



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 48/15

In the matter between:

DAMELIN (PTY) LTD

Appellant

and

SOLIDARITY OBO PARKINSON, STEVE

First Respondent

SITHOLE, SIBONGISENI NO

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION

Third Respondent

Heard: 30 November 2016

Delivered: 10 January 2017

Summary: Dismissal for poor performances – employee dismissed for failing to meet stipulated target – court finding that period to meet target, after a warning, was too short or that target was incapable of being achieved. Appeal dismissed with costs.

Coram: Tlaletsi DJP, Coppin JA and Landman JA

Neutral citation: **Damelin (Pty) Ltd v Steve Parkinson** (LAC: JA 48/15)

JUDGMENT

LANDMAN JA

Introduction

[1] Damelin (Pty) Ltd, the appellant or “Damelin”, appeals against a judgment of the Labour Court (Bleazard AJ) that reviewed and set aside an award made by Ms S Sithohle NO, a Commissioner acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), the second and third respondents respectively, concerning Mr Steve W Parkinson (Parkinson) represented by Solidarity, the first respondent. The appellant appeals with leave of the court *a quo*.

[2] Mr Edy, who appeared for the appellant, relied on the heads of argument filed by Mr Nel but referred to two other decisions and made a few additional submissions. Ms Ras, appeared on behalf of the first respondent.

Background

[3] The appellant is a company carrying on business in the tertiary education sector. It has several campuses throughout South Africa, including one at Boksburg. Parkinson commenced employment as the general manager of the Boksburg campus, with effect from 3 January 2011.

[4] Parkinson’s contract of employment specified in clause 4.3.3 that:

'The attainment of performance goals determined by the employer, from time to time shall be periodically evaluated by the employee's supervisor, continued non-attainment of performance goals may result in the termination of employment.'

- [5] When Parkinson assumed his position at the Boksburg campus in January 2011, the campus had 352 enrolled students of which 168 were first-year students. His target for 2012, which was the national target, was to enrol 420 first year students by February 2012.
- [6] In 2011, Mr Andrew Pienaar, the national sales director, estimated that there were 15 000 grade 12 learners in the catchment area for the Boksburg campus. 85% of this number would translate into 10 824 leads ie. possible Damelin students in this area. Pienaar wrote on 9 March 2011 to all campus general managers advising them of the leads as at March 2010 and 2011. He added:
- 'As per Nolan, please note that he will be holding all General Managers personally responsible for these numbers and the lack of Schools Marketing activities.'
- [7] On 9 March 2011, Parkinson queried the target of 15 000 grade 12 learners. He says that his team contacted all the schools in the area and there were only 12 735 grade 12 learners in his area and this translates into 10 824 leads (85% of 12 735). He concludes that unrealistic numbers give rise to unrealistic targets.
- [8] Pienaar replied saying that 15 000 was the same target as in the previous year (2010). He suggested that Parkinson gets creative and canvass the Vaal area where he said there are schools and very little tertiary education.
- [9] Parkinson replied, pointing out that learners in the Vaal area would either go to Damelin's Vaal franchise or the Alberton franchise. He says if they do marketing further than Nigel they would be benefiting the Witbank and Middleburg franchise. And if they were to canvass Kempton Park, they would be infringing on the Bramley franchise. He ends off saying:

'Setting a target that is 50% higher than what is available is setting people up to fail.'

[10] Parkinson repeated his query: Where, he asked, is he to find the additional grade 12 learners to make up the 15,000 target. He asks: "Or are we being told we have failed before we can even begin?" He points out that although he was not there in 2010 no one achieved their targets.

[11] On 14 November 2011, Mr Nolan Charles, the Group Chief Commercial Officer, informed Parkinson that his campus is:

'... behind in first year preenrolments compared to last year this time (sic). This situation is unacceptable and cannot continue. What do you expect me to tell the CEO and Chairman of Educor regarding your campus poor performance? They are not accepting any of my excuses on your behalf and are holding me FULLY accountable for your lack of performance. Damelin campuses generally are showing on average a 30% growth compared to last year, while your campuses are not even breaking even. You are letting me, yourself and your team down. We placed you at this campus with clear instruction in terms of what our expectations are for growth. We have given you the tools, the plan, the incentives to make these numbers a reality.

I am now officially informing you of the following sanctions that will be effective from the 1 December 2011 if you do not turn your first year preenrolment numbers around to at least a 30% increase compared to last year by the 30 November 2011.

- 1) All your annual leave will be cancelled for November/December's/January 2011.
- 2) You will formally be given notice that we intend to dismiss you from your employment at Damelin.

Do not underestimate my resolve to follow through with these sanctions as I am under immense pressure to ensure you deliver. I WILL NOT CARRY YOU THROUGH THIS PROCESS. You need to work with your sales managers and sales consultant to achieve these numbers. If they are not prepared to co-

operate then dismiss them. Either they are ASSETS to you or they are a millstone around your neck (sic).'

- [12] In a letter dated 25 January 2012, addressed to Parkinson, Nolon set a target for the Boksburg campus for the 2012 enrolment of 558 students (420 first year students and 138 so-called roll over students ie students in their second and higher years). The targets were to be achieved by 8 February 2012. The letter advises Parkinson that:

'This situation is not acceptable and the level of poor performance will not be tolerated.

You are officially informed that if your campus is not at least a few percent ahead of sales as compared to last year (irrespective of the national sales target), formal disciplinary steps will be taken which will result in your dismissal.

Should you wish to discuss this any further, kindly contact me.'

- [13] On 30 January 2012, the Group National Sales Manager advises Parkinson that one Nunlal has been temporarily seconded to the Boksburg campus to manage the sales office. The next day Parkinson complained that the target is still set at 15 000.

- [14] On 1 February 2012, Charles writes to all general managers and sales managers:

'I have consistently over the last few months told you that there will be serious consequences for nonperformers in the Damelin Group. We have, at an head office level spent millions on school marketing in an attempt to ensure we have a good database to work with. On the ground this was YOUR responsibility to implement and monitor and you are now reaping the benefits of this labour. Most campuses are ahead of last year's numbers but a few are not. This lack of performance falls squarely on the shoulders of the GM and S.M of the campuses concerned. To those campuses who are behind each GM and S.M will receive a letter stating that you have till the end of February 2012 to be at least on par with last year's numbers as at the end of February 2011. If you are not we will take

the necessary disciplinary action to dismiss you or redeploy you (sic).’ (My emphasis.)

- [15] The actual enrolment of first-year students for the Boksburg campus for 2012 was 117 first year students. In 2011, the figure had been 168. Parkinson had not met the target. The Bramley and Mowbray campuses did not meet their targets. The Benoni campus narrowly missed its target.
- [16] A disciplinary inquiry was convened for 9 May 2012. Parkinson was charged with poor work performance relating to his failure to reach sales targets. He was dismissed on 15 May 2012.
- [17] Parkinson was dissatisfied with his dismissal and his union referred a dispute to the CCMA. The dispute could not be resolved and the arbitrator heard the evidence of two witnesses for appellant and Parkinson.
- [18] Pienaar expressed the opinion that the target of 558 enrolments set for 2012 was achievable based on the number of leads. He offered an explanation as to why the target had not been achieved. He testified that:

‘In my personal opinion what went wrong there was that they focused too much on handing out flyers, branding exercises for lack of a better term, getting out information and they didn’t focus on the traditional way of getting in students and that is to phone them, get them in, get the appointment in, do the career tests, evaluate the results and sign them on that is what brings you in the numbers at the end of the day. All the other things, all the marketing exercises and all the pamphlets etcetera that assists yes, and it pushes you over the top but that doesn’t - that’s not what brings you the numbers. And what’s within the bundle that adds to that being the mail you asked me to read out, where they had t[w]o extra temps in to call the 8 000 people. I mean at that stage if you need to call your database there is something wrong with what you have done.’

- [19] Parkinson explained in the course of his evidence at the CCMA arbitration the steps that had been taken to boost enrolment at his campus: schools were visited, presentations were made and data collected, all the learners had been

telephoned, advertisements were placed, flyers were handed out, a request for the secondment of a sales manager was made and received but the database was exhausted by February 2012.

- [20] Parkinson also offered an explanation for not achieving the targets. He said the target of 15 000 was unachievable; there were only 13 500 matriculation students in the catchment area. The Benoni "City Campus" had been reopened in November 2010 and impacted on his campus as Benoni residents preferred to attend their local campus. The fees of the Benoni campus were lower than those of Boksburg and students benefited from lower travelling costs. The matriculation numbers were dropping. There were 20 competitors in Boksburg. Students were turning to technical subjects. But the Boksburg campus offered mainly management and academic programmes.
- [21] Parkinson testified that he had explained his predicament to Damelin head office and had had several meetings with head office staff where he complained that the target was unrealistic. He was not counselled. Unlike other managers, he was not sent on a performance improvement course. He was not given a formal warning. He did not regard the letters addressed to him as warnings as they had not been preceded by any process. His sales manager was not disciplined. Neither was the national sales manager. He acknowledged that the general managers of the Mowbray and Bramley campuses were replaced.
- [22] The Boksburg campus's collection of fees was good. The Boksburg campus made a profit. Boksburg exceeded the targets set as regards roll-over students.
- [23] It was put to Parkinson that he was incompetent at his job. He denied this. He had pointed out that the Boksburg campus did not offer technical programmes but he agreed that his campus offered courses in sound technology, hospitality and MTV program which the Benoni campus did not. It was put to him that his continuing non-performance made the employment relationship intolerable.

- [24] The commissioner considered the Code on Good Practice as regards Dismissal for poor work performance and found that Parkinson had been given more than a period of six months to improve his performance. He had not communicated that his targets were not attainable. Higher standards are expected of senior employees. The letters were sufficient and did not need to be headed a formal warning. Dismissal was the appropriate sanction.
- [25] Parkinson was dissatisfied with the award. He applied to the court *a quo* to review and set aside the award. The court *a quo* examined the appellant's disciplinary procedure and code and inquired from Mr Nel, who appeared for the appellant in the court *a quo*, what the nature of its complaint *vis-à-vis* Parkinson was. Mr Nel informed the court that the issue was one of misconduct and not poor performance. The court considered that the appellant could not willy-nilly depart from the procedures specified in its code without notification. The appellant's letter of 25 January 2012 was ambiguous and was not a warning. It was unreasonable for the commissioner to have reached this conclusion. In any event, dismissal could only be considered as a fourth step. The court *a quo* was of the opinion that the commissioner had allowed the appellant to ask leading questions of its witnesses in spite of objections to this approach. The court *a quo* set aside the award and reinstated Parkinson.

Evaluation

- [26] It is common cause that Parkinson was dismissed. Therefore, the *onus* rested upon Damelin to prove that the dismissal was procedurally and substantively fair. The Code of Good Practice on Dismissals provides the following guidelines in cases of dismissal for poor work performance:

'Any person determining whether a dismissal for poor work performance is unfair should consider—

- (a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not—

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.’

[27] At the outset, it is necessary to state that this appeal must be decided on the characterisation of the dismissal as one for poor work performance and not as Mr Nel, who appeared for the appellant in the court *a quo*, was induced to concede in that court, that it was one of misconduct.

[28] Secondly, Charles informed Parkinson on 1 February 2012 that he would be dismissed if he did not enrol the same number of first years by the end of that month as had been enrolled in 2011. However, the evidence tendered at the arbitration by Damelin was focused on proving that Parkinson had not met a target of 420 first year enrolments. The commissioner noted the reduced target in her award. The basis of the dismissal, in view of the concession by Charles, can only be that Parkinson had continuously failed to meet a target of 168 first year enrolments.

[29] Thirdly, the inquiry whether Parkinson was given a fair opportunity to meet the initial target and the reduced target depends to a great extent on whether the targets were fair ie reasonably achievable.

[30] Mr Edy was asked by this Court whether the poor performance was related solely to not achieving the target or whether it implied that Parkinson had not put in the required effort to meet the reduced target. Mr Edy replied that insufficient effort had been devoted and thus the target numbers eluded Mr Parkinson. The Boksburg campus enrolled 161 first year students (ie 57 students less than in

2011). A shortage in first-year students impacts adversely on the following years as there will be fewer roll-over students.

[31] Parkinson's main defence related to the reduction in the catchment area of the Boksburg campus and the impact that the reopened Benoni campus had on the Boksburg campus.

[32] There was and is no infallible way to predict the number of potential first years students in a given area. Past experience provides a guideline but if the parameters on which the estimates were made, change, the guidelines may be defective. This explains why so much of the evidence was opinion based. The formula that was presented as a method of arriving at a target is no better than the estimate on which it is based.

[33] In 2010 (leading to the February 2011 figures for enrolment) the catchment area for the Boksburg campus extended to Springs in the East and was limited by Bramley in the West. Importantly it included the nearby town of Benoni some 5 km away. In 2011, the Benoni campus was reactivated and marketed as a city campus. The Boksburg campus was consequently limited to 70 schools but could canvas two schools in Benoni jointly with the Benoni campus. The Benoni campus offered 60% of its programmes in further education and training and 40% in Higher Education. The offering at the Boksburg Campus placed more emphasis on Higher education: 60% of the programmes related to this, while 40% of the programmes related to further education and training. The programmes offered at Boksburg were academic or management orientated while those at Benoni were mostly technical. But Boksburg offered three technical programmes. The parents of the Boksburg students were said to be more affluent than the parents of the Benoni students. The fees for courses at the Benoni campus were lower than those at the Boksburg campus.

[34] The person who initiated the reintroduction of the Benoni campus did not testify. Charles set the target of 420 first year enrolments but he did not testify. It was left to Leloka, the previous General Manager of the Benoni campus, and Pienaar to

testify on the impact that the Benoni campus had on the viability of the Boksburg campus in its reduced catchment area. Leloka testified that it was not intended that Benoni campus would impact on the viability of the Boksburg campus. He also testified that it had no impact on the Boksburg campus. Pienaar disagreed that the reintroduction of the Benoni campus would have had no impact on the Boksburg campus. But he testified that the impact would not have been a major one. The commissioner found that the Benoni campus would have no major impact on the Boksburg campus.

- [35] The fact that Charles reduced the target from 420 first year enrolments to 168 first year students is arguably an acceptance that the 420 target was completely unrealistic in the changed circumstances of the Boksburg campus. But, as noted, Charles did not testify.
- [36] The commissioner found that Parkinson did not challenge the target, presumably the target of 420 first-year enrolments. But Parkinson vigorously challenged the assumptions on which the 420 target was based. The assumption was that there were 15 000 potential first year students in the reduced Boksburg catchment area that could be persuaded to enrol at that campus. The actual number of learners leaving school at the end of 2011 was put by Parkinson at 13 500 and this was not disputed by Damelin. Parkinson queried whether he was being set up to fail.
- [37] Mr Edy placed great emphasis on what he submitted was Parkinson's lack of diligence in contacting potential students on the Boksburg database. He illustrated this by referring to the fact that in November 2011 it was necessary for Parkinson to call in temporary staff to call the 8 000 names on the database. This submission appears to originate from Pienaar. Pienaar made the damning suggestion that when Parkinson called in the temps in November 2011, the 8 000 names on the database had not been canvassed. But Pienaar said he did know what happened at the Boksburg campus except when he visited there or learnt of its various initiatives.

[38] In his evidence, Parkinson stressed that his staff had called the students capture on his database. His evidence finds support in the testimony of Leloka who testified that documents showed that by 17 March 2011 the Boksburg campus had called the learners of 30 of the 70 schools in its catchment area. It would be most improbable, having canvassed 30 schools by mid-March, that Parkinson would permit his team to discontinue canvassing the database until November 2011. The commissioner made no finding as regards Parkinson's credibility. There is no reason on the record to suggest that he should be disbelieved.

[39] Pienaar also thought that Parkinson might have laboured under a misapprehension that his staff were doing what they were telling him they were doing. But this is simply speculation. It would seem to tie into Charles communication that the general managers should in effect dismiss others in order to save their own jobs. This is an unacceptable approach in employment law.

[40] In *Palace Engineering (Pty) Ltd v Ngcobo and Others*,¹ it was said at para 24:

'Although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets.'

[41] Accepting that the letter of 25 January 2012 constituted a final warning, the period of some 27 days within which to achieve the reduced target set in that letter, given all that preceded it and taking into account that it was not achieved even with assistance afforded by Damelin head office goes to show that either the period was too short or that the target was incapable of being achieved.

¹ (2014) 35 ILJ 1971 (LAC).

[42] In my view a reasonable commissioner would have found that Damelin had not acquitted the *onus* of showing that there was a fair reason to dismiss Parkinson and that dismissal was a fair sanction.

[43] Parkinson seeks reinstatement in his employment. This is the primary remedy, and there is no reason why it should not have been ordered.

[44] Costs should follow the result of the appeal.

Order

[45] In the result, I make the following order:

1. The appeal is dismissed with costs being the expenses necessary incurred by the first respondent.

AA Landman

Judge of the Labour Appeal Court

Tlaetsi DJP, Coppin JA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT:

Adv Edy

Instructed by Jason Moodley Attorneys

FOR THE FIRST RESPONDENT:

Ms Nicolette Ras

Instructed by Solidarity

LABOUR APPEAL COURT