IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA1/2017

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA)	**First Appellant**
ZODWA MAKHENTE	**Second Appellant**
PUMEZA ROJI	**Third Appellant**

and

BLUE PUMP ON UNION (PTY) LTD	**First Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL (DRC)	**Second Respondent**
NALEDI BISIWE	**Third Respondent**

Heard: **12 November 2017**

Delivered: **30 November 2017**

Summary: The appellant employees were dismissed for insubordination in refusing to comply with a lawful and reasonable instruction of the employer to clean a forecourt driveway. At arbitration, the dismissals were found unfair in that the employer failed to prove that the instructed task could reasonably be undertaken. The Labour Court found that the instruction given was reasonable and that the employees had refused to comply with on the basis that it was unreasonable. The arbitration award was set aside on review, with the dismissals were found to be substantively fair. On appeal: judgment of the

Labour Court upheld. Dismissals found substantively fair. Appeal dismissed with costs.

Coram: Coppin JA, Sutherland JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This is an appeal, with the leave of the Labour Court (Lagrange J), against the review and setting aside of the award of the third respondent, an arbitrator of the second respondent, the Motor Industry Bargaining Council, in which the dismissal of the appellant employees was found to be both procedurally and substantively fair.

[2] The second appellant, Ms Zodwa Makhente, and the third appellant, Ms Pumeza Roji (the employees), were employed at a car wash owned by the second respondent, Blue Pump On Union (Pty) Ltd (the employer). After the car wash closed down at the end of October 2011, as an alternative to retrenchment, the employees were re-assigned to work as cleaners at the forecourt area of the employer's filling station. On 1 November 2011, the employees were issued with safety clothing and a spray bottle containing cleaning material and instructed to clean the forecourt driveway. After they failed to carry out the instruction, the employees were warned that their conduct was dismissible and they were given time to consult their union. Following their return from doing so, the employees were issued with final written warnings the same day. They were told to go home and report for their next shift. On their return to work, the same instruction was given to both employees. Once again, the employees did not perform the cleaning task given.

[3] At the ensuing disciplinary hearing, the employees contended that the task which was the subject of the instruction given to them was not part of their job description. This defence was rejected and the employees were found to had

failed or refused to obey a reasonable and lawful request by management. On 10 November 2011, the employees were dismissed.

Arbitration award

[4] Aggrieved with their dismissals, the employees, assisted by the National Union of Metalworkers of South Africa, the first appellant, referred an unfair dismissal dispute to the bargaining council. The arbitrator found that the employees were obliged to perform the work as instructed, that the instruction issued was clearly understood, that the employees attempted the work but that –

> '*they complained that it was difficult and not do-able. This was not reflective of workers who were defiant and refusing to carry out an instruction. This could have been due to misunderstanding of how the task was to be performed and what needed to be done to make it do-able.'*

[5] The employer was found to have "*owed it to himself and the employees to ensure that they are 'shown the ropes' in their new assignment"* to determine if the employees were defiant or ignorant of what needed to be done:

> *'All it would have taken was for a supervisor to walk out of the office and go with the employees to inspect and investigate their challenges with the given assignment. That inspection would have sorted out whether the employees' claims were based on ignorance of what was expected of them or defiance to carry out the task as required.'*

[6] Since the employer had failed to discharge the *onus* to prove that the employees refused to carry out a work instruction, the dismissal of the employees was found to have been unfair. With reinstatement the primary remedy under the Labour Relations Act 66 of 1995 (the LRA), the employees were retrospectively reinstated into their employment with the employer.

Judgment of the Labour Court

[7] On review, the Labour Court found that the instruction given to the employees was clear and understood. However, it was found that the arbitrator had erroneously concluded that the employees' case had been that the work was "*not do-able*", a phrase coined by the arbitrator, when their evidence was that

the work was "*hard*', '*too hard*', "*difficult*' or '*too difficult*', that it was not easy for them as females to do and that they should have been provided with a waterjet instead of protective clothing, chemicals and scrubbing brushes. Since the arbitrator failed to construe the employees' evidence in the context of it not having been properly tested with the employer's witnesses that the work was not possible to do, the Labour Court found that this led the arbitrator "*to the mistaken inference that it was common cause the workers had consistently said the work could not be done"*. Since the work fell within the duties of the employees, it was *prima facie* reasonable to expect the employees to perform the work unless it was practically impossible. If the employees wished to rely on the practical impossibility of performing the work as the basis for arguing that the instruction was unreasonable, it was found that they needed to rebut the *prima facie* case that the work was not difficult to perform. The Labour Court concluded that:

> '*In the circumstances, I am satisfied that the arbitrator misconstrued the evidence in an important aspect in inferring it was common cause the employees had maintained the work could not be done. As a result of this, it seems [the arbitrator] failed to appreciate that, if all the evidence was considered, she could not reasonably infer that it could not be done and that therefore the refusal to perform it was not wilful. Consequently, her finding that the employer failed to prove that the [employees] had failed to carry out a work instruction was not one that a reasonable arbitrator could have come to and must be set aside.*'

[8] As to sanction, the Labour Court approached the issue on the basis that the final written warning which had been issued against the employees was part of the same events that led to their dismissal. That warning only served to aggravate the situation although the employer "*tried to get the [employees] to consider their course of conduct and get advice*." Yet, the employees –

> *'…remained obdurate and even after getting the warning did not alter their response when the instruction was repeated. They were not prepared to do the work assigned and their solution was to persist in asking the employer to provide them with alternative employment, in a situation in which they had recently escaped retrenchment.'*

[9] The Court, therefore, concluded that it was difficult to see how the employees could return to their jobs without the same issues resurfacing and that given their prior conduct there was no reason to believe they would be any more willing to perform the work. In such circumstances, the dismissals were found not to have been an inappropriate sanction. The arbitration award was for these reasons set aside on review and substituted with an order that the dismissals were substantively fair.

On appeal

[10] On appeal, the employees contend that the Labour Court erred in placing reliance on "*a semantic issue*", which did not detract from the arbitrator's finding that the employees were not guilty of insubordination. A conspectus of the evidence showed that the employees did not clearly understand what was expected of them, even when video footage indicated that the employees had received a demonstration on a smooth concrete curb of the manner in which to undertake the task required. Since the probabilities supported a finding that the employees genuinely considered the work too difficult for them, with no refusal to comply with the instruction, the dismissal of the employees was unfair and the arbitrator's award was not reviewable. Consequently, the employees sought that the appeal be upheld with costs.

[11] The employer argued on appeal that while Mr Darryl Talbot, the owner of the business, had shown the employees the cleaning method that had been used for 20 years, the employees approached the matter on the basis that they were employed as chars and that the instruction given was not part of that job. As much was borne out by the fact that on their return from their trade union after receipt of their final written warnings, the employees informed the employer that the work was not part of their job. Since their case was that they understood the instruction but that it was unreasonable given that they were female, the task was too difficult, they wanted a water jet to complete it and it was not part of their job, the employer submitted that the Labour Court correctly found that it had not been the employees' case that the work was "*not do-able*". Since the error that the work was not do-able permeated the arbitration award, it was argued for the employer that the result reached was unreasonable and that the

decision of the Labour Court on review could not be faulted. In the circumstances, the employer sought that the appeal be dismissed with costs.

Discussion

[12] The Labour Court cannot be faulted for finding that the arbitrator misconstrued the evidence before her in inferring that it was common cause the employees had maintained that the work could not be done. The evidence before the arbitrator showed that the employees understood the instruction they had been given but that they considered it unreasonable for a number of reasons: that they were employed as chars and did not consider the work as part of their job; on the basis that they were female and considered the task too difficult for them; and that they wanted a water jet to complete the task. On a consideration of the evidence, the Court *a quo* correctly found that the arbitrator could not reasonably have inferred that the work as instructed could not be done; that the refusal to perform was not wilful and that the employer failed to prove that the employees had failed to carry out a work instruction. In such circumstances, the finding that the dismissal of the employees was substantively unfair was found to fall outside of the ambit of reasonableness required and the arbitration award was set aside on review. I agree. It follows that there is no basis on which to interfere with the Labour Court's findings in this regard on appeal.

[13] Turning to the appropriateness of dismissal, it is trite that a determination as to whether the sanction of dismissal is fair requires a consideration of all relevant circumstances, without deference to the decision of the employer.[1] This includes the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, other factors such as 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 and that this is not an exhaustive list.[2]

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* at para 79.
[2] *Sidumo op cit.* at para 78.

[14] The employees' conduct in refusing to comply with the employer's reasonable workplace instruction constituted insubordination.[3] They were progressively cautioned that their conduct was serious and were made aware that they risked dismissal if they persisted with their refusal to comply with the instruction given to them. After they had been invited to consult with their trade union and given the opportunity to leave work to do so, they did not alter their stance. This led to a final written warning being issued to them before they were sent home and told to return to work the next shift allocated to them. On their return to work, the employees persisted with their refusal to comply with the instruction. By so doing, their conduct amounted to a serious and willful breach of their obligation to adhere to and comply with the employer's lawful authority.[4]

[15] In such circumstances, it is indeed difficult to see how the employees could return to their jobs without the same issues resurfacing. Given their prior conduct, there is no reason to believe they would be any more willing to perform the work now than they were in the past. Their jobs were secured as an alternative to their retrenchment, with no alternative positions available to them. In such circumstances, interference is not warranted with the finding of the Labour Court that the dismissal of the employees was appropriate. It follows for these reasons that the dismissal of the employees was substantively fair and that the appeal falls to be dismissed.

[16] Having regard to considerations of law and fairness there is no reason as to why costs should not follow the result.

Order

[31] For these reasons, the following order is made:

1. The appeal is dismissed with costs.

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[3] *Sylvania Metals (Pty) Ltd v Mello N.O and Others* [2016] ZALAC 52 at para 16; *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC).

[4] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (Juta & Co Ltd, Cape Town 2007) at 307; *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 314H-J; *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC) at para 22; *National Trading Co v Hiazo* (1994) 15 ILJ 1304 (LAC); [1994] 12 BLLR 53 (LAC) at 1308H-J.

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Savage AJA

Coppin JA and Sutherland JA agree.

APPEARANCES:

FOR THE APPELLANTS:	Mr C Kirschmann
	Instructed by Gray Moodliar Attorneys
FOR THE RESPONDENTS:	Mr J Grogan
	Instructed by Kirschmanns Inc.