IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1644/20

In the matter between:

ESKORT LIMITED **Applicant**

and

STUURMAN MOGOTSI **First Respondent**

COMMISSIONER SIMPHIWE SAKI NGADA *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **18 March 2021(Via Zoom)**

Delivered: **This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, publication on the Labour Court's website, and released to SAFLII. The date and time for hand-down is deemed to be 28 March 2021 at 16:00**

REASONS FOR ORDER

TLHOTLHALEMAJE, J

Introduction:

[1] This unopposed review application raises a topical issue surrounding the fairness of the dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/or observe COVID-19 related health and safety protocols put in place at the workplace.

[2] The facts of this case are indeed extraordinary. They are indicative of the need for more to be done at both the workplace and in our communities, in ensuring that employers, employees, and the general populace are sensitised to the realities of this pandemic, and to further reinforce the obligations of employers and employees in the face of, or event of an exposure to COVID-19.

[3] Following the hearing of the application, the Court had on the same day issued an order reviewing and setting aside the arbitration award issued by the second respondent, and substituting that award with an order that the dismissal of the second respondent by the applicant on 3 September 2020 was substantively fair. What follows are reasons for that order.

Background:

[4] The applicant conducts a butchery business on a national scale, and sells meat and cooked food to the public. The first respondent, (Mr Mokgotsi) was employed as its Assistant Butchery Manager since May 2018. Mogotsi was charged with;

(a) gross misconduct related to his alleged failure to disclose to the employer that he took a COVID-19 test on 5 August 2020 and was waiting for his results;

(b) gross negligence in that after receiving his COVID-19 test results which were positive, he had failed to self-isolate, continued working on 7, 9 and 10 August 2020, and thus put the lives of his colleagues at risk. It was further alleged that during the period he had reported for duty, he failed to follow the health and safety protocols at the workplace, including failing to adhere to social distancing.

The arbitration proceedings and the Commissioner's award:

[5] Following Mogotsi's dismissal and a referral of an alleged unfair dismissal dispute to the third respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), the matter came before the second respondent (Commissioner).

[6] The applicant had called two witnesses, viz, its Group Human Resources Manager (Mr Lucas Sithembiso) and the Retail Operations Manager (Mr Pieter Strydom), whilst Mogotsi testified in his case. Most of the essence of the evidence led at the arbitration proceedings, unless pointed out, was not placed in dispute. The evidence is summarised as follows;

6.1 Mogotsi used to travel to and from work daily with a colleague, Mr Philani Mchunu (Mchunu) in a private vehicle. On 1 July 2020, Mchunu did not feel well and had consulted with a medical practitioner on the same date. Mchunu was then booked off sick from 1 to 3 July 2020, and had his sick leave extended on 4 July 2020.He was subsequently admitted to a hospital on 6 July 2020, and was informed on 20 July 2020 that he had tested positive for COVID-19.

6.2 At about the time that Mchunu initially fell ill, Mogotsi also started experiencing chest pains, headaches and coughs. He had consulted a traditional healer, who had booked him off on 6 and 7 July 2020 and also from 9 to 10 July 2020. The traditional healer happened to be his wife.

6.3 Upon being booked off by the traditional healer, Mogotsi was informed by management to stay at home. He nonetheless reported for duty after 10 July 2020. This was even after he became aware from 20 July 2020 of Mchunu's positive results.

6.4 Mogotsi took a COVID-19 test on 5 August 2020, and was informed on 9 August 2020 via 'SMS' that he had tested positive. The concern however raised by the applicant is that despite having taken a COVID test on 5 August 2020 and being informed of his positive results on 9 August 2020, Mogotsi had reported for duty on 7, 9, and 10 August 2020, and personally came to the premises to hand in a copy of his results.

6.5 The applicant had COVID-19 policies, procedures, rules and protocols in place, and all employees had been constantly reminded of these through memorandum and other various means of communications posted at points of entry and also through emails.

6.6 Of further significance however, is that Mogotsi was also a member of the in-house 'Coronavirus Site Committee', and was responsible for *inter alia*, putting up posters throughout the workplace, informing all employees what and what not to do in the event of exposure or even if they suspected that they may have been exposed to CoVID-19, and the symptoms they must look out for.

6.7 Other than the above, and upon the applicant having conducted its own investigations after Mogotsi' test results were made known, it was discovered that on 10 August 2020, a day after he had received his results, he was observed on a video footage at the workplace, hugging a fellow employee (Ms Milly Kwaieng), who happened to have had a heart operation some five years earlier and had recently experienced post-surgery complications.

6.8 Again, from the video footage on 10 August 2020, Mogotsi was observed walking on the workshop without a mask. Upon Mogotsi's test results being known, and after further investigations and contact tracing, a number of employees who had contact with him had to be sent home to self-isolate, amongst whom were Kwaieng and others who had other comorbidities.

6.9 In the face of this evidence, Mogotsi's main contention was that he was aware of Mchunu's health condition and positive COVID-19 test results, as far back as 20 July 2020, and that he had informed management of his contact with Mchunu. He alleged that he was not given any clear directive as to what to do, but was instead, subjected to victimisation when his medical certificates were questioned, and when he was informed of changes to his job description, and further given other tasks to perform.

6.10 Despite having seen a traditional healer and being booked off on 6 , 7, 9 and 10 July 2020 due to having experienced headaches, chest pains and coughs, Mogotsi contended that when he consulted with health workers on 5 August 2020, he had informed them that he had no

noticeable symptoms, but had undertaken the test, which results he had only obtained on 10 August 2020, and had sent same to management the following day. He had personally handed a copy of the results of his test to the store and acting managers in their offices, and was subsequently sent home. He came back on 28 August 2020 and was informed of the scheduled disciplinary enquiry.

6.11 Mogotsi had nonetheless conceded under cross-examination that he received the test results on 9 August 2020, but alleged that he did not know that he needed to self-isolate. He further conceded having hugged Kwaieng on 10 August 2020, and further having walked on the shop floor without a mask. His excuse was that he was on a phone call at the time and that he needed to remove his mask to have a clearer conversation with his caller. His main contention was that despite asking for a direction after he had reported ill and informed management that he had been in contact with Mchunu, nothing was done, as business had continued as usual when he reported for duty.

[7] Given the above evidence, which was mainly common cause, the Commissioner had in the award, stated that he had regard to 'the provisions of the LRA, CCMA Guidelines, the Code of Good Practice, and relevant case law', and came to the following conclusions;

7.1 Mogotsi's allegations that he was dismissed on account of being victimised ought to be rejected.

7.2 The employer did not have any instructions or rule that expressly compelled its employees to inform it when they had undertaken COVID-19 tests. However there was a rule in place that required employees to inform the employer when they suspected that they had been infected. Implied in that rule was the need for employees to inform the employer of their COVID-19 tests. To that end, Mogotsi was therefore required to inform the employer of the test he took, and he was therefore guilty of failing to report his test to the employer.

7.3 The conduct of Mogotsi of having reported for duty in circumstances where he knew of his positive test results on 9 and 10 August 2020 and did not inform the employer of the test; of hugging fellow employees, and walking around the butchery without a mask, was 'extremely irresponsible' in the context of the pandemic, and he was therefore grossly negligent.

7.4 In determining the appropriateness of the sanction, and having had regard to the provisions of paragraph 96 of the CCMA Guidelines, the employer in the light of its own disciplinary code and procedure which called for a final written warning in such cases, failed to justify the sanction of dismissal, and had thus deviated from its own disciplinary code and procedure.

7.5 The sanction of dismissal was therefore not appropriate on account of that deviation, making the dismissal substantively unfair. To this end, Mogotsi was to be reinstated retrospectively, without back-pay, and a final written warning placed on his record.

The grounds of review and evaluation:

[8] The test on review is fairly settled. The principal enquiry is whether the arbitration award sought to be reviewed, can be said to fall within a range of reasonableness[1]. The applicant attacked the Commissioner's award on various fronts, including that he failed to properly apply his mind to the evidence placed before him, and made findings that are not those of a reasonable decision maker.

[1] See *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality* (JA 64/2019) [2020] ZALAC 53 (2 December 2020) at para 27, where it was held;

> "The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator." (Citations omitted)

[9] I fully agree with the contentions made on behalf of the Applicant, and further add that the findings and conclusions of the Commissioner on the issue of the appropriateness of the sanction and the relief granted, are entirely disconnected with the evidence that was placed before him, making the award reviewable.

[10] In regard to the grounds of review advanced on behalf of the applicant, I do not deem it necessary to deal with the applicant's contentions that the Commissioner ought not have gone further upon Mogotsi alleging that his dismissal was as a result of victimisation, and that he ought to have declined jurisdiction to deal with the dispute. That issue is neither here nor there to the extent that the Commissioner had rejected that contention.

[11] What however needs to be added is that more often than not, the CCMA is habitually inclined to refuse to determine disputes involving dismissals for ordinary misconduct, simply because the employee (in most times unrepresented and throwing everything in the mix), happened to have alleged that he/she was victimised, harassed, discriminated against, or any other allegation that would divest the CCMA of jurisdiction. Where such allegations are made, a Commissioner is duty bound to look at the real nature of the dispute, irrespective of how the parties label the cause of a dismissal, before deciding whether the CCMA has jurisdiction to determine the dispute or not. The mere mention of 'victimisation', or 'discrimination' by an employee at arbitration proceedings is not a gateway to this Court.

[12] An important consideration in this case is that the Commissioner had decisively concluded that Mogotsi's conduct was 'extremely irresponsible' in the context of the pandemic, and that he was therefore 'grossly negligent'. That conclusion on its own given the facts of this case ought to have been the end of the matter, and the dismissal ought to have been confirmed.

[13] In these proceedings, despite Mogotsi not having opposed the application, had made an appearance, and his only submission was that he was wanted to be reinstated as per the Commissioner's award. For reasons that are clearly beyond comprehension in that light of that decisive findings, the Commissioner

had awarded reinstatement, *albeit* with a sanction of final written warning and without back-pay.

[14] When Commissioners state in their arbitration awards that they had regard to the 'provisions of the LRA, CCMA Guidelines, the Code of Good Practice, and relevant case law', this does not imply merely paying lip-service to these provisions or authorities. Furthermore, merely regurgitating these provisions in an arbitration award without actually applying them to the facts of the case is in my view a meaningless exercise. The Commissioner's approach in this case is on point.

[15] Despite having stated that he had regard to all the provisions he had cited, it had clearly escaped the Commissioner's reasoning that a disciplinary code and procedure, is not prescriptive as correctly pointed out on behalf of the applicant, and that it is merely a guideline, insofar as issues of sanctions are concerned.

[16] Ultimately, irrespective of what the disciplinary code and procedure stipulates, in determining the appropriateness of a sanction of dismissal, the Commissioner is obliged to make an assessment of the nature of the misconduct in question, determine if whether, combined with other factors and the evidence led, the misconduct in question can be said to be of gross nature. Once that assessment is made, and the invariable conclusion to be reached is that the misconduct in question is of such gross nature as to negatively impact on a sustainable employment relationship, then the sanction of dismissal will be appropriate.

[17] In the end, it is apparent that the Commissioner failed to take into account the totality of circumstances as long stated in *Sidumo*[2], when impartially

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC), where it was held;

> "78. In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, 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. This is not an exhaustive list."

considering the appropriateness of the sanction of dismissal in this case. To this end, the sanction of dismissal in this case was appropriate given the considerations below;

17.1 Mogotsi had at the very least, from 20 July 2020, been aware that he had been in contact with Mchunu, who had tested positive for COVID-19. On his own version, he had experienced known symptoms associated with COVID-19 as early as 6 July 2020. It cannot therefore be probable for him to allege that he was not aware of the known symptoms, nor did he not know he had those symptoms. Be that as it may, he had over that period until 11 August 2020, recklessly endangered not only the lives of his colleagues, and customers at the workplace, but also those of his close family members and other people he may have been in contact with.

17.2 Mogotsi's conduct came about in circumstances where on the objective facts, and by virtue of being a member of the 'Coronavirus Site Committee', he knew what he ought to have done in an instance where he had been in contact with Mchunu and where on his own version, he had experienced symptoms he ought to have recognised. He nonetheless had continued to report for duty as if everything was normal, despite being told on no less than two occasions to stay at home during July 2020.

17.3 Mogotsi's conduct was not only irresponsible and reckless, but was also inconsiderate and nonchalant in the extreme. He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was fairly aware of given his status not only as a manager but also part of the 'Coronavirus Site Committee'.

17.4 For reasons which are clearly incomprehensible, Mogotsi had through his care-free conduct, placed everyone he had been in contact with whether at the workplace or at his residence at great risks. Even more perplexing is the reason he would go about the workplace mask-less and

hugging fellow employees, in circumstances where he knew or ought to have known the consequences of his actions, especially after having become aware of Mchunu's results. There is a COVID-19 term which has been coined for this type of behaviour, which out of respect for Mogotsi's dignity, I will refrain from repeating in this judgment due to its derogatory nature.

17.5 However, the consequences of Mogotsi's conduct were not only dire for the applicant but equally so for all of those employees with whom he had contact with, their own families and communities. In this regard, the applicant's operations were affected in that a number of those employees had to be given time off to quarantine, and whilst in self-isolation, this had obviously impacted on their immediate family members.

17.6 In the midst of all the monumental harm he had caused, and which was clearly foreseen, Mogotsi could only come up with the now often used defence that he was victimised. At no point did he show any form of contrition for his conduct. At most, the evidence presented before the Commissioner pointed out to Mogotsi as an employee who was not only grossly negligent and reckless, but also dishonest. He had failed to disclose his health condition over a period of time, sought to conceal the date upon which he had received his COVID-19 test results, and completely disregarded all existing health and safety protocols put in place not only for his own safety but also the safety of his co-employees, and the applicant's customers.

17.7 The gross nature of Mogotsi's conduct is such that a trust and working relationship between him, the applicant, and his fellow employees, cannot by all accounts be sustainable. This is especially so in circumstances where on the applicant's version, other employees had been dismissed for similar acts of misconduct, and where Mogotsi had failed to appreciate, let alone acknowledge the monumental harm, anxiety and strain he had caused on his co-employees and their

immediate families, but also on the operations of the applicant. It follows that a dismissal was indeed an appropriate sanction.

[18] Mogotsi's care-free conduct however also brings into question the seriousness with which the applicant and its own employees also attaches to the dangers posed by this pandemic at the workplace, and whether the measures it has in place are adhered to, and effective in mitigating the effects of this pandemic. This is particularly so in circumstances where Mchunu had reported ill since 1 July 2020, and particularly after 20 July 2020, when his positive COVID-19 test were made known.

[19] Upon investigating the matter after Mogotsi had tested positive, it was discovered that not only had he hugged Kwaieng who had comorbidities, but that he had also walked around the workplace without a mask. The questions that need to be posed despite the applicant having all of these fancy COVID-19 policies, procedures and protocols in place, is whether more than merely dismissing employees for failing to adhere to the basic health and safety protocols is sufficient in curbing the spread of the pandemic? How can it be, that in the midst of the deadly pandemic, the applicant still allows mask-less 'huggers' walking around on the shop floor? Of further importance is notwithstanding all of these protocols and awareness campaigns about this pandemic, why would any employee in the workplace, especially one with comorbidities, hug or reciprocate hugging in the middle of a pandemic? Does a basic principle such as social distancing mean anything to anyone at the workplace? Furthermore, what is the responsibility of the applicant and its employees when other employees or even customers, are seen roaming the workplace or shopfloor mask-less? Of even critical importance is what steps were taken in ensuring the health and safety of all the employees and customers, where at least from 20 July 2020, Mchunu's test results were known? All of these questions need to be addressed in the light of Mogotsi's version that after Mchunu's test results were made known, business at the store had continued as usual, hence he had continued reporting for duty.

[20] It is appreciated that the applicant had as per its evidence, taken disciplinary measures against other employees for violating the health and safety protocols

put in place, including dismissals. However, the facts of this case in my view clearly compels the need for serious introspection by the applicant and all other employers in the light of the above questions posed, in regard to whether existing health and safety measures and protocols in place are being taken seriously by everyone affected. It is one thing to have all the health and safety protocols in place and on paper. These are however meaningless if no one, including employers, takes them seriously.

[21] In the end however, in the light of the evidence led at the arbitration proceedings, the egregious nature of Mogotsi's conduct, and its impact on both the applicant and its employees, the arbitration award of the Commissioner completely fell outside the bounds of reasonableness. It was in the light of all of these considerations that an order was made on the hearing date, setting aside that award, and substituting it with an order that the dismissal of Mogotsi was substantively fair.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Representation:

For the Applicant: Adv L Pillay, instructed by Yusuf Nagdee Attorneys

For the First Respondent: In Person