge, the chairperson found that the applicant should have taken more care and communicated with

Dlelengana to ensure timeous reconciliation of the amount because she knew that Petu's employment contract was ending on 30 November 2021.

- [17] On 9 February 2022, the chairperson recommended a sanction of dismissal against the applicant, which was accepted by the third respondent, leading to the applicant's dismissal.

[18] Subsequently, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). She challenged the findings of guilt on both charges and the appropriateness of the sanction. The commissioner issued an award dismissing her unfair dismissal claim.

The arbitration proceedings

- [19] The third respondent led evidence of Kleynhans and Megaw. Kleynhans testified that on 16 November 2021, Petu requested petty cash of R2500.00 for expenses related to the fun run. She informed Petu that because of the value of the amount, the third respondent does not only pay petty cash of any amount that exceeds R500.00. She further informed Petu that because she was a temporary employee, the third respondent could not pay her the expense advance and that advances are only paid to permanent employees so that in the event the funds are misused, the third respondent would be able to recover them from the permanent employee's salary. She informed Petu that someone else should apply for the advance.
- [20] Kleynhans testified that the rule is that after the employee who requested the advance received the payment, she would have to do the reconciliation of the amount and show how much was spent or not. The claimant or recipient of money would be responsible for any unaccounted amount and he or she would either pay the amount back in cash or by way of a deduction from his or her salary.
- [21] With regard to the transaction in question, her evidence was that Dlelengana claimed the R2500.00 and that after reconciliation, it was established that there was an unaccounted amount of R570.81. Kleynhans' evidence was that Dlelengana, the claimant, disputed that she was responsible for payment of the unaccounted money. Dlelengana, Kleynhans' evidence continued, refused to sign an acknowledgement and consent to deduct the R570.81 from her salary. This was allegedly before the December 2021 holidays. Kleynhans reiterated the rule that a claimant is responsible for any unaccounted amount and that the employees understood this
- [22] Kleynhans testified that Dlelengana refused to take responsibility allegedly because she was instructed by the applicant to give the money to Petu to run the promotion. Therefore, because the third respondent could not recover the money from Dlelengana and Petu, the amount had to be written it off. However, she "felt" that the applicant should have taken responsibility for the unaccounted amount because of the instruction she gave to Dlelengana.

When the applicant's version was put to Kleynhans that she did not instruct Dlelengana to give the money to Petu, Kleynhans'

response was firstly that she "gathered" from her conversation with Dlelengana that the applicant instructed her to give the money to Petu, and secondly that Dlelengana understood the applicant's email to Petu asking her to "ask Sabo [Dlelengana] to apply for the expense advance" to mean that the funds should be given to Petu.

- [23] However, Kleynhans confirmed that Dlelengana, as the claimant and employee who received the R2500.00, was liable to pay the unaccounted amount. She qualified this answer and persisted as follows – “but the manager [applicant] had instructed her to give [the money] to someone else without my knowledge”.
- [24] Kleynhans conceded that the applicant’s instruction to Petu to ask Dlelengana to apply for the expense advance was in accordance with her instruction. It was then put to her that the applicant did not disregard her instruction but followed it. Kleynhans conceded albeit conditionally - “if you ignore everything else”.
- [25] Megaw testified about the alleged trust relationship. He said that the trust relationship had broken down because the third respondent “cannot trust that in future [the] company resources will be looked after and that funds would not go missing”. He then referred to previous grievances by the applicant and against the applicant and testified that it was evident that the work relationship became increasingly strained as a result of these grievances.
- [26] The applicant disputed instructing Dlelengana to give the money to Petu. She testified that Dlelengana was responsible for the unaccounted amount and that it was her duty to reconcile the account. She testified about her attempts to contact Petu and to recover the unaccounted amount. She provided evidence of text messages and telephone calls and the email to Petu on 2 December
2021. She testified that after failing to get hold of Petu, she contacted her recruitment agency and escalated the matter to human resources department.
- [27] Further, the applicant’s case was that she did not have to put any control measures in place because the third respondent had already put measures in place insofar the expense advance was concerned. The applicant disputed that the trust relationship had irretrievably broken down.

The commissioner’s findings

- [28] The commissioner found that there was a valid and reasonable rule which the applicant was aware of. She found that the applicant contravened this rule by allowing the “funds to be transferred to a temporal employee despite knowing that was not allowed”.
- [29] The commissioner criticised the applicant that although she disputed knowledge that Dlelengana transferred the funds to Petu, she did not ask Dlelengana why she transferred the money to Petu and/or discipline her. She found that the applicant did not dispute knowledge of the email dated 19 January 2022 from Kleynhans to Megaw where Kleynhans stated the reason for her decision to write off the R570.81 to be that Dlelengana was instructed by the applicant to give the money to Petu.

- [30] The commissioner further criticised the applicant for not reporting the missing funds to Megaw. She found that the conduct of the applicant showed that she was negligent and failed to act in the best interest of the third respondent.
- [31] She found that the applicant was a manager and responsible to ensure compliance with the rules and regulations of the third respondent to mitigate any risk. She rejected the applicant's argument that she could not be held responsible for any loss of funds and found that as a marketing manager, she was responsible for the conduct of her subordinates.
- [32] The commissioner then concluded that the applicant was guilty of financial misconduct, negligence and dereliction of her duties "by not ensuring that control measures were put in place over cash given to temporal employee". She mentioned Megaw's evidence, without evaluating it against the applicant's, that the trust relationship had irreparably broken down and concluded that the applicant's dismissal was for a fair reason. She dismissed the inconsistency challenge and the unfair dismissal claim.

The applicant's grounds for review

- [33] The applicant takes issue with the findings of the commissioner on the merits of the charges, sanction and inconsistency.
- [34] In summary, the applicant contends that the commissioner committed gross irregularities in her assessment of the evidence, that she misconstrued the nature of the charges and ignored material and relevant evidence leading to unreasonable conclusions, that she failed to evaluate the appropriateness of sanction which would have required her to consider whether the relationship of trust had irreparably broken and that she misconceived the nature of the enquiry and ignored evidence in respect of the inconsistency

challenge.

Evaluation

- [35] It is now well-established that the commissioner's award is reviewable if it is "one that a reasonable decision maker could not reach".[2]
- [36] The reason for the applicant's dismissal is that she committed financial misconduct and that she was negligent or in dereliction of her duties. Although the first charge or reason for dismissal is that she committed financial misconduct, the nature of the financial misconduct allegedly committed is that she disregarded instructions, which suggests insubordination. However, a further reading of the charge is that she allowed a non-permanent employee to be given expense funds when she knew this was not allowed, suggesting non-compliance with the policy. The third respondent alleged further that it suffered a financial loss of R570.81 as a result of the applicant's misconduct.

[37] Properly construed and considering the third respondent's evidence on charge 1, the third respondent's complaint is that the applicant allowed Petu to be given money in contravention of the policy that requires only permanent employees to apply or claim for the expense advance. The question then is how did the applicant allow Petu, the temporary employee, to be given the funds?

[38] The third respondent's evidence through Kleynhans was that the applicant instructed Dlelengana to pay or give the money to Petu and therefore she felt that the applicant should have taken responsibility for the unaccounted amount. How did the third

respondent establish that the applicant instructed Dlelengana to pay the funds to Petu? Kleynhans gave three different versions –

(1) Dlelengana told her that the applicant instructed her to give the money to Petu; (2) she gathered from her conversation with Dlelengana that the applicant instructed her to give the money to Petu; (3) Dlelengana told her that she understood from the email from the applicant to Petu that she should pay the money to Petu. Dlelengana did not testify.

[39] Does this evidence establish that the applicant instructed Dlelengana to give the money to Petu? Well, the commissioner found that it did. In the absence of Dlelengana's evidence and an application for admission of hearsay evidence, Kleynhans' testimony remained inadmissible evidence. Kleynhans' three versions cannot all be true. Her evidence was not only inadmissible, it was contradictory, extremely poor and not credible.

[40] The commissioner also appears to base his finding that the applicant issued the instruction Dlelengana on an email from Kleynhans to Megaw dated 18 January 2022, where Kleynhans stated the reason for writing off the amount to be that Dlelengana was acting on the instruction of the applicant. However, the applicant was not copied on this email and therefore did not have the opportunity at the time to respond and/or dispute the alleged instruction. The applicant's testimony was that she saw this email for the first time during the disciplinary hearing. She consistently disputed issuing such an instruction.

[41] The commissioner ignored the email from Dlelengana to Megaw dated 19 January 2022. In this email, Dlelengana provided the facts leading to her transferring the money to Petu. She made no mention of an instruction she received from the applicant to give the money to Petu.

[42] There was no evidence led to show when and how the instruction was given. Therefore, because the applicant did not issue the instruction to Dlelengana to give the money to Petu, the allegation that she allowed Petu to be given the expense funds of R2500.00 is baseless and must be rejected.

- [43] Accordingly, the commissioner's finding that the applicant issued an instruction to Dlelengana and consequently allowed Petu to be given the expense funds is not supported by the documentary and oral evidence led at arbitration proceedings. It is disconnected from the evidence and is irrational and untenable. The third respondent woefully failed to establish a prima facie case against the applicant and the only reasonable and inevitable finding should have been that there was no evidence to establish the first charge.
- [44] The second charge against the applicant is that she was negligent or in dereliction of her duties in that after she failed to follow the procedure per charge 1 by allowing Petu to be given the expense funds, she failed to put control measures and ensure that the expense was settled before Petu left the company.
- [45] The commissioner found that there was a valid and reasonable rule which the applicant was aware of and had breached. What is this valid and reasonable rule? The first rule is as per charge 1 – that non-permanent employees should not be given the expense advance. I have already found that the applicant is not guilty of charge 1. The second rule is that whoever applies for the expense advance would account for that advance within 30 days and she would be responsible for any unaccounted amount. The applicant did not apply for the expense advance, but Dlelengana did. On this basis alone, the charge against the applicant cannot be sustained and should have been dismissed. The commissioner misconstrued the enquiry.
- [46] The commissioner's criticism against the applicant that she did not report the unaccounted funds to Megaw did not form part of the reason for the dismissal. Even if it did, the applicant, together with Kleynhans, were still addressing the issue when she was charged. In any event, the third respondent did not prove that the applicant was obliged to report this matter to Megaw and the time period within which she had to report.
- [47] The commissioner then concluded that the applicant failed to ensure that control measures were put in place over cash given to a temporary employee. This conclusion is astounding for two reasons – first, it suggests that the applicant had the power to establish policies by virtue of her position as a marketing manager (without any evidence) and second, it ignored the fact that the third respondent had already put control measures as contained in the expense advance form, which clearly stipulates that the signatory or claimant of the advance would be responsible for any unaccounted funds. The commissioner's finding is unreasonable.
- [48] Based on the documentary and oral evidence before the commissioner, the third respondent failed to establish that the applicant was guilty of the two charges. The commissioner failed to apply her mind to the evidence, committed gross irregularities and misconceived the nature of the enquiry. Consequently, she made findings that are disconnected from the evidence and that are unreasonable. The

applicant's dismissal was substantively unfair and the award must be substituted accordingly. Based on my finding of not guilty, the inconsistency challenge is moot.

- [49] Having found that the third respondent failed to discharge its onus that the applicant's dismissal was fair and that the award is liable to be reviewed and set aside and the dismissal declared substantively unfair, the next issue to consider is the remedy.
- [50] Section 193 of the LRA sets out the relief which a commissioner or this Court may award following a finding that a dismissal was substantively and/or procedurally unfair. Section 193(2) requires the commissioner or this Court to reinstate the employee unless she does not wish to be reinstated or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employee.
- [51] The applicant sought reinstatement. Where a dismissal is found to be substantively unfair and the employee seeks to be reinstated, the primary remedy of reinstatement must be awarded.[3] The third respondent's evidence that the trust relationship has irretrievably broken allegedly because of the grievances launched by the applicant and/or against her is irrelevant. because the applicant was found not guilty.
- [52] The breakdown of the trust relationship must be assessed based on the misconduct committed by the employee. Where the employee is found to not have committed the alleged misconduct, this enquiry is not triggered. The enquiry becomes whether continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employee

e, not whether the trust relationship has broken down. The third respondent did not lead evidence to establish that a continued

employment relationship would be intolerable or not reasonably practicable. In the absence of such evidence, the applicant must

therefore be reinstated.

- [53] The employer bears the burden to prove that reinstatement should not apply retrospectively. [4] The third respondent did not advance any evidence or arguments that militate against full retrospective reinstatement. There is no basis to deny the applicant the primary remedy and to put her at the position she would have been but for the unfair dismissal.

Accordingly, the applicant must be reinstated retrospectively with full backpay.

- [54] In the premises, the following order is made:

Order

1. The late delivery of the review application is condoned.

2. The arbitration award issued by the second respondent dated 6 June 2022 under case number ECD091918 is reviewed and set aside.

3. The award is substituted with the following order:

i. The dismissal of the applicant by the third respondent on 9 February 2022 is declared substantively unfair.

ii. The third respondent is ordered to reinstate the applicant retrospectively from the date of her dismissal on the same terms and conditions of employment that existed prior to her dismissal and without any loss of benefits.

iii. The third respondent is ordered to pay the applicant backpay from the date of dismissal until the date she reports for duty within 10 court days of this order.

iv. The applicant is ordered to report for duty on 7 August 2024.'

4. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms. E. van Staden of the Legal Aid Board, Gqeberha.

For the Third Respondent: Mr. R. Wheatley, Third Respondent's Legal Advisor.

[1] Act 66 of 1995, as amended.

[2] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

[3] See: Booi v Amathole District Municipality and Others

(2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) at paras 39 – 40; Notisi v South African Police Service and Others [2023] ZALAC 33; [2024] 4 BLLR 380 (LAC) at paras 58 – 60.

[4] Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

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