IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NO: JA21/08

IN THE MATTER BETWEEN:

THEMBA PRINCE MOTSAMAI APPELLANT

and

EVERITE BUILDING PRODUCTS (PTY) LTD RESPONDENT

JUDGMENT

WAGLAY DJP

INTRODUCTION

[1] This is an appeal against the judgment of the Labour Court in terms of which it reviewed and set aside an award handed down by the Commissioner for the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The Labour Court found, *inter alia*, the Commissioner's award that the appellant be re-employed from 21 February 2005, notwithstanding the fact that he sexually harassed a co-employee, not sustainable on the evidence presented at the arbitration.

[2] The Labour Court refused leave to appeal and this matter finds itself before this Court because of a successful petition to the Judge President of this Court.

BACKGROUND

[3] The background to this matter is that two of the respondent's employees lodged a complaint against the appellant to the effect that the appellant had behaved inappropriately towards them. On receiving the complaint the employer suspended the appellant and investigated the matter. It took statements from the two complainants and was satisfied that there was sufficient evidence to found charges of sexual harassment against the appellant. It then proceeded to hold a disciplinary hearing. The appellant was found guilty at the disciplinary hearing and dismissed. The appellant appealed against the findings of the disciplinary hearing but his appeal was unsuccessful.

[4] The appellant, dissatisfied with the internal disciplinary process referred the matter as a dispute to the CCMA. He did so on the grounds that his dismissal was both substantively and procedurally unfair. The matter was referred to arbitration after the parties failed to resolve the dispute during conciliation.

THE ARBITRATION

[5] At the arbitration the respondent led the evidence of one, Richard Tsokodibane ("Tsokodibane"), the plant manager and the two complainants, Joyce Msibi ("Msibi") and Paulina Rammaila ("Rammaila"). The appellant testified in his own defence. Tsokodibane was the person to whom the complaints were made,

he investigated them and served as the respondent's representative at the disciplinary hearing.

[6] Tsokodibane's evidence was to the effect that Msibi and Rammaila went to see him and lodged complaints that the appellant had behaved inappropriately. He was told by Msibi that the appellant had *inter alia* touched her private parts. Tsokodibane immediately summoned the appellant and told him of the allegation levelled against him which he said he would investigate. He then suspended the appellant, this was on a Friday. On the same day he took statements from Msibi and Rammaila and decided that the matter was sufficiently serious to merit a disciplinary hearing. On Monday, after the Friday on which the appellant was suspended, he gave the appellant notice of a formal disciplinary hearing. Tsokodibane testified about the disciplinary hearing that followed and explained that he did not consider it appropriate to follow a process of conciliation and mediation between the parties, as set out in the employer's disciplinary code in relation to sexual harassment complaints, because he believed that the actions of the appellant constituted a serious case of misconduct.

[7] Msibi testified that she worked as a machine operator. The appellant was her immediate superior, he was her foreman. According to Msibi on a particular day he called her into his office and once she entered he closed the door and proceeded to his desk top computer. Although the appellant shared the office with others he was alone in the office at the time. He then asked Msibi if she knew that he *"could undress her"* and then switched on the computer which displayed pornographic material. Msibi saw this,

laughed and walked out of the office after a little while. The appellant followed her and commented to her about the possible size of a colleague's (Moeketsi) penis and then pointing to a female colleague said words to the effect that the size of the female colleague's panties must be the same as that worn by the woman in the pornographic movie he was playing on his computer.

[8] Msibi further stated that the day after the above incident she went to fetch a key at the office occupied by the appellant and as she entered his office, again he was the only person present in the office, he closed the door and showed her female condoms. He then went to sit on his chair and asked her to bring the condoms to him. She refused. She told him that she did not like his behaviour and that she would inform, his superior, Tsokodibane about it. He had also on this occasion told her that he thought *"by my lips and mouth that I will be nice"*. She left the office in disgust but did not report the matter.

[9] Some time later, on a day in June 2004, when the appellant had returned from study leave she met him in his office. This was before the working day began. She went to that office looking for "Oupa" who shared that office with the appellant and did not know that the appellant had returned from his study leave that day. When she saw the appellant she greeted him and put out her hand to give him a hand shake which she believed was the respectful thing to do. The appellant reacted by saying that the proper way to greet was to give him a hug. Innocently, she agreed. When they hugged he touched her private parts. She became extremely

upset and although she did nothing about it immediately by the next day she decided she would take it further and reported the matter to Tsokodibane.

[10] The other complainant, Rammaila, testified that on 10 June 2004, after she returned from the stores and approached her work station she saw the appellant on the one side of her work station. As she got to her work station the appellant asked her what was the size of her panties. When she inquired why he wanted that information, the appellant's reaction was simply that she must give him that information. She refused to do so. She then went to a colleague, one Thoko, and complained about the appellant's request. Thoko approached the appellant to establish why the appellant wanted the information and the appellant told him that it was just a joke. Rammaila reported the matter to her superior. According to her though, she was offended, not so much, by the information requested by the appellant, but, the manner in which he made the request.

[11] The appellant in his defence, firstly, complained: that Tsokodibane had not interviewed him when the investigation was conducted; and, that he was not handed the statements collected from Msibi and Rammaila. He admitted that he had pornographic material on his computer but denied that he showed it to Msibi or played it in her presence. He also denied that he showed Msibi the female condoms or requested that she brings them to him. He did however admit that there were female condoms in his office which were available to staff. The appellant also denied that he touched

Msibi's private parts while admitting that Msibi and he had hugged each other when he returned from his study leave.

[12] Further, the appellant admitted asking Rammaila for her panty size and said that he had done so because he had decided to buy all the female staff winter tights and he needed the panty size of the female staff to get those tights. Later on he testified that it was Rammaila who initiated the word "panty" because he had, at the outset, only asked her to provide him with the size of her pants for the purchase of tights but the size indicated by her was to him obviously incorrect. He then repeated his request and she replied by saying: *"do you want the size of my panty or what"* and it was to this that he said yes he wanted the size of her panty. Finally, he stated that it was his belief that Msibi and Rammaila were part of a conspiracy hatched by his employer to get rid of him. Why they would want to get rid of him he did not say, nor did he lead any evidence to indicate that there was any conflict between him and his superiors at the work place.

[13] Although the appellant was legally represented he did not put his version to any of the witnesses who testified against him; his legal representative also did not indicate that the failure to do so was due to any error, in fact, no explanation for this failure is provided.

[14] Based on the above evidence the Commissioner concluded that the appellant's dismissal was procedurally fair. The Commissioner also found that the appellant did sexually harass Msibi but not Rammaila and found that the sanction of dismissal was too harsh. The Commissioner thus replaced the sanction with the one that

the employer must *inter alia* re-employ the appellant within five days of the receipt of the award. The award records the following in respect of the sanction: *"...the Applicant [appellant] be re-employed and not re-instated on new terms and conditions. The Respondent [employer] must not pay him any arrear wages he may be entitled to. He must in addition be given a final written warning valid for a period of twelve (12) months. Should the applicant be involved in another act of sexual harassment the respondent may dismiss him. The Respondent must arrange a counselling session at least once a week. Should he fail to attend the sessions arranged the Respondent may dismiss him".*

The Labour Court

[15] Both parties took the Commissioner's decision on review to the Labour Court. The appellant did so on the grounds that the Commissioner was wrong in finding that he sexually harassed Msibi and, in any event, notwithstanding the Commissioner's view that he had sexually harassed Msibi, the Commissioner should have, says the appellant, ordered his reinstatement and not just re-employment. The respondent, on the other hand, took the matter on review on the grounds that the award of re-employment was not a decision that a reasonable person in the position of the Commissioner could arrive at having regard to the misconduct committed by the appellant and that the award should therefore be set aside and the sanction of dismissal should be found to be fair.

[16] The Labour Court did not find any irregularity or conduct that would justify an interference with the Commissioner's finding that the appellant behaved inappropriately towards Msibi and that he

was guilty of sexually harassing her. The Labour Court was also satisfied that there was nothing to justify an interference with the findings of the Commissioner that the dismissal of the appellant was procedurally fair and accordingly dismissed the application sought by the appellant in so far as it related to the appellant's complaints that the Commissioner's decisions in the above respects was reviewable.

[17] In relation to the review relating to the sanction raised by both the appellant and the respondent the Labour Court found that the sanction imposed by the Commissioner was neither justifiable nor one that could reasonably be imposed having regard to the facts that were before the Commissioner [1]. Also, the failure by the Commissioner to provide any explanation as to why he decided to impose the sanction he did led the Labour Court to conclude that there was no reason not to impose dismissal as the proper sanction. The Labour Court thus set aside the award in so far as the sanction was concerned and replaced it with an order that the dismissal was substantively fair. It also, therefore, followed that the Labour Court dismissed the appellant's complaint that the Commissioner's decision not to reinstate him was liable to be set aside.

This Appeal

[18] The appellant has not set out any grounds upon which this Court can conclude that the Commissioner committed an irregularity which renders the award open to be interfered with by the Labour

[1] See Sidumo v Rustenburg 2008 2 SA 24 (CC) where the tests for the setting aside an award handed down by a of the CCMA is set out. In that matter it was held that the test is whether the decision of the commissioner was one that a person in the position of the commissioner could reasonably arrive at having regard to the evidence presented at the arbitration.

Court nor does he set out any reasons as to why he is of the view that the Labour Court was wrong in setting aside the award of the Commissioner. The evidence presented at the arbitration points to the appellant having committed sexual harassment on three different occasions. On the first occasion he called Mbisi to his office and played a pornographic movie on his computer, he then made comments about the size of a colleague's penis and the size of a female colleague's panty in relation to the pornographic movie. Mbisi nevertheless simply made a dignified retreat; on the second, and this on the very next day after the first incident, he closed the door with her in his office and after showing her the female condoms and telling her to bring it to him, he makes sexual talk, this despite the fact that she admonished him and told him that she will report the incident to his superior; on the third occasion the appellant went further and made objectionable physical contact, this time he touched her private parts.

[19] The evidence of Msibi was unchallenged. As against that there are only bare denials by the appellant. In the light of the evidence that was then before the Commissioner it cannot be said that the decision arrived at by the Commissioner is not one that a reasonable person in the position of the Commissioner could arrive at. An examination of the evidence presented at the arbitration cannot lead to the conclusion that the decision of the Commissioner in so far as the misconduct is concerned is liable to be set aside: the Commissioner properly considered all the evidence and concluded, in so far as Msibi is concerned, that she was sexually harassed by the appellant. In the case of Rammaila he found that she was not sexually harassed (this Court is not

required to express any opinion on the Commissioner's findings in respect of the misconduct charge relating to the appellant's conduct towards Rammaila). The decision of the Commissioner that the appellant did sexually harass Msibi is thus not one that can be interfered with.

[20] I now turn to the appellant's complaint that the respondent should not have held a disciplinary hearing but should have attempted to conciliate between Mbisi and him because that is what was required in terms of the respondent's disciplinary code. Sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of ones being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable. In the circumstances, I believe, to force conciliation or mediation between the perpetrator and the victim further compounds the wrong. Therefore, unless the victim agrees to any other form of resolution of a complaint of sexual harassment the employer should hold a disciplinary hearing against the perpetrator. A disciplinary hearing must however be proceeded with, with the victim's cooperation, where the victim, having raised the complaint, is uncomfortable with proceeding with any process whether formal or informal the employer must find a way to deal with the issue lest he be found culpable for failing to deal with the matter. In the latter case some form of counselling for

the victim might be appropriate if the employer is of the means of providing it.

[20] In this matter the victim wanted a disciplinary hearing: in such an instance it would have been improper for the respondent to proceed with a process other than a disciplinary hearing. The fact that the respondent's disciplinary code provided for conciliation does not mean that the respondent is inextricably bound to follow that process. The procedure must be chosen by the employer but it must do so in consultation with the victim. In the circumstances there are no grounds to interfere with the Commissioner's finding that the dismissal was procedurally fair, it is a decision that a reasonable Commissioner could properly arrive at.

[21] This then brings me to the important issue of sanction. It is now accepted that when a Commissioner arbitrates a dispute, it is the Commissioner who must decide what is the appropriate sanction having regard to: all of the evidence presented to him/her; the company's code of conduct; and, of course the nature and seriousness misconduct. The fact that the decision is that of the Commissioner does not mean that it can be made in a vacuum. Like any other decision the decision that the Commissioner arrives at in respect of the sanction must also be one that is reasonable in all the circumstances.

[22] Here, although the Commissioner found that the appellant was guilty of sexually harassing Msibi and that the misconduct was of a serious nature, in determining the appropriate sanction he reduces the seriousness of the misconduct by:

(i) labelling the fact of showing the female condoms as being *"childish"*; and,

(ii) finding that the appellant had not persisted with his wrongful conduct after he was told by Mbisi that his conduct was unacceptable.

The Commissioner clearly got it wrong. Showing of the condoms must be seen in the context of the sexual innuendo contained in the appellant's statement to her ("*by my lips and mouth I will be nice*") after showing her the condoms and asking her to bring it to him. Also, the appellant did not stop after Mbisi told him to stop with his wrongful conduct; in fact after being told to stop he continued to sexually harass her and proceeded from sexually harassing her verbally to doing so physically.

[23] The Commissioner also appears to take into account, in determining an appropriate sanction, the fact that the employer failed to convene a meeting between the appellant and Msibi to address the matter as provided for in the employer's disciplinary code. In this respect it is my view that such a meeting even if agreed to by Msibi would serve no purpose because the appellant was of the view that he had not committed any of the wrongs complained of. In any event Msibi wanted a formal process and the employer provided this. The process followed, cannot in my view be faulted and cannot serve as a *"mitigating factor".*

[24] In any event the sanction imposed by the Commissioner is extremely curious. The Commissioner compels the employer to re-employ the appellant but on new terms and conditions. There is nothing to indicate whether the employer is required to employ the

appellant in the same position and, as Msibi's superior, or in some new position. Is it, in any event, appropriate to place appellant again in the same position in relation to Msibi? if not, does the employer have some other position for the appellant? We have no answers to these questions, nor is there any evidence that the employer can afford to create a new position for the appellant. The other conditions imposed by the Commissioner are even more curious. Clearly the sanction imposed by the Commissioner is not based on any evidence that would justify it and as such it is not a sanction that is either logical or reasonable in the circumstances.

[25] The fact of this matter is that the appellant was found to have committed serious misconduct and remained unrepentant, in these premises to have escaped the sanction of dismissal is difficult to comprehend.

Conclusion

1. [26] I am mindful of the fact that this is an appeal of a review application and, therefore what I may believe to be an appropriate sanction is irrelevant, however, having regard to all the facts and circumstances as set out above I do not believe that any person in the position of the Commissioner could reasonably arrive at a decision other than the one that the dismissal of the appellant was fair.

[27] In the circumstances I believe that the Labour Court was correct in reviewing and setting aside the award handed down by the CCMA and replacing it with the order it made. The order the Labour Court made was as follows:

"1. The arbitration award made by the second respondent under case number GA25798-04 on 16 February is reviewed and set aside.

2. The said arbitration award is substituted by the following award: '*The dismissal of the Applicant is found to have been procedurally and substantively fair. There is no order as to costs'*.

3. The first respondent and the Union who assisted him are jointly and severally ordered to pay the applicant's costs, the one paying the others to be absolved."

[28] With regards to costs, however, there appears to me to be no basis in law and equity why the Labour Court made the order it did. I am also of the view that in terms of both law and equity there should be no order as to costs in the appeal.

[29] In the result I make the following order:

(i) The appeal is dismissed with no order as to costs;

(ii)Paragraph "1" and "2" of the order of the Labour Court stands paragraph "3" of the order of the Labour Court is replaced with the following:

"3. There is no order as to costs"

Waglay DJP

I agree

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Tlaletsi AJA

I agree

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Musi AJA

Appearances;

For the appellant: Adv. W.R.Mokhare instructed by E.S.Makinta Attorneys

For the respondent: Adv. E. Tolmay instructed by Breytenbach-Potgieter Inc

Date of hearing: 23 February 2010

Date of judgement: 4 June 2010.