

In the matter between:

TZANENG TREATED TIMBERS (PTY) LTD

(REG. NO. 2004/006888/07)

and

NATIONAL BARGAINING COUNCIL FOR THE

WOOD & PAPER SECTOR

First Respondent

M N MASETLA N.O.

Second Respondent

THE CHEMICAL, ENERGY, PAPER, PRINTING

WOOD & ALLIED WORKERS UNION OBO

S MALATJI & 29 OTHERS

Third Respondent

Heard: 17 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be on 06 April 2022.

Coram: Coppin JA, Tokota et Phatudi AJJA

JUDGMENT

PHATUDI AJJA

[1] This is an appeal against the entire order of the Labour Court (Coetzee AJ) in which it dismissed an application brought by the appellant in terms of section 145 of the Labour Relations Act¹ ("LRA") to review an award made by the second respondent in favour of the 30 employees represented by the third respondent. Leave to appeal to this court was granted on petition.

[2] The issue that arises for decision in this appeal is essentially whether the court a quo had erred in dismissing the review application and whether the award of the arbitrator, acting under the auspices of the first respondent, fell within the range of a reasonable award an arbitrator could have made.²

[3] It is common cause that the employees affiliated to the third respondent union, including the 30 employees who are cited herein as third respondent, embarked on a legal, protected strike on 4 August 2014. On the morning of the strike the workers clocked in at the workplace of the appellant but then left to participate in the strike. The workers were not given access to the workplace again on that day, as a result of which they never clocked out. The appellant in fact denied them such access.

[4] Upon their return to work the next day the respondent employees were each given a notice of suspension by the appellant, pending an investigation into their alleged misconduct relating to their clocking conduct on the day of the strike. Notwithstanding protestation by the third respondent union on their behalf, the respondent workers were thereafter charged with misconduct relating to the clocking.

[5] In the main charge they were alleged to be guilty of fraudulent clocking in, because on 4 August 2014 (i.e. the day of the strike) they had clocked in for duty and had left the appellant's premises without clocking out. The charge also alleged that this was "a class 1" and "a very serious offence".

[6] The appellant principally relied on "clocking instructions", with which the employees were allegedly familiar, that had been revised in July 2011, and in

¹ Act 66 of 1995.

² See the test in, *inter alia*, *Sidumo and another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) ("Sidumo").

terms of which: “1. Employees must clock in when coming on duty; 2. Employees must clock out for lunch and then clocked in again when they return to work; and 3. Employees must clock out when they leave the premises.” In terms of the instructions employees who leave the premises without clocking out will face disciplinary action.

- [7] In terms of the appellant’s disciplinary code class 1 offences are considered “very serious”. Item 22 of the code states the following under the heading “Fraudulent Timekeeping”: “Clocking in for someone else, having someone clock in for you”, and more relevant for this case, “clocking without actually working”.
- [8] The thirty respondent employees were found guilty of the said charge at the disciplinary hearing and were dismissed by the appellant. As a consequence, the third respondent union, on behalf of the employees, referred an unfair dismissal dispute to the second respondent (i.e. the bargaining council). After conciliation failed the matter was referred to arbitration, where the arbitrator presided under the auspices of the second respondent. At the arbitration evidence was led on behalf of both the appellant and the employees, but the basic, relevant facts were otherwise not in contention.
- [9] In the award the arbitrator, having evaluated the evidence and argument, found that the respondent employees’ dismissals were procedurally fair, but substantively unfair and directed that the appellant reinstate each of them on terms and conditions that were no less favourable than those which applied before their dismissal, and effectively from 1 April 2015. Significantly, the reinstatement was not made retrospective (i.e. to the date of the dismissals) and the payment of back pay was not ordered.
- [10] In the review application, which is the subject of this appeal, the appellant sought to review and set aside the arbitrator’s award contending, mainly, that the arbitrator erred in concluding that the dismissals of the employees were not substantively fair. The appellant further, essentially, contended that the charge of misconduct (fraudulent clocking) had been proved and that the sanction of dismissal was fair since the misconduct was a class 1 form of

misconduct which is regarded as very serious. The appellant further contended that the award had to be set aside and that the matter had to be remitted to the bargaining council for a hearing *de novo* because the appellant had never been given a fair opportunity to deal with the appropriateness of the dismissals as a fair sanction, i.e. in respect of each of the employees.

[11] It was submitted on behalf of the third respondent (the only respondent opposing this appeal) that the court a quo was correct in finding that the award of the arbitrator falls within the range of awards a reasonable arbitrator in his position would have made. Counsel for the third respondent union and employees further emphasised that the respondent employees could not have been found guilty of the charge relating to the failure to clock out because they were deliberately denied access to the workplace by the appellant to enable them to clock out; and that, in any event, this was not an instance where one employee clocked in for another or where they clocked in in order to defraud the employer by misrepresenting that they were at work or on duty in order to be paid, while in reality they were on strike.

[12] Counsel for the third respondent union and employees further submitted that not only was it incumbent upon the appellant to prove the fairness of the dismissal, which would also entail proving the appropriateness of the sanction for the (mis)conduct the respondent employees could be said to have committed, but that the issue of the fairness of the sanction had been canvassed and dealt with adequately at the arbitration.

Discussion

[13] Fraud in the conventional or ordinary sense was clearly not proved by the appellant. It had not been proved that the individual respondent employees had clocked in deliberately on the day of the strike in order to create the false impression that they were at work while they were actually on strike. The reason why they actually clocked in was not to defraud the appellant, it may have had to do with the fact that they had started the day at the workplace and as a result clocked in. They left the workplace to participate in the strike,

and seemingly omitted to clock out but were then deliberately prevented by the appellant from entering the workplace again.

[14] The individual respondent employees did indeed openly participate in the legal strike and in a group. The appellant did not and does not assert that it did not know which of them participated in the strike, or that any of them denied participating in the strike on 4 August. There was therefore no proof that their clocking in and their leaving without clocking out was deliberate and intended to mislead the appellant into believing, either that they were at work and not on strike, or to create a false impression that they should be paid in circumstances where they were not entitled to be paid. None of the respondent employees claimed payment and the appellant at no stage believed, or was led to believe that they were entitled to be paid while being on strike. The conduct in clocking in and not clocking out given the circumstances also caused no harm to the appellant or anyone else³.

[15] They may have been guilty of some lesser form of misconduct, namely that of failing to clock out in the first place, i.e., when they left to join the strike, as the arbitrator seems to have found, albeit impliedly, because the arbitrator appears to have allowed for what seems to have been some sanction in that the reinstatement was not made retrospective, nor was the appellant directed to pay them back pay. The sanction of dismissal for such infraction was clearly not considered by the arbitrator to have merited the sanction of dismissal. The latter sanction being reserved for the more serious cases where there was actual fraudulent clocking, i.e. truly dishonest conduct.

[16] It was most definitely unfair for the appellant to have equated the conduct of the respondent employees with that of actual fraudsters, who, for example would get others to clock in for them while they were not at work, or utilise some other means, in order to create a false impression of being at work and being entitled to payment.

³ Compare *Sidumo* (above) para 78.

[17] The difficulty of course is that the arbitrator did not fully articulate the reason for the curtailed reinstatement award, but that can hardly be a reason for setting aside the award.

[18] It appears from the record that the issue of the sanction (i.e. of dismissal) would have been integral to the case the appellant, as employer, had to meet and it cannot now argue that it ought to have been given, effectively, a greater opportunity to prove that the sanction of dismissal was appropriate. It clearly had that opportunity. On the evidence, it could reasonably be found to have failed to have established that it had exercised its discretion fairly in dismissing the respondent employees.

[19] In light of all of the evidence the arbitrator could reasonably find that the respondent employees were not guilty of fraudulently clocking in or out (despite the heading in the disciplinary code) and that if there was an infraction it was less serious and could be dealt with by denying the respondent employees retrospective reinstatement and back pay. This was fair to both sides⁴. The court a quo rightly found accordingly that the appeal should therefore fail.

[20] Taking into account the facts, the law and fairness, a costs order is not appropriate, therefore there shall be no costs order even in respect of the appeal.

[21] In the result, the following is ordered:

21.1 The appeal is dismissed;

21.2 There is no costs order.

⁴ *Toyota South Africa Motors (Pty) Ltd v Radebe & others* [2000] 3 BLLR (LAC); (2000) 21 ILJ 340 (LAC) paras 49 and 50.

MG Phatudi

Acting Judge of the Labour Appeal Court

Copping JA and Tokota AJA concur in the judgement of Phatudi AJA

APPEARANCES:

FOR THE APPELLANT:

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Instructed by Joubert & May Attorneys, Tzaneen

FOR THE RESPONDENT:

Adv Dobble

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