IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1186/22

In the matter between:

TEMBE BLESSING **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

SUNDUZA MODONSELA **Second Respondent**

NAS COLOSSAL AVIATION SERVICES **Third Respondent**

Heard: **10 January 2024**

Delivered: **31 January 2024**

Summary: **Review of arbitration award – misconduct dismissal – review application dismissed – decision reached by the commissioner that the dismissal of the employee was substantively and procedurally fair, was one that a reasonable decision maker would arrive at.**

JUDGMENT

SCHÄFER-KING, AJ

Introduction

[1] The Applicant launched an application to review and set aside the Second Respondent's arbitration award dated 23 May 2022, which was issued under case number GAEK3864-22. The application was opposed by the Third Respondent.

[2] In terms of the award, the Second Respondent found that the Applicant's dismissal was substantively and procedurally fair, and accordingly dismissed the Applicant's case.

[3] The Applicant seeks an order that the arbitration award be reviewed and set aside and that the matter be referred back to the First Respondent for a new hearing before an arbitrator/commissioner other than the Second Respondent.

Background

[4] Briefly, the facts of this matter are that the Applicant was employed by the Third Respondent in the position of cargo sorter from 1 July 2021.

[5] The Applicant contended that he was unfairly treated in that he was not given a permanent contract of employment, payslips and was not given the correct PPE, which included a raincoat.

[6] A contract of employment was signed by the Applicant on 5 July 2021.

[7] Clause 9.1.2 of the contract of employment is an undertaking by the Applicant that he will comply with all lawful instructions given to him from time to time by the Third Respondent.

[8] Clause 9.1.3 of the contract of employment is an undertaking by the Applicant to obey and comply with all lawful and reasonable instructions given by his superior.

[9] Clause 12.1 of the contract of employment states that the Applicant will notify his supervisor or designated senior person at least 2 hours prior to the commencement of his shift if he is unable to report for duty in case of illness or unforeseen emergencies.

[10] The Applicant had been issued with a written warning on 22 June 2021 and a final written warning on 9 November 2022 for unauthorised absenteeism.

[11] A disciplinary enquiry took place on 17 March 2022, at which the Applicant was charged with the following charges:

'1. Refusal to carry out lawful and reasonable instruction: On or about 10 March 2022 you failed to carry out a lawful and reasonable instruction from your superiors by obtaining a written explanation concerning your absence from work on the 02, 14, 17, 21 and 28 February 2022 and 3 and 8 March 2022.

2. Unauthorised absenteeism: In that on 02, 14, 17, 21 and 28 February 2022 and 3 and 8 March 2022 you were absent from work without authorisation.

3. Gross breach of company rules of employment: Your actions as outlined above are in direct breach of the company rules and regulations as well as your contract of employment.'

[12] The Applicant was found guilty of the charges and summarily dismissed from the employ of the Third Respondent on 6 April 2022.

[13] The Applicant challenged the substantive and procedural fairness of his dismissal by referring an unfair dismissal dispute to the First Respondent under case number GAEK3864-22.

[14] The unfair dismissal dispute was arbitrated on 11 May 2022. The Second Respondent issued the arbitration award on 23 May 2022, which dismissed the Applicant's case on the grounds that the Second Respondent found that the dismissal of the Applicant by the Third Respondent was substantively and procedurally fair.

[15] The Applicant's grounds for review are set out in his founding affidavit. I do not intend repeating such grounds of review here. The Third Respondent opposed the application as set out in the Third Respondent's answering affidavit.

[16] At the conclusion of the hearing of this matter:

[16.1] The Applicant argued that the Second Respondent's decision was unfair, as it favoured the Third Respondent and that it was against the Constitution, as it should have favoured the Applicant as he was the employee.

[16.2] The Third Respondent argued that:

[16.2.1] The Applicant has failed to set out any grounds upon which the arbitration award can be reviewed and set aside;

[16.2.2] No other arbitrator would have come to any other decision.

Analysis

[17] I do not deem it necessary to extensively address the relevant test to be applied in proceedings such as this. The test laid down by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines*[1], namely that an arbitration award will be reviewable if it is one that a reasonable decision maker could not reach, is well established.

[18] The Labour Appeal Court (LAC) confirmed in *Fidelity Cash Management Services v Commission for Conciliation, Mediation & Arbitration & others*[2], that there can be no doubt under *Sidumo* that:

'[102] The reasonableness or otherwise of a commissioner's decision does not depend – at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[19] Ultimately, whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were before him

[1] 2008 (2) BCLR 158 (CC); (2007) 28 ILJ 2405 (CC).
[2] (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC).

or her.

[20] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration*[3], stated the applicable test as follows:
'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[21] It is common cause that the Applicant had been issued with a written warning on 22 June 2021 and a final written warning on 9 November 2022 for unauthorised absenteeism.

[22] In cases of employees being subjected to a final written warning, I agree with the judgment in *Transnet Freight Rail v Transnet Bargaining Council & others*[4], where it was stated that employees already on a final written warning, leave the employer with little choice but to dismiss them. In this judgment, the Labour Court further concluded that *"the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature"*[5], and that *"the principles of progressive discipline required such a re-offending employee usually to be considered irredeemable"*[6].

[23] Having considered the pleadings, the record of the arbitration proceedings which consists of the bundle of documents presented at the arbitration and the transcript of the arbitration proceedings, I am satisfied that the arbitrator considered the principal issue before him, evaluated the facts presented at the arbitration hearing and came to a reasonable conclusion.

Conclusion

[24] I, therefore conclude that the review application falls to be dismissed, as the Applicant has failed to make out any competent grounds for review of the arbitration

[3] [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 16.
[4] (2011) 32 ILJ 1766 (LC) at para 38.
[5] Ibid at para 42.
[6] Ibid at para 42.

award and I am not persuaded that the decision reached by the Second Respondent that the dismissal of the Applicant by the Third Respondent was substantively and procedurally fair, was not one that a reasonable decision maker would arrive at.

[25] In the premises, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

L Schäfer-King
Acting Judge of the Labour Court of South Africa

Appearances

The Applicant: Tembe Blessing

For the Third Respondent: Advocate M Bekenstrater
Instructed by: Moodie & Roberstson