



Collaboration Space / UCT Equality Law Database / 2011

MOTSAMAI v EVERITE BUILDING PRODUCTS (PTY) LTD

Created by Jenny Erasmus [Administrator], last modified on Jul 25, 2013

YEAR: 2011PLAINTIFF / APPLICANT / APPELLANT: APPELLANT: THEMBA PRINCE MOTSAMAIDEFENDANT / RESPONDENT: RESPONDENT: EVERITE BUILDING PRODUCTS (PTY) LTDCOURT: LABOUR APPEAL COURTCITATION: (2011) 2 BLLR 144 (LAC)POST / PRIOR ACTION:

CCMA

LABOUR COURT: available at <http://www.saflii.org/za/cases/ZALC/2006/117.html>JUDGE(S): WAGLAY DJPGROUND(S) OF DISCRIMINATION:STATEMENT OF FACTS:

The appellant was a former male employee of the respondent. He was dismissed following a disciplinary hearing at which he was found guilty of sexually harassing 2 female employees.

The appellant aggrieved by his dismissal, and following a failed appeal, referred a dispute to the CCMA. He alleged that his dismissal was procedurally and substantively unfair. Conciliation failed and the matter proceeded to arbitration. The commissioner found that the appellant's dismissal was procedurally fair and that he was guilty of sexual harassment against one of the two complainants. Despite same the commissioner found the appellant's dismissal to be too harsh and issued an award that, inter alia, the respondent re-employs the appellant. Notably the award did not provide for the reinstatement of the appellant to his former position, but for the re-employment of the appellant on different terms and conditions. The specifics and viability of which was not presented in evidence, or canvassed by the commissioner.

The decision of the commissioner was taken on review to the Labour Court by the appellant and the respondent. The appellant sought to have the decision reviewed on the basis that the commissioner was incorrect in his determination that the appellant was guilty of sexually harassment. The respondent sought to have the decision reviewed 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 regarded 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." The Labour Court dismissed the appellant's grounds of review. The court found no irregularity in the commissioner's conduct. It upheld the respondent's grounds for review. The court found that there was no justification for the award of re-employment imposed by the commissioner nor could such a sanction be one that could be "reasonably imposed having regard to the facts before the commissioner." Accordingly the court found the appellant's dismissal to be substantively fair, and as such there was no reason not to impose a sanction of dismissal.

The appellant appealed against the decision of the Labour Court.

ISSUE OF LAW:

Whether the Labour Court was correct in reviewing the commissioner's sanction of re-employment.

DECISION, RATIO AND OUTCOME (including minority judgment):

The Labour Appeal Court dismissed the appellant's appeal.

The Labour Appeal Court was satisfied that the commissioner committed no irregularity in concluding that the applicant had sexually harassed his co-employee. The appellant argued that the respondent should not have convened a disciplinary hearing but rather facilitated a process of conciliation as set out in the respondent's disciplinary code. The court stressed the vulgarity of sexual harassment in the workplace. It rejected the notion of compelling conciliation between the victim and the perpetrator in instances of alleged sexual harassment. The victim wanted a disciplinary hearing and it would have been "improper" for the respondent to select another process. The court held that the respondent was not bound by the procedures in its code, and the procedure followed was to be decided in consultation with the victim. Therefore there was no reason to interfere with the commissioner's decision that the dismissal was procedurally fair.

The court found the commissioner's decision with respect to the sanction of re-employment to be incorrect. The sanction of re-employment, and the language used by the commissioner in its award, down-played the seriousness of being found guilty of sexual harassment. The court found that the commissioner had regarded the lack of conciliation by the respondent as a mitigating factor in considering the sanction to be imposed against the appellant in its award. The court rejected such a "mitigating factor". It validated the procedure and conduct of the respondent in responding to the sexual harassment complaints lodged against the appellant. The sanction of re-employment furthermore had no basis or justification on the evidence.

The Labour Appeal Court dismissed the appellant's appeal and upheld the decision of the Labour Court - that the decision to dismiss the applicant was procedurally and substantively fair.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALAC/2010/23.html>

LABELS: