United Chemical Industries Mining Electrical State Health and Allied Workers Unions obo Maelane / Savuka Managed Solutions

(2022) 31 CCMA 8.37.6

Reported in (Butterworths)	[2022] 2 BALR 200 (CCMA)
Case No.	GAJB17131-20
Award Date	15/11/2021
Jurisdiction	Commission for Conciliation, Mediation and Arbitration
Commissioner	L Dlamini
Subject	Substantive fairness in dismissal Misconduct - Ignoring Covid-19 protocols

Keywords

Dismissal - Substantive fairness - Misconduct - Ignoring Covid-19 protocols - Shop steward holding meeting in female change room during which health protocols ignored - Dismissal fair.

Mini Summary:

The applicant employee was dismissed for convening a meeting in the ladies change room on the premises of one of the respondent's clients during which none of the participants complied with Covid-19 lockdown regulations and for refusing an instruction to terminate the meeting. The applicant denied organising the meeting and said that he had attended only because he was a shop steward to listen to the employees' concerns about TERS payments. He claimed that his dismissal was substantively and procedurally unfair.

The Commissioner noted that the employee's only defence was that he had not convened the meeting. This attempt to shift the blame to his colleagues, which had never been put to the respondent's witnesses, was preposterous. As a shop steward, he should have ensured that Covid-19 protocols were complied with. Nothing turned on the fact that his union had not been consulted before disciplinary action was taken. At best for him, the employee had been grossly negligent, for which dismissal was warranted.

The employee's dismissal was upheld.

Award

Details of the hearing and representation

[1] The arbitration hearing was initially scheduled for 9 September 2021. It was part-heard and was rescheduled for 28 October 2021. This was after the respondent had made its case through two witnesses. The applicant requested time to study some of the documents which had been placed in the bundle of documents on the day of the hearing. On both dates, the arbitration was held at the CCMA offices at 127 Fox Street, Johannesburg.

[2] In terms of process, the employee party (UCIMESHAWU obo Maelane J), hereinafter referred to as the applicant, appeared in person and was also represented by a trade union official, B Khumalo. The employer party (Savuka Managed Solutions CC), hereinafter referred to as the respondent, was represented by S Shava, the official from an employer organisation, Labour Matrix.

[3] The proceedings were electronically recorded, and I also took handwritten notes. The respondent submitted two bundles of documents (marked "A" and "B" for ease of reference).

Background to the Issue

[4] The applicant was employed by the respondent as a Cleaner. He commenced employment with the respondent in February 2011 and was dismissed on 13 August 2020. This was after a disciplinary hearing arising out of four (4) charges which were Gross Insubordination, Contravention of Lock Down Regulations, Bringing the Company Name into Disrepute and the Breakdown of the Trust Relationship Between the Parties.

[5] In terms of the charge sheet, the respondent alleged that on 23 June 2020, the applicant convened a meeting despite being informed that it could not go ahead based on the unavailability of the Human Resource Manager. It is further alleged that the applicant ignored the instruction and convened the meeting in the ladies changing room which is completely forbidden. Lastly, in the meeting the staff members were not wearing the relevant and appropriate PPE and exposed everyone on the Discovery site to a potential hazardous infection.

Issue to be decided

[5] Whether the dismissal of the applicant was unfair, both in terms of procedure and the substance. In the event I find in favour of the applicant, an order of reinstatement is sought by the applicant in terms of section 193(a) of the Labour Relations Act 66 of 1995.

[*Numbering as per award* - Ed.]

Survey of evidence and argument

Respondent's case

[6] The respondent called two witnesses for its case. The first one to come forward was S Janse van Rensburg, the Key Accounts Manager. She testified under oath and started by reading her statement (page 42 of "A") on record which she had submitted during the investigation of the matter. She basically pointed out she came to be aware of the meeting the applicant held with the staff at basement 4 in the ladies change room. This was after two supervisors, Busisiwe Nxumalo and Sonia Mathews came to inform her and Fikile Zwane, the contract manager about the incident.

[7] Her and Fikile Zwane made their way to the ladies change room and found the applicant indeed having a meeting. She immediately told the staff members present in the meeting that it was unauthorised and that they should go back to work. Instead, the applicant continued to address the meeting, ignoring a clear and direct instruction from her. He even ignored an instruction from Fikile Zwane to stop the meeting. No permission was granted by the client for the meeting to be held. It was held during the time the country was placed on lockdown alert level 5, and the staff at the meeting were not wearing masks and no social distancing was observed. Even though the meeting consisted of males and females, it was held in the ladies change room.

[8] Having observed all of this, she went to the head office and informed the Human Resources Manager that she intended to take disciplinary action against the applicant. Subsequently, the applicant was informed that he should report to the head office the following day. He also ignored this instruction, claiming that he did not receive the message. He eventually made his way to the office and was suspended and given a notice to attend the disciplinary hearing (page 15 of "A"). Even though part of the suspension conditions was for him not go on site, the following day he was on site and participated in an unprotected strike.

[9] She went on to explain the nature of the charges and the disciplinary sanctions applicable to them. In terms of all the charges, the first offence carried a final written warning, whereas the second offence is dismissal. The applicant was charged for gross insubordination for refusing to stop the meeting when instructed to do so. secondly, he held the meeting in the ladies change room, ignoring all Covid-19 protocols in terms of masks and protocols (referred to pages 43-45 of "A").

[10] She stated that the applicant was fully aware of the rules (page 4 of "A"), especially item 25 on page 8 which is the applicant's contract of employment which encompasses the issue of company rules and regulations. The applicant ignored a clear instruction to stop the meeting. She stated that the company has had to deal with something like this before. In instances where something similar to this had happened, disciplinary action was taken which resulted in any person involved being dismissed.

[11] Under cross-examination, she stated that she does not deal with the trade unions, it is a matter for the human resources department, and that is the reason she did not inform the union about the pending disciplinary action against the applicant. She insisted that the actions of the applicant when she ordered him to stop the meeting were clearly that of insubordination. She argued that this was because there was no permission granted for the meeting.

[12] She was adamant that the name of the company had been severely compromised and it was brought into disrepute. The daring act of holding a meeting in the ladies change room, ignoring all protocols associated with the Covid-19 Pandemic was clearly a deliberate act, aimed at bringing the union into disrepute.

[13] The second witness to come forward was the Human Resources Manager, P. Mokgophi. She testified under oath and stated that on 23 June 2016 [sic], S Janse van Rensburg went to her and told her what had happened on site. The meeting, which was held on the premises on site, had not been granted permission for. The meeting was held in complete disregard of the basic rules which included, amongst other things, the wearing of masks and all other related things.

[14] The applicant failed or refused to observe the Covid-19 regulations. In this regard, the company's name was brought into disrepute by this type of conduct. The applicant refused to cooperate, despite the fact that he was being confronted by two senior managers in the company. She insisted that the offence in question falls under item 31 (page 12 of "A") and attracts the sanction of dismissal even if it is a first offence, depending on the type of instruction given.

[15] Under cross-examination, she was adamant that the applicant and the fellow participants in the ladies room failed to observe the Covid-19 protocols. She insisted that the applicant blatantly refused and/or ignored a lawful instruction. She argued that the meeting was held in the ladies change room, knowingly disregarding any procedure or protocol related to Covid-19 regulations. This clearly brought the name of the company into disrepute.

Applicant's case

[16] The applicant testified under oath and stated that his job was that of a Cleaner and he ended up operating a cleaning machine. He stated that he is a member of the union and a shop steward, whose duties, amongst other things, is to represent the fellow workers on any issues affecting their conditions of employment.

[17] On 17 June 2020, he phoned the Human Resources Manager, Patricia, requesting a meeting with her

regarding the issues of Temporary Employee Relief System ("TERS"), time sheets and risk remuneration. The latter told him to speak to the site manager since she was busy sorting out the TERS matters. He did not manage to speak to the managers on site and was only able to see her the following [sic] on 18 June 2020. He eventually spoke to Fikile who demanded an agenda for the meeting but he could not provide her with it since it was closer to knock-off time.

[18] The following morning he gave Fikile the agenda at around 6:40am. The meeting was requested for 12:00 but could not proceed, instead he received an SMS from a colleague, stating that he must report to B3. When he went there, he found Fikile who told him that the meeting must be postponed to the following day since Patricia wanted to attend as well. On 19 June 2020 when he knocked-off he got a message on his phone, stating that some people had been paid the TERS money.

[19] On 23 June 2020, during the tea break, employees came to him and wanted to know about the TERS money based on the message received the previous day. He was then requested to go to B3 and enquire about the message but did not find anyone there. The employees then returned to their work-stations. At 12pm, a security guard came to him and told him that the employees were waiting for him in the change room. Although the meeting was in the ladies room, the audience was mixed. On arrival there, the employees demanded feedback on the issue. He could not assist and the meeting lasted only 5 minutes.

[20] At lunch time, he was called back by the workers to the ladies change rooms where they demanded feedback. They demanded that Patricia be phoned since they wanted to know whether the meeting will continue the following day. During the telephonic conversation, Patricia could only say that she would only be able to confirm her attendance of the meeting the following day. After that, while the workers were dispersing, Stefani and Fikile arrived and told them the meeting was unauthorised. They immediately took out a phone and began taking pictures.

[21] During the time, he requested to follow the managers to B3 and on arrival there he was told the meeting was unauthorised. He then went back on lunch. The following day on arriving at work, Fikile called him aside and told him to go to the Head Office. On arriving at the Head Office, he was then given a charge sheet and was told to appear at the disciplinary hearing.

[22] Under cross-examination, he vehemently denied organising the meeting, arguing that it was the workers themselves who organised it and called him to address them. It was put to him that this version was never put to the respondent's witnesses. It was further put to him that the first version he had put forward was that there was no meeting, something which shows that he has a tendency to bend the truth. He insisted that he never organised any meeting, persisting that he was called to come and explain what had happened. Even though he conceded that what happened in the ladies change rooms was a meeting, he maintained that he did not organise it.

[23] He could not recall the number of people, insisting that the number he mentioned previously was just a mere example. He further stated that he did not take notice of who was wearing the masks and could not recall whether social distancing was observed. He conceded that he did not wear his mask but insisted that he observed social distancing. Although he admitted that he attended and addressed the meeting, he was adamant he did not organise it. He refuted the claim put to him that he defied a clear and lawful instruction to stop the meeting, issued by Stefani and Fikile. He argued that by the time the latter came around, the meeting had dispersed already.

[24] He denied knowledge of the policies and procedures of the company, arguing that there has never been an explanation of any documents given to them, except being asked to sign them. He was then referred to page 8 of "A" which contained his contract of employment, including policies and procedures which he signed confirming receipt and knowledge there-of. He however continued to argue that, despite his signature appearing on such documents, he was not aware of them.

[25] In re-examination, he insisted that the workers were angry, and they demanded answers, hence the meeting which was held in the ladies change room. He was adamant that when he went to the office to request permission, he found no one in the office. He insisted that he did not call the meeting.

[26] He then called his own witnesses. The first one called was Letta Mogotsi who had to leave the witness stand after it became clear that her evidence was completely irrelevant. The second witness to be called was EB Mbhele, who also worked as a cleaner at respondent. He pointed out on 23 June 2020, he was part of the group of people who requested the applicant to go to the office and bring back answers regarding the TERS. The tea break completed while the applicant had not returned with answers.

[27] At lunch time, they waited for the applicant to come and give them feedback. When they could not see him, they requested the security officer to call him. When he arrived at the meeting, he expressed unhappiness, pointing out that there was no permission for the meeting to be held on the day. While he was busy explaining what had transpired, management representatives came in and accused him of organising a meeting without permission. They told management that they had called the meeting not the applicant.

[28] Under cross-examination, he confirmed that the meeting was actually held in the ladies change room. He however insisted that it was the employees who called the meeting not the applicant. It was put to him that the reason he came to testify at the arbitration was that he was dismissed for an unprotected strike. He admitted that he was indeed unhappy about the dismissal but argued that it was not the reason he came forward to testify. He refuted the claim put to him that this was some form of revenge on his part, insisting that he is only giving evidence of what happened on 23 June 2020.

[29] He was quizzed extensively about the amount of time the meeting lasted. He could not account for the discrepancy between his own estimate and that of the applicant, initially stating that the meeting lasted only

5 minutes but later changing to approximately 15 minutes. He stated that he would defer to the applicant in terms of the actual time the meeting lasted. He initially insisted that there was an observance of social distancing in the meeting, including the Covid-19 protocols. He, however, conceded that this was not the case when he was shown the photographs on pages 43-45 of "A".

[30] Under re-examination, he insisted that the overall time the meeting lasted, including the time that management came in was 15 minutes. He argued that, at least this is what he observed from his own watch. He reiterated the reason that he only came to testify that the applicant did not call the meeting. Accordingly, he would not want to see him losing his job because of that. He insisted that this was not about him and the anger he has towards the respondent for losing his job.

[31] In terms of closing arguments, the parties submitted such in writing. I have read them and took into account all issues raised in them, including the relevant case law.

Analysis of evidence

[32] It is trite that an employer seeking to dismiss an employee for misconduct must prove on a balance of probabilities, that such misconduct has been committed. Invariably, the decision to dismiss must be a fair one and the onus to prove this rests with the employer once it has been established that the employee has proved the existence of a dismissal. For fairness to be established, the conduct or action of the employer should be just, unbiased and equitable. This means that the employer bears the onus to prove, on a balance of probabilities, that the misconduct was indeed committed by the employee.

[33] Invariably, failure to do that will not warrant a dismissal. In essence, there must be tangible and admissible evidence of the misconduct, some-thing which both the respondent's witnesses discharged without any difficulty, let alone being challenged. In essence, the doctrine of *res ipsa loquitur* (facts speak for themselves) is more appropriate in this case. The entire incident is basically common cause, except the fact that the applicant is merely arguing that he did not call the meeting. Basically, he is arguing that the respondent got the wrong person.

[34] The aforementioned assertion or attempt by the applicant to shirk responsibility for his own action is preposterous, to say the least. All that the applicant has sought to do here was to deny and try to put blame on fellow employees for calling him to address a meeting they organised without his knowledge. It is baffling to me why this version was never put to the witnesses of the respondent. It was never featured in terms of the evidence led at the internal disciplinary hearing. It is clearly an afterthought, something which was pulled out of a bag as a form of some "make believe" type of evidence.

[35] The applicant was a shop steward, a responsibility which carries a lot of obligations in terms of action or conduct. It is in this context that he made an argument that his dismissal breached the procedural fairness in terms of what he referred to as Schedule 8 of the Code of Good Practice on Dismissal as contained in the Act. In terms of item 4(2) of the Code, it required that when a disciplinary action is taken against a trade union representative or an employee who is an office bearer of a trade union, the union be informed (my own parenthesis).

[36] This has created a lot of noise, especially creating an impression that this compulsory requirement, whose non-compliance should be deemed fatal. The court in *NCBAWU v Masinga and others* [2000] 2 BLLR 171 (LC), put an end to this distortion. It stated that:

> "the employer's failure to notify the union of a disciplinary hearing was not regarded as fatal on the grounds that Schedule 8 is not part of the law but merely a guideline of good practice".

Basically, nothing turns on this. The important thing in a disciplinary process is for the employer to place allegations against the employee and provide an opportunity for the latter to respond. Accordingly, this point is dismissed.

[37] The applicant's evidence was riddled with evasion and obfuscation. It called into question the credibility of his own evidence and that of his witness. This was quite startling when compared to the evidence presented by the respondent's witnesses. In terms of substance, the two opposing witnesses gave mutually destructive versions. The respondent who bears the onus to prove that the applicant committed an act of misconduct argued that its evidence was solid and its witness credible.

[38] It is against this background that it is important to make a brief assessment of the credibility of the evidence presented before me and the witnesses that presented it. In *Marapula v Consteen (Pty) Ltd* [1999] 8 BLLR 829 (LC) it was held that:

> "the employer's onus is discharged if the employer can show by credible evidence that its version is more probable and acceptable".

The credibility of its version is dependent on the credibility of its witnesses. In this matter, the respondent presented a consistent story which was barely disputed, except that the applicant sought to deny that he called the meeting. In the end, his case was characterised by evasiveness and bare denials. He clearly failed the test of a credible witness and his version is not believable.

[39] This is clearly shown in terms of the photographic evidence on pages 43-45 of "A". The applicant is seen, standing without his mask and addressing fellow employees who barely had theirs on them. There is clearly no observance of social distancing between the people who are in attendance of the meeting at the ladies change room. All of this evidence is sufficient to show that the Covid-19 regulations were not observed in a meeting addressed by a leader and a representative of the workers. All of this happened in the premises of a

client of the respondent.

[40] The applicant called and addressed a meeting which was clearly not permitted. He had been asked to postpone the meeting in order for the Human Resources Manager to attend and address any questions and queries arising out of it. In haste, which was not clearly explained in the evidence he presented, the meeting was convened. Instead of refusing to partake in the meeting, he chose to address it, arguing that he was complying with the wishes of the employees.

[41] The impact of such misconduct must be assessed against the broader scheme of things. In *Labuschagne v WP Construction* [1997] 9 BLLR 1251 (CCMA):

> "the commissioner interpreted item 3(5) of the Code of Good Practice on Dismissal as requiring that the employer should consider the offence in conjunction with the nature of employee's work in order to determine the seriousness of the misconduct committed".

The applicant was clearly negligent and basically failed to apply a standard of care that should be exercised by a reasonable person under the circumstance.

[42] This is a serious offence and the more serious the offence, the more likely that the appropriate sanction under the circumstance is that of dismissal. Any act that is deemed to be compromising the integrity of the service provider in the eyes of a client, whose business also relies heavily on reputation, can have dire consequences for the business of the employer. The net effect of this is that the current and prospective clients could end up taking their business elsewhere and this would result in financial loss as well as job losses to other employees.

[43] The important thing to determine is whether in terms of the circumstances of the case, the sanction is an appropriate one. In *Visser v Standard Bank of SA Ltd* [2003] 24 ILJ 890 (CCMA) the court held that:

> "an employer is not required to retain a person in employment if the evidence discloses that the continued employment relationship had been irreparably damaged and that the more senior the position, the greater the need for higher levels of trust relationship".

The conduct of the applicant in this matter cannot be said to be that of a person who inspires a confidence of trust. His actions harmed the relationship of trust that ought to exist between the employer and employee.

[44] Based on the evidence before me, it is clear to me that the respondent's case is the most probable. Accordingly, the dismissal of the applicant was procedurally and substantively fair.

Award

[45] The dismissal of the applicant is upheld.

[46] There is no order as to the costs.