IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case Nr: PA3/08

In the matter between:

THE DEPARTMENT OF LABOUR **Appellant**

VERSUS

THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **1st Respondent**

COMMISSIONER M. FOUCHE **2nd Respondent**

A. FERREIRA **3rd Respondent**

W. OLIPHANT **4th Respondent**

Judgment

Tlaletsi *AJA:*

Introduction

[1] This is an appeal against the judgment and order of the Labour Court handed down on 28 September 2007, pursuant to an application which was brought by the third and fourth respondents ("the respondents") in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("the Act"), to review and set aside second respondent's award in the arbitration proceedings which were held under the auspices of first respondent pertaining to allegations of unfair dismissal of the respondents.

[2] In the award the second respondent ("the commissioner") held that the dismissal of the respondents was substantively fair but procedurally unfair and made no award for compensation. The Court *a quo* on review made an order on the following terms:

"1. *The arbitration award of the second respondent dated 7th June 2004 in this matter is reviewed and corrected.*

2. *The dismissal of the two applicants from the employ of the third respondent was substantively and procedurally unfair*.

3. *The third respondent is directed to re-instate the two applicants without retrospective effect, as from 15 October 2007*.

4. *The last aspects relates to the cost order. No cost order is accordingly made*".

The appellant applied for leave to appeal and same was granted on 1 September 2008 by the Labour Court.

Factual background

[3] The following facts are either common cause or not in dispute. During July 2002 a contingent of the appellant's employees attended a training course at an out-of-town venue, namely the Mpekweni Sun Hotel, near Port Alfred. They travelled from Port Elizabeth and arrived at the venue on Sunday 21 July 2002. The course commenced on 22 July 2002. The two respondents as well as Ms [R] ("the complainant") were part of the delegation.

[4] After the first day of the course, and whilst the complainant was in her hotel room, she received a telephone call from third respondent who was in the company of fourth respondent. Third respondent enquired from the complainant whether she was alone in her room and whether he and fourth respondent could visit her. The complainant informed third respondent that they

were not welcome to visit her. Third respondent then responded by stating that:

"Now that you are at Mpekweni you will come a lot".

These remarks were understood by the complainant to be intended in a sexual context.

[5] After the aforesaid remark, fourth respondent took the telephone and asked the complainant who was in her room and, whether it was a "*black guy*". The complainant was upset and called him a "*pig*". The fourth respondent then said to her *"if you ride in that car you will surely die"*. This remark in the context in which it was said was understood to mean that should the complainant sleep with "*the black guy*" she would die. She immediately dropped the receiver to end the call.

[6] Later in the evening the complainant was in her room with a certain Ms Carelse who was helping her with her hair. Two other colleagues joined them. They were Messrs Davids and Bezuidenhout. The two respondents later entered the room. At that time Ms Carelse was busy blowing the complainant's hair with a hair dryer. The third respondent touched the complainant's hair and asked her to give him a "*blow-job*". Everybody else laughed except the complainant who got offended. She did not think that to be a joke.

[7] It would appear that the respondents felt unwelcome. They decided to leave. As they were leaving the room the third respondent said the following to the complainant; *"weet jy hoe lyk jy met jou hare wat so in jou oë hang? Jy lyk net soos 'n jagse spinnekop".* By these Afrikaans remarks he meant that the complainant looked like a randy spider because of her hair that was hanging over her eyes. This time, nobody, including the two

male persons in the room laughed. The complainant was upset by all these remarks and she cried. Ms Carelse told her not to allow the respondents to speak to her like that.

[8] Once the respondents had left, the complainant reported the incident to her colleague, Mr Mali. She was in tears when she did so. Mali tried to calm her down. She also went to her other colleague Mr Alfred Cakata ("Cakata") and made a report to him. According to the complainant Cakata was "*working closely*" with the respondents and she thought that he would speak to them and also make it clear to them that she was upset about what happened.

[9] The following day the complainant attended the course presentation. She could not concentrate as she was upset. Ms Carelse had reported the incident to the lecturer who presented the course. The lecturer excused the complainant from attending the course presentation for that day. She did however attend lectures for the rest of the week. She was not in the same lecture as the respondents. She tried all means possible to avoid meeting the respondents during her stay at the hotel. She ignored them and did not greet them whenever she met them. Cakata also reported to her that he had advised the respondents to apologise to her as they had offended her. It is common cause that the respondents did not offer any apology to the complainant.

[10] On Friday 26 July 2002 and on the journey back to Port Elizabeth, the complainant found herself in fourth respondent's motor vehicle. She had been reluctant to be a passenger in his motor vehicle. She had endeavoured to secure alternative transport

without success. All the other motor vehicles travelling back to Port Elizabeth were fully occupied. In the motor vehicle the complainant was sitting quietly between Mali and Ms Marala at the back seat. During the drive, fourth respondent asked Mali if the complainant was sleeping on his lap and what did she have in her mouth. By this he suggested that the complainant had bowed on to Mali's lap and had "*something*" in her mouth. The complainant became disgusted as a result of this remark. She kept quiet until they reached their destination.

[11] The complainant reported the incidents to her superior on her return to the office. The matter was investigated by the Department. The investigation culminated in a disciplinary hearing. The complainant was granted special leave in order to prevent contact with the respondents and also to allow her to undergo counseling. She consulted her medical doctor who referred her to a psychiatrist and a psychologist for further treatment. She received counseling for the incident.

[12] It is common cause that the respondents were charged for misconduct relating to sexual harassment. Separate enquiries presided by the same chairperson were held. The respondents were found guilty. The chairperson recommended dismissal as the appropriate sanction to be imposed for the misconducts.

[13] On 13 February 2003, the Director- General of the appellant sent identical letters to the respondents in which the following was, *inter alia*, stated .That:

13.1 the chairperson of the enquiry had recommended a sanction of dismissal;

13.2 the department was willing to explore an alternative sanction short of dismissal being final written warning coupled with suspension from duty without pay for a period of three months;

13.3 the respondents should consider the aforementioned alternative sanction with their union representatives;

13.4 should they agree to the said alternative sanction of dismissal, to forward their written consents within five days of receipt of the letter;

13.5 should they not accept the alternative sanction that they should convey their rejection in writing and in which event the Director-General would have to impose the sanction of dismissal as recommended by the chairperson of the enquiries.

[14] On 19 February 2003 the respondents responded by each writing identical letters to the Director-General. In the letters the respondents expressed their opinion that the proceedings against them were not substantively and procedurally fair. They based their contention on the fact that the charges were not "*correctly phrased*"; that their constitutional rights had to be protected and that they hoped that the decision that would be taken would be in the interests of fairness and justice. The letters concluded by stating that:

> *"I finally leave the decision of the sanctioning in the very capable hands of yourselves, not forgetting the repercussions to myself as well as the entire office who also has expectations similar to mine."*

[15] On 18 March 2003 the Director-General replied by sending identical letters to the respondents in which he informed them that:

15.1 he had decided to concur with the sanction pronounced by the chairperson of the disciplinary hearing;

15.2 they were discharged from the Public Service with effect from the date of receipt of the letter; and

15.3 they had the right to appeal to the Departmental Appeals Authority within five working days of receipt of the letter.

[16] Indeed the respondents lodged their appeals on 18 March 2003. On 26 March 2003 the chairperson of the Appeals Authority wrote letters to them informing them that a hearing was held on 9 May 2003 and that it was decided that the appeals be dismissed on the basis that the grounds of appeal were found to be irrelevant.

Arbitration proceedings

[17] Aggrieved by the said decision, the respondents referred a dispute of unfair dismissal to the first respondent. The dispute was conciliated on 8 August 2003 and could not be resolved. A certificate to the effect that the dispute remained unresolved was issued and the matter was subsequently referred to arbitration.

[18] At the arbitration the complainant as well as Ms Carelse, Mali, Ms Marala and Ms Julia Kenyane who was the chairperson of the disciplinary enquiries, testified on behalf of the appellant. The respondents also testified and called Messrs Davids and Bezuidenhout as their witnesses.

[19] In brief, the complainant's evidence was corroborated by the other witnesses. Most of the appellant's version of the event was unchallenged. The defence put up by the respondents was the denial that they were guilty of misconduct and accused the

complainant of fabricating a case against them and attempting to falsely implicate them in sexual harassment. They admitted to making what they referred to as innocent jokes which according to them did not have a sexual or any other inappropriate content.

[20] The commissioner rendered a detailed award in which she recognized that the parties had conflicting versions of the events and considered the probabilities and improbabilities in the respective versions as well as the credibility of the respective witnesses. The chairperson found the dismissal of the respondents for misconduct to be substantively fair. She however found the procedural component of the decision to be unfair due to the delays encountered from the date of the complaint up to the stage of communication of the outcome of the investigations. It shall not be necessary to refer to the analysis of the evidence by the commissioner in relation to her finding the respondents guilty of misconduct in view of the concessions made on behalf of the respondents on appeal.

Labour Court Proceedings

[21] Once again the respondents were aggrieved by the award of the commissioner and launched review proceedings to the Labour Court. The initial grounds of review relied upon were that the commissioner failed to apply her mind to the necessary inferences to be drawn from the evidence presented; that she took into account irrelevant considerations in arriving at her determination; the decision arrived at is grossly unreasonable

both on facts and in law and that her decision is not justifiable in relation to the reasons given for it.

[22] The founding affidavit was later supplemented to include the averments that the commissioner should have found that the respondents did not consider their conduct to be offensive or unacceptable to the complainant; that the dismissal was substantively unfair; and further that the sanction imposed induces a sense of shock and alarm, and finally, that the sanction is not justifiable in relation to the reasons given for it.

[23] The Court *a quo* found as follows with regard to the misconduct:

> *"If you look at the utterances themselves, you look at how she reacted, indeed her demeanor was enough to show, when everybody was laughing and she is sitting there in a very upset condition, she was demonstrating to them that she was unhappy with what they did. In my view therefore, the Arbitrator produced an award in terms of the infraction, she produced an award which is justifiable an award in terms of the infraction, she produced an award which is justifiable an award, which is rational when it is seen against evidential material that was before her. Notwithstanding the fact that the complainant did not verbalise her denunciation her demeanor was more than good enough to show them. It must be borne in mind that when she so acted she was in her room. What else could she do? If she was in another person's room perhaps one would speculate and say she should have walked out. She should have done this and that but this as within her own comfort zone, she was with her own friend and she reacted in a way that her friend saw what was going on and they similarly should have seen the upset condition in which she was and that clearly was a reaction to utterances to sexual nature and therefore in my*

view the award was defendable to the extent that it relates to the infraction."

The Court *a quo* concluded thus:

"This therefore brings me to the conclusion that to the extent that the award relates to the infractions, to the misconduct, the Arbitrator produces an award, which indeed is justifiable."

[24] With regard to the sanction of dismissal, the court *a quo* held that since the Director-General had made an offer of alternative sanction, the only inference that can be drawn is that the *"[appellant] decided that [respondents] be kept in its employ."* The Labour Court then reasoned that had the respondents decided to accept the alternative sanction "*they would certainly have been kept in the employ*" and found the sanction to be that *"a reasonable employer would not have in the circumstances have imposed it".* The Labour Court, on this ground alone "*reviewed and corrected*" the award and made the order referred to in paragraph [2] above.

The Appeal

[25] In this Court, the appellant relied on the following grounds for the appeal:

25.1 that the Labour Court erred in setting aside and correcting the award made by the commissioner and not by concluding that the decision reached by her was one that a reasonable decision-maker could have made;

25.2 the finding that the dismissals were substantively unfair is a misdirection in that no or proper consideration was given to the seriousness of the misconduct and its effect on the

trust relationship rendering reinstatement an inappropriate remedy;

25.3 that the Labour Court erred by overlooking the fact that the appellant was obliged to follow the procedure provided for in the Public Service Code and that the respondents made an election not to accept the alternative sanction and that their election was binding on them.

[26] The Disciplinary Code and Procedures for The Public Service (PSCBC Resolution no:2 of 1999) in terms whereof the disciplinary process pertaining to the misconduct was conducted provided as follows with regard to sanction:

"7.4 Sanctions

a. If the chair finds an employee has committed misconduct, the chair must pronounce a sanction, depending on the nature of the case and the seriousness of the misconduct, the employees' previous record and any mitigating or aggravating circumstances. Sanctions consist of:

i. counseling;

ii. a written warning;

iii. a final written warning;

iv. suspension without pay, for no longer than three months;

v. demotion;

vi. a combination of the above; or

vii. dismissal

b. With the agreement of the employee, the chair may only impose the sanction of suspension without pay or demotion as an alternative to dismissal. If an

employee is demoted, after a year she or he may apply for promotion without prejudice.

c. *The employer shall not implement the sanction during an appeal by the employee".*

[27] Also applicable in this matter is the appellant's "*Sexual Harassment Policy*". The policy provides for *inter alia*, the forms of sexual harassment and the procedure to be followed in sexual harassment cases. It makes provision for the informal procedure to be used for "*subtle*" forms of sexual harassment and specifically excludes cases that involve sexual assault, rape, strip search by or in the presence of the opposite sex, *quid pro quo* or persistent forms of sexual harassment, unless the aggrieved party chooses to follow an informal procedure. The formal procedure is the one referred to in the PSCBC Resolution NO: 2 of 1999. The formal procedure is used to address sensitive and serious sexual harassment complaints. The policy provides further that the appellant should be guided by the Code of Good Practice as contained in Schedule 8 of the Labour Relations Act.

[28] It is perhaps apposite to state that there is no challenge against the finding of the Court *a quo* that the conduct of the respondents constituted sexual harassment. The formal procedure adopted, which relate to the sensitive and serious forms of sexual harassment is also not an issue in this appeal. Put differently, it is not the respondent's contention that the appellant should not have followed the formal procedure in dealing with the complainant's sexual harassment complaint. Counsel for the respondents also submitted in argument before us that the conduct of the respondents was not acceptable and that they have been correctly found guilty of the misconduct.

[29] It is evident from the judgment of the Labour Court that the only "*misdirection*" found in the award of the commissioner is with regard to the sanction of dismissal. The finding of misdirection itself is only limited to the narrow fact that if the appellant was prepared to consider another sanction short of dismissal, then it cannot be said that the employment relationship had irretrievably broken down. It is for this finding that the Labour Court reasoned that had the respondents decided to accept the alternative sanction they would still have been in the employ of the appellant. The corollary to the reasoning of the Labour Court is that had the Director-General simply imposed the recommended sanction of dismissal without considering suspension without pay, then the dismissal would have been fair. It therefore means that the consideration by the Director-General of a sanction short of dismissal has rendered what would have been a fair sanction an unfair sanction. I doubt the correctness of this reasoning.

[30] One must be careful not to consider the conduct of the employer in this matter in isolation without taking into account the prescribed procedures in dealing with disciplinary matters of this nature. It is evident from the judgment of the Labour Court that it did not take into account the prescribed procedures as well as the obligations they imposed on the appellant as the employer.

[31] The respondents contended that the finding of the Labour Court that the sanction of dismissal is harsh under the circumstances is a correct finding. It was submitted on their behalf that the appellant should have adopted a progressive approach and applied corrective discipline. This submission is premised on item 3(2) of the Code of Good Practice as well as on clause 2.1 of the

Disciplinary Code and Procedures which provides that discipline should be viewed as a corrective measure and not as punitive.

[32] It is to be noted that the Director-General, when offering the respondents to consider an alternative sanction short of dismissal, was in effect complying with the provision relating to the purpose and object of discipline. By giving the respondents an option of accepting a sanction other than dismissal, the Director-General was offering them an opportunity to correct their behaviour and to rehabilitate themselves. The Director-General could not impose a sanction of suspension without pay, demotion or both without the consent of the respondents. This process was prescribed by the collective agreement which was binding on the appellant as well as the respondents and their union. The Director-General went further to advise the respondents to consult with their union in making a decision whether to accept or reject the offer made to them. The respondent failed to take advantage of the offer and instead adopted an obstructive approach to the implementation of a process that they are now complaining that it was not followed. The respondents can therefore not claim to have been unaware of the consequences of their decision because they were expressly informed that should they not agree with the said alternative sanction the Director- General would have no option but to proceed with the sanction as recommended by the chairperson of the disciplinary enquiry. The appellant also told the Director-General not to forget the repercussions of the sanction left to him to impose on themselves. Their dismissal could not have come as a surprise to them under the circumstances.

[33] In my view, the respondents only have themselves to blame for frustrating attempts made by the appellant to implement corrective discipline. The submission by their counsel that on hind sight the respondents should have taken the advantage of the opportunity offered is in my view well founded. Considering the letters of response to the offer, it makes it clear that their rejection or failure to accept the offer was based on their insistence that they were not guilty of misconduct. It would have therefore served no purpose for the appellant to insist on imposing other forms of sanction aimed at correction and rehabilitation when the respondents themselves believed that they did nothing wrong. For rehabilitation to be effective the incumbent must acknowledge the wrongfulness of his or her conduct and be prepared and willing to rehabilitate. Forced rehabilitation would not achieve its desired result unlike what forced physical exercise would do to the body.

[34] The argument that because the appellant considered an alternative sanction in compliance with the Disciplinary Code, it meant that the employment relationship itself was not intolerable and that the appellant showed some trust on the respondents is in my view, illogical. One of the answers to this argument is that the alternative sanction itself was a form of punishment which had its own conditions which would, if successful, repair the respondents' relationship with the appellant. The respondents were required to subject themselves to suspension from duty for a period of three months without pay. It is perhaps for this reason why the collective agreement provided that the employee who is to be suspended for a period without remuneration has to consent to such an alternative sanction as a measure of cooperation. It is clear from the judgment of the Labour Court that these factors were not

considered when it made an order to review and correct the award rendered by the commissioner.

[35] When the respondents rejected the offer of a sanction short of dismissal, they were quite aware that they were facing dismissal as they were warned already by the employer. They made an election not to accept an alternative dismissal. It is only fair that they be bound by their election and the consequences flowing there from. Their decision left the appellant with no option but to impose the sanction recommended by the chairperson of the disciplinary enquiries. Their rejection of the offer was unreasonable when regard is had to the circumstances of this matter. An offer of alternative sanction could not have meant that the dismissal of the respondents could never have been fair because of the seriousness of the appellant's misconduct.

[36] The Labour Court in making an order of reinstatement without retrospective effect but to a future date of 15 October 2007 when the judgment itself was delivered on 28 September 2007 reasoned that "[*t*]*hat which would have been initially seen by the employer to be an appropriate sanction appears now to have been served*" because four years had since elapsed from the date of dismissal. By this reasoning as well as the decision not ot order retrospective reinstatement, the Labour Court seems to have accepted that the sanction of suspension without remuneration was fair and that the appellant should have imposed such sanction. However, had the Labour Court been alive to the fact that the appellant was prohibited from imposing the alternative sanction without the consent of the respondent it would not, in my view, have held that the respondents should not have been dismissed. This is because the conclusion by the Labour Court that the dismissal was harsh was only based on the

fact that the respondent had considered an alternative sanction which would still have kept the respondent in employment and not on the fact that the misconduct itself did not warrant dismissal. The effect of the order of the Labour Court is that the Labour Court has imposed a sanction of suspension without pay, in excess of three months, without the consent of the appellants, in contravention of Disciplinary code.

[37] The commissioner when considering the sanction of dismissal remarked that an employer is required to eliminate sexual harassment in the workplace and to create a working environment where employers and their employees respect one another's integrity, dignity, privacy and right to equity in the workplace. She mentioned that the employer must take action against perpetrators of sexual harassment. This approach by the commissioner is a proper one in considering cases of sexual harassment. The employer is obliged to keep a sexual harassment free workplace.

[38] Having said what I have said above, the question that remains to be answered is whether the decision made by the commissioner that the dismissal of the appellants was fair is a decision that a reasonable decision maker could not reach. In my view, the answer to this question is that the decision by the commissioner is not a decision that a reasonable decision maker could not reach. The appeal should therefore succeed.

[39] What remains is the issue of costs. In my view this is one of those cases where it would be in accordance with the requirements of the law and fairness that costs should follow the result. Both counsel agreed that a successful party should be awarded costs.

[40] In the result the following order is made:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and substituted with the following:
   "The application for review is dismissed".
3. The third and fourth respondents are to pay the costs of the appeal.

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TLALETSI AJA

I AGREE

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WAGLAY ADJP

I AGREE

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KHAMPEPE JA

On behalf of the Applicant:	**Advocate P.N. Kroon**
Instructed by:	**State Attorney**
On behalf of the Respondents:	**Advocate M. Grobler**
Instructed by:	**Brown Braude and Vlok Attorneys**

Delivered: 29 January 2010