IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA96 / 2022

In the matter between:

MURRAY AND ROBERTS CEMENTATION PTY LTD **Appellant**

and

ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION OBO DUBE **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

HENDRICK OLIPHANT NO **Third Respondent**

Heard: **27 September 2023**

Delivered: **18 October 2023**

Coram: **Waglay JP, Smith AJA and Malindi AJA**

JUDGMENT

MALINDI AJA

Introduction

[1] This is an appeal against the whole of the judgment and order handed down on 14 June 2022 by the Labour Court in which the Labour Court set aside and substituted the arbitration award of the second respondent.

[2] The court below found in favour of the employee whereas the commissioner had found in favour of the employer. The arbitrator found that the dismissal of the employee was procedurally and substantively fair, whereas the court below found the dismissal to have been substantively unfair and ordered his reinstatement retrospectively from the date of dismissal and without loss of benefits.

[3] The appellant (employer) appeals against the judgment and order of the court below. The first respondent (union), acting on behalf of the employee, opposes the appeal.

Background

[4] The background facts, save for the dates on which it is alleged that the employee was absent from work, are common cause.

[5] The appellant employed the employee as an artisan assistant electrician on 17 January 2018. He was dismissed on 7 November 2019, following a disciplinary hearing where he was found guilty of misconduct. An internal appeal was dismissed.

[6] The dismissal followed upon the charge of misconduct reading as follows:

> 'Poor work attendance
>
> Allegedly: were absent without permission from 29/10/2019 and 4/11/2019;
>
> Allegedly continuously misused sick leave and your conduct has demonstrated a person that you had virtually book sick leave before and after weekends/rest period a conduct that is not acceptable [sic].'

[7] At the disciplinary hearing, the employer led the evidence that the employee had absented himself on 14, 21, 28 and 30 October and 4 November 2019. The employee's witness, at the arbitration, Mr Chueu, testified that the employer's code of conduct provides for dismissal as an appropriate sanction where an employee was absent without permission (AWOP) for a period of five working days or longer. The date of 29 October was abandoned as a date

on which the employee was alleged to have been absent from work. Regarding the allegation that the employee abused sick leave, it was alleged that he had previously absented himself without permission and was issued with written warnings in respect of each of the two incidents.

[8] Mr Chueu testified further that he was not involved in the disciplinary enquiry against the employee nor was he involved in the investigations that form the basis of the charges against him. He relied merely on the charge sheet and the employer's clock-in sheet that was submitted to the disciplinary hearing proceedings. Furthermore, Mr Chueu was unable to testify to the allegation that the employee had abused sick leave during the period he had testified about. He sought his evidence to be admitted on the basis that he is the employer's human resources officer responsible for discipline and absenteeism. It must be inferred that he meant further that he had access to the documents that he presented before court.

[9] Mr Chueu was unable to explain to the arbitrator whether the charge that the employee was absent for five days or more means consecutive days, whereas the employee's witness Mr Benjamin Kedirileng testified that in his ten years of employment by the appellant, he had understood that it is a dismissible offence to absent oneself from work for five or more consecutive days without authorisation.

[10] Mr Chueu testified that the dates, other than those appearing in the charge sheet, became available on the eve of the hearing and that therefore, the arbitrator was to take cognisance thereof and to also disregard the date of 29 October 2019 as the time sheets show that the employee was present at work on that day.

Findings of the arbitrator

[11] The arbitrator expressed doubt about whether the charge was clear, seeing that it states that the employee is charged for having been absent without permission from 29 October 2019 and 4 November 2019. It therefore was not clear whether this represents a continuous period or whether he was absent on the stipulated dates of 29 October 2019 and 4 November 2019.

Furthermore, the arbitrator noted that the charge is not contained in the employer's code. By this, I understand the arbitrator to mean that the code does not provide for an offence of absence without permission for a continuous period of five consecutive days or a period of any five days over a period.

[12] Despite the above, the arbitrator continued to express a view that the employee knew what charge he had to answer to and concluded that, despite the wording of the charge, he finds that the reason for dismissal as stated by the employer's witness is valid and that to find otherwise would be overly technical. In this regard, the arbitrator referred to *Xstrata South Africa (Proprietary) Limited - Thorncliffe Mine v NUM obo Mphofelo and Others*[1]. On this authority, the arbitrator found that he cannot hold the employer to the wording of the charge but to its reason for dismissal.

[13] The arbitrator found the employee unreliable on the basis that he had testified in his evidence-in-chief that he could not remember whether he was present or absent from work on 14, 21, 28, and 30 October 2019, whereas, in cross-examination, he contradicted this and denied that he was absent on any of those days. Furthermore, the arbitrator admitted the time sheets as evidence on the basis that the employee relied on them to prove that he was at work on 29 October 2019. He concluded that the employer had therefore proved that the employee breached the rule on absence without permission for the days stated by the employer, which constituted five days, and that this was a dismissible offence. The arbitrator rejected the union's submissions that the charge against the employee meant that he had to be absent without permission for five consecutive days for it to constitute a dismissible offence.

[14] Finally, the arbitrator held that the finding that the employee had absented himself from work for five days, taken together with the two prior written warnings for sick leave abuse and being absent without permission, cumulatively, justifies a sanction of dismissal.

[1] [2018] ZALCJHB 148 (11 April 2018).

The findings of the court below

[15] The court below set out the test on review as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*[2] and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[3] namely whether the decision reached by the arbitrator is one that a reasonable decision maker could reach, having considered the principal issues before him or her; evaluated the facts presented at the hearing and come to a conclusion that is reasonable. The court below correctly stated that the court of review is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. The court considers the totality of the evidence and decides whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence before him/her.[4]

[16] The grounds of review were first, that the arbitrator admitted hearsay evidence, and secondly, that he found the employee guilty of misconduct, the form of which was not as stated in the charge sheet and that the reason for dismissal does not constitute a dismissible offence in the employers' code of conduct. In view of these two grounds of review, the role of the court below was to determine whether the arbitrator committed an irregularity or erred in a material manner by admitting hearsay evidence when there was no application to admit it in terms of the Law of Evidence Amendment Act[5]; whether the arbitrator misconceived the enquiry that he was bound to undertake. In *Head of the Department of Education v Mofokeng and Others,*[6] It was stated that:

> '…Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to

[2] [2007] ZACC 22; 2008 (2) SA 24 (CC) at para 110.
[3] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para 19.
[4] Ibid at paras 18 – 19.
[5] Act 45 of 1988.
[6] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at para 33.

be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute.'

[17] I agree with the court below in its assessment of the hearsay evidence of the evidence of Mr Chueu. This pertains to the two issues of whether the employee had previously contravened the employers' code of conduct by absenting himself on two separate occasions without authorisation, and whether he had been absent from work on the days set out in the charge sheet and those that Mr Chueu testified to in his evidence in order to bring the number of days of absenteeism to five. This was hearsay evidence. We differ on how it was to be treated on appeal. Although the employee disputed that he had been absent from work on the extra days testified to in addition to 28 October and 4 November 2019, it was not incumbent on the employer to call witnesses who could testify directly regarding the timesheets that Mr Chueu relied upon. The correctness or authenticity thereof was not disputed by the employee's representative, except in cross-examination. The fact that the arbitrator did not expressly consider the law in relation to the admission of hearsay evidence does not mean that he did not apply his mind to it. As stated above, he stated at least one ground upon which he admitted the timesheets. In terms of section 3(1)(c) of the Law of Evidence Amendment Act, hearsay evidence is inadmissible unless it was admitted by agreement between the parties or was admitted in terms of the section and in the interests of justice. Seeing that the evidence was not admitted by agreement, it had to be admitted in the interests of justice if, upon application by the employer and in the arbitrator's assessment of the facts or factors listed therein, he decided to admit such evidence. It has been said that it is the combined assessment of all the factors that will result in a proper application of section 3(1)(c).[7] The record does not show that the arbitrator had regard to the provisions of the Law of Evidence Amendment Act. It appears that he simply admitted the evidence of the timesheets on the basis that the employee had relied on the evidence in order to argue that he was at work on

[7] A Bellengere, C Theophilopoulos, et al: "*The Law of Evidence in South Africa*" 2nd ed, Oxford University Press Southern Africa at 297 – 300.

29 October 2019. As stated above, the arbitrator was alive to the fact that hearsay evidence was being tendered and decided to admit it. His decision in this regard cannot be characterised as unreasonable.

[18] The court below then considered whether the employee was found guilty of the misconduct as charged. The employee's contentions were that the misconduct alleged is that he was absent from work without authorisation on two dates, namely, 29 October and 4 November 2019. It became apparent that it was an error to state 29 instead of 28 October 2019, and the arbitrator proceeded on this basis. If the hearsay evidence that he had been absent on 14, 21, 28 and 30 October 2019 is excluded, the employer would not have made a case that the employee had been absent without permission for five days consecutively or even five days over a period, which would constitute a dismissible offence. The court below held that firstly, on the basis of the charge sheet, the employer had only established the employee's absence on 4 November 2019 since it became common cause that he was at work on 29 October 2019. Secondly, If the employer wished to rely on the extra dates testified to by its witness, the charge sheet ought to have been amended.

[19] In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[8] (*EOH Abantu*), it was stated that, when formulating charge sheets, employers must advise the accused employee of the precise charge he or she is required to answer in the disciplinary hearing. This requirement is to ensure that the employee knows precisely what charges he or she is required to answer to. The accused employee must be afforded adequate notice and information to ascertain what act of misconduct he or she is alleged to have committed. In this case, the employee had been given notice and information pertaining to the absence from work without permission on 29 October and 4 November 2019 as the reason that the employer would seek his dismissal. In argument, Mr Bosch, for the employer, submitted that the reason for dismissal is absenteeism without leave regardless of the number of days, especially in view of two previous warnings. Mr Cook, for the union and employee, submitted that the reason for seeking a dismissal is not

[8] (2019) 40 ILJ 2477 (LAC) at para 16.

for absenteeism *per se* but absenteeism over a period of five or more continuous days. He submitted that if the extra days falling outside the charge sheet are excluded then the reason for dismissal has not been satisfied. He added that on the employer's evidence which also excludes 29 October, then it has only been established that the employee was absent for one day. It would be unfair, he submitted, to dismiss on the basis of one day's absence, albeit without leave.

[20] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others,*[9] it was stated that "*it is an elementary principle … of labour law … that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal*". It is common cause that the reason for dismissal in this case was that the employee was absent from work without permission on 29 October and 4 November 2019 as contained in the charge sheet, including the extra days that were added at the hearing. It is inescapable therefore to conclude that a number of five days was crucial for the employer to make its case. Had it not been so, it should have been content with proceeding with one day (4 November) or two days (28 October and 4 November) if five consecutive days was not a requirement for dismissal. It was not fair therefore for the employee to be confronted with additional dates without him having been provided or afforded adequate notice and sufficient information in order for him to prepare for the hearing and to provide answers to the allegation.[10]

[21] It was not open to the chairperson of the disciplinary hearing or the arbitrator to interpret the charge sheet in a manner not supported by an ordinary, grammatical and contextual reading.[11] For this reason, the arbitrator had misconstrued the true nature of the inquiry and his mandate. The enquiry was

[9] (2008) 29 ILJ 964 (LAC) at para 32.
[10] *EOH Abantu supra* at para 16.
[11] *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

whether the employee had absented himself from work for five or longer continuous days without permission. In *Sidumo*[12], it was held that:

> '…where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing … the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[22] In the circumstances, the arbitrator's award stands to be reviewed and set aside for two reasons. First, because the charge sheet does not contain a dismissible offence in terms of the code of conduct, nor did the employer establish that the employee had been absent from work without permission for five or more consecutive days. Secondly, the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings when he failed to have regard to the evidence as a whole. He misinterpreted the reason for dismissal to mean absence for five days over a period instead of five days consecutively.

[23] In *Palluci Home Depot (Pty) Ltd v Herskowitz and others*,[13] it was held that where a commissioner undertook the inquiry in a misconceived manner by determining the appropriateness of a dismissal on the basis of reasons for dismissal which the employer did not rely upon at the time of dismissing the employee. But for this error, the court in Palluci found the commissioner would have arrived at a different result in the award. The court below found correctly therefore that the arbitrator in this matter undertook the inquiry in a misconceived manner by disregarding the reasons stated in the charge sheet as the reasons for dismissal and by supplementing the charge sheet.

Conclusion

[12] *Sidumo supra* at para 268.
[13] [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC) at paras 45 – 46.

[24] The court below was not correct in excluding the hearsay evidence but correct in finding that the arbitrator committed a gross irregularity in terms of section 145(2)(a)(ii) of the LRA by finding the employee guilty of misconduct based on the reasons for dismissal which the employer had not relied upon in the charge sheet. The charge sheet should have been interpreted to require a consecutive five or more days of absence without leave to constitute a valid dismissible offence and not five days or more over any period.

[25] In the circumstances, the following order is made.

Order

1. The appeal is dismissed.

2. There is no order as to costs.

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MALINDI AJA

Waglay JP and Smith AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv C Bosch
	Instructed by Van Zyl Inc
FOR THE FIRST RESPONDENT:	Adv A Cook
	Instructed by LDA Inc Attorneys