Employee dismissed for wanting to wear heels... Now the shoe is on the other foot

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The Labour Appeal Court recently issued an order[1] refusing to grant leave to appeal against the judgment[2] of the Labour Court, after the Labour Court reinstated an employee who was dismissed for voicing her dissatisfaction with the company's policy on wearing high-heeled shoes on mine premises.

Image source: Karolina Grabowska from Pexels

In this matter before the Labour Court and Labour Appeal Court, Webber Wentzel acted for an employee, Litshani Mofokeng, who was dismissed from Tharisa Minerals (Pty) Ltd (Tharisa / company) for expressing dissatisfaction about a rule which precluded women at the company from wearing high-heeled shoes.

In its judgment, the Labour Court emphasised, among other issues, the need to distinguish between employees' expressing their dissatisfaction/grievances in the workplace and conduct that amounts to a challenge of authority and wilful defiance of workplace rules. The latter, depending on the circumstances, may amount to insubordination. The case also restates employees' rights to hold a peaceful demonstration to have their grievances addressed by their employers.

The company's policy

In June 2015, Tharisa adopted a policy and procedure in terms of the Mine Health and Safety Act (MHSA), which, among other things, stated that high heels and open shoes were not to be worn by its employees (policy). The policy was ambiguous. It did not specify where on Tharisa's premises high heels and open shoes were not allowed. It was also not fully adhered to, particularly at the main office complex of the mine, where Mofokeng worked as an HR co-ordinator.

After one of Tharisa's directors saw Mofokeng wearing high-heeled shoes in the main office complex in September 2017, he raised the potential danger with one of the managers. Management hastily arranged for a risk assessment, which indicated that high-heeled shoes posed a safety risk. Employees were then instructed in a memorandum only to wear flat shoes on the mine premises and were told that non-compliance with the instruction could result in disciplinary action.

A day before this memorandum was issued, Mofokeng was again seen wearing high-heeled shoes. She was summoned to the manager's office and instructed to immediately comply with the policy and procedure, which she did (ie. she removed the high-heeled shoes). She expressed her dissatisfaction to some of her colleagues, asking them to voice their dissatisfaction together, and she also approached a trade union leader.

Mofokeng's manager viewed her actions as a challenge to his authority and charged her with gross insubordination and incitement. She was found guilty and dismissed, and on referral to the CCMA, the CCMA Commissioner agreed with Tharisa.

Mofokeng then approached the Labour Court. We represented Mofokeng at the Labour Court, where she was successful in reviewing and setting aside the CCMA Commissioner's decision. We also represented Mofokeng before the Labour Appeal Court, when the company petitioned for leave to appeal against the judgment of the Labour Court. The Labour Appeal Court issued an order against the company, refusing to grant leave to appeal.

Labour Court findings

The Labour Court found, inter alia, that Mofokeng's dismissal was substantively unfair and ordered Tharisa to reinstate her (with effect from 16 October 2017). The Court held that, when the policy was first adopted in June 2015, there appeared to be no justification for prohibiting high-heeled shoes and the company did not specify where on the premises this applied. Also, before the risk assessment was undertaken in September 2017 (ie. about two years after the policy was first adopted), the rule seemed invalid and unreasonable. The justification of the rule against wearing high-heeled shoes only emerged after the risk assessment.

On the risk assessment, the Court held that the MHSA requires an employer to record the risks assessed and make them available for inspection by employees. The process contemplated in the MHSA of identifying risks and/or conducting a risk assessment is subject to the principle of legality. This means that an employee may approach a Court to question the legality of the risk assessment report. The Court held that the rights of an employee such as Mofokeng to question a policy, and/or the risk assessment that justifies a policy, are untrammeled. Employees have a constitutional right to freedom of expression, which includes expressing views about the reasonability or otherwise of any workplace rule and/or policy.

The Court said that insubordination does not only manifest itself in refusal to obey a reasonable and lawful instruction but can also be in a challenge to or defiance of the authority of the employer - provided the authority imposed is lawful and reasonable. The factors to be considered to establish whether misconduct amounts to insubordination are the willfulness of the employee's defiance; the reasonableness of the instruction defied; and the actions of the employer prior to the purported act of insubordination. Provocation by an employer is an important mitigating factor which may render dismissal inappropriate.

The Court held that a unilateral change to a dress code is tantamount to provocation and even if Ms. Mofokeng was

insubordinate, which she was not, dismissal was inappropriate. The Court held that there was no evidence that Ms. Mofokeng deliberately challenged the authority of her employer or willfully defied the policy and that an expression of dissatisfaction does not equate to persistence or willfulness or challenge and/or defiance of authority.

On the allegations of incitement against Mofokeng, the Court held that the finding that Mofokeng was guilty of incitement was not justifiable on any basis. Incitement is a common law criminal offence defined as the intention by words or conduct, to influence the mind of another in the furtherance of committing a crime. Mofokeng did not incite anyone to commit a crime. Nor did she incite any co-worker to engage in unprotected strike action. Mofokeng merely voiced her dissatisfaction and asked a few employees to join her in approaching management to plead a case for wearing high-heeled shoes, since they had worn them in the past without any difficulties.

1. *Tharisa Minerals v Mofokeng and others (8 November 2022)*
2. *Mofokeng v CCMA and others (27 June 2022)*

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