

A **Rankeng / Signature Cosmetics and Fragrance (Pty) Ltd**

Commission for Conciliation, Mediation and Arbitration

B *Award date: 02/06/2020 Case No: GAJB19105-19*

Before: N Mbileni, Commissioner

C ***Referral in terms of section 191(5)(a)(i) of the LRA***

Dismissal – Substantive fairness – Misconduct – Drugs – Employee reporting for duty after smoking dagga at home but capable of performing duties – Dismissal unfair.

D **Editor's Summary**

E The applicant, a picker, was dismissed after he was found guilty of reporting for duty under the influence of dagga. He admitted that he had smoked a “zo!” early that morning before leaving home but claimed that he was fit to perform his duties.

F The Commissioner noted that the applicant had been charged with being under the influence of a narcotic drug. However, he had been allowed to remain at work. The only evidence the respondent had presented about the applicant's condition was the observation that his eyes were inflamed. The most that could be said was that the applicant had acted irresponsibly. This merited no more than a warning.

The applicant was reinstated subject to a final written warning.

G **Award**

Details of hearing and representation

H [1] The above matter was set-down for arbitration on 22 May 2020. The hearing was held at the offices of the CCMA at 127 Fox Street, Johannesburg.

I [2] The applicant is Ofentse Rankang who appeared in person. The respondent is Signature Cosmetics and Fragrance (Pty) Ltd and it was represented by its employee, Chris Botha.

Issue to be determined

J [3] Whether the dismissal of the applicant was procedurally and substantively unfair.

Background to the issue

- [4] The applicant was employed by the respondent on 28 February 2018 as a Picker. He was dismissed on 11 June 2019 for alleged misconduct. At the time of his dismissal he earned a salary of R4 200 per month. Subsequent to his dismissal he referred a dispute of unfair dismissal to the CCMA for resolution. The dispute could not be resolved through conciliation and the applicant has requested that it be resolved through arbitration as provided for by section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 as amended (“the LRA”). He wishes to be reinstated. A
- [5] It is common cause that the applicant was charged with being under the influence of Cannabis while at work. He admitted to smoking a full “zol of Cannabis” early in the morning prior to going to work. He smoked around 5am and left his house around 6:30am to report for duty around 7am. B
- [6] The applicant further conceded that he was asked to take a drug test through Lancet Laboratories. He tested positive for Cannabis. He further conceded that the procedure which was followed at the disciplinary hearing was fair. He however disputed that the offence warranted a dismissal. C
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Summary of evidence and argument

- [7] Two (2) witnesses, Mr Farhaad Ebrahim and Mr Thokozani Dumakude were called to testify on behalf of the respondent. The respondent also relied on the report from Lancet Laboratories to prove that the applicant was under the influence of Cannabis. Mr Farhaad Ebrahim testified that the applicant reported to Thokozani Dumakude and he (Thokozani) reported to him (Farhaad Ebrahim). E
- [8] Mr Farhaad Ebrahim, to whom I will refer as Ebrahim, testified that on 29 May 2019 he checked the attendance register and discovered that the applicant had reported late for duty. He then asked him (applicant) to report to his office to explain the reason he was late. Upon the applicant’s arrival at his (Ebrahim’s) office he realised that his eyes were red and watery. He initially thought that the applicant may be suffering from a bad cold or flu, but the applicant insisted that he was not sick. F
- [9] Ebrahim asked the applicant if he had taken drugs, and his response was that he did not use drugs but had smoked “dagga”, which is another word for Cannabis. The applicant was asked to make a statement which statement is part of the bundle. The statement read: G
- “I have smoked weed at home and then I admit that. I don’t smoke during lunch. I reported on 29 May 2019 for duty at 07:05. I will go for a test today.” H
- He then signed the statement.
- [10] The applicant indeed agreed to take the test and he tested positive for Cannabis. Through his conduct on the day of 29 May 2019 and being argumentative, Ebrahim concluded that he was under the influence of the Cannabis drug. The policy of the company prohibited anyone from working while under the influence of alcohol or drugs. The company was very strict on the said policy because it was a compliance issue in terms of the I
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- A Occupational Health and Safety Act. The company policy recommends dismissal even for the first offence.
- [11] Under cross-examination, the applicant put it to the witness that the reason why he was argumentative on the said day was that they were insisting that he was under the influence of dagga. He further put to the witness that the fact that he was allowed to continue working demonstrated that he was not under the influence of any drug. The response of Ebrahim was that he (applicant) was placed in a safe environment at the dispatch.
- B [12] Mr Thokozani Dumakude also testified and confirmed that the applicant told him that he admitted to smoking dagga.
- C [13] The applicant did not really testify. He stated that there was no point in testifying because everyone was lying. He in fact intimated at the time that he was not willing to proceed with the matter. In spite of advice, he did not testify but stated that the respondent was not able to prove that he was under the influence of Cannabis as they had alleged.
- D [14] He further argued that the Lancet Laboratories report did not say he was under the influence of Cannabis, but merely indicated that he had tested positive for Cannabis.

E Analysis of evidence and argument

- [15] It is common cause that the applicant smoked Cannabis on 29 May 2019. It is further common cause that when he was tested his results came back positive. The only issue in dispute is whether the applicant was under the influence of the drug which he admitted to taking in the morning before coming to work. Further, whether testing positive for Cannabis was a dismissible offence in terms of the respondent's policy.
- F [16] The applicant was charged with being under the influence of Cannabis at the workplace. The disciplinary code of the respondent states that management should not allow any employee to remain on its premises if it is suspected that they (employee) are under the influence of any drug. It further provides that whether or not an employee is fit to report for duty will be determined by the respondent's management by exercising reasonable discretion.
- G [17] It would appear that in this case the reasonable discretion of management was that the applicant was fit to continue working. They exercised reasonable discretion to restrict him to a particular area. The problem with a charge of being under the influence of drugs is that there has not been any scientific method of determining whether a person is under the influence of the drug such that there is an impairment in their performance. It is suggested that the employer needs to prove that the employee was under the influence of a narcotic drug such as dagga or Cannabis.
- H [18] Employers may however rely on circumstantial evidence such as obvious signs of physical or mental impairment. Although the respondent's evidence was that the applicant's eyes were red and watery, it did not refer to any evidence of impairment which would suggest an inability to perform tasks allocated. On the contrary, when management was empowered by
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the Code of Conduct and Discipline to send the applicant home, they chose to allow him to work. In my view that was an acceptance that although he tested positive for Cannabis, which he had already admitted to taking, it had not affected his ability to perform his work. A

[19] In the circumstances, dismissal was too harsh and was not an appropriate sanction. I have taken into account though that the applicant was aware that the policy of the respondent prohibits the use of drugs on duty. It was irresponsible to take a substance that may have the ability to impair his mental or physical abilities. B

Award

[20] I, therefore, order the respondent Signature Cosmetics and Fragrance (Pty) Ltd to reinstate the applicant Ofentse Rankeng with effect from 15 July 2020 without any back-pay. C

[21] I further [order] that he be issued with a final written warning, valid for a period of 12 months. D

[22] No cost order is made.

No cases were referred to in the above award.