

iAfrica Transcriptions (Pty) Limited//dkdj

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT:

JOHANNESBURG

CASE NO: JA52/08

DATE: 2010-05-28

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In the matter between

METCASH TRADING AFRICA (PTY) LIMITED

Appellant

And

COMMISSIONER N MASEKO N.O. & OTHERS

Respondent

Coram: DAVIS JA, PATEL JA & HENDRICKS AJA

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J U D G M E N T

DAVIS JA: This appeal against a judgment, of Moshoana AJ of 26 February 2008.

Briefly the facts can be summarised thus:

The third respondent was employed by the appellant and was also shop steward of several years standing. On 1 March 2005, the third

respondent failed to arrive at work without completing any leave forms or proceedings through the formal procedures which were required with the obtaining permission to take leave.

It is not disputed that, on 22 March 2005, appellant transmitted telegrams to third respondent to his home address requesting that third respondent contact his superiors at the premises of appellant regarding the absence with had now ennead since 1 March 2005. It is common cause that this telegram was sent and was delivered to the home address of the third respondent. Notwithstanding, the third respondent tendered no
10 plausible explanation for his failure to respond.

The third respondent did not dispute that the appellant sent a further telegram to his home address on 29 March 2005 requesting that he contacts his superiors regarding the absence from work. Again, he accepted that the telegram was addressed, the third respondent failed to give any plausible explanation for his failure to respond thereto.

On 30 March 2005, appellant again sent a telegram to the third respondent's home address. Again no response was forthcoming and no explanation was provided. The telegram advised the third respondent that he should contact his superior by 16:30 on 31 March 2005 regarding his
20 absence at work, the failure of which would result in his having being considered to have absconded from his employment.

As a result, the appellant sent a telegram on 1 April 2005, to the same address advising that, due to his failure to respond to the earlier telegram requesting he make contact with his superior, appellant regarded the third respondent as having absconded from his employment.

It is clear from the evidence that these notices accorded with the appellant's policy, which, given the fact that the third respondent was a shop steward, was well known to him. The policy stipulated that, should an employee be absent from work for three consecutive days, without being ill, without having any valid reason for such absence, the appellant would make a reasonable effort to contact the employee and request the latter to contact the appellant within 24 hours. Should the employee so fail, he or she would deem to have been absconded.

The third respondent then responded to the telegram of 1 April 2005
10 advising that he had lodged an appeal against the finding. At a postponed appeal hearing, in that he had failed to arrive at the first hearing, the third respondent tendered, as an explanation of his absence, that his wife had given birth on 2 March 2005 and he took family responsibility leave from 3 March 2005 whereafter he took annual from 4 March to 6 April 2005, which leave he averred had been verbally approved by one Sejake. Notwithstanding this explanation on 1 April 2005, he was dismissed from his employment.

Having being dissatisfied with the decision for being dismissed, the third respondent eventually took the matter to the second respondent. The
20 first respondent was appointed as an arbitrator to determine the dispute. The first respondent held that the appellant's version was more probable than the third respondent. Accordingly he concluded that the third respondent did not have the necessary permission to take leave, nor could the first respondent determine that any procedural unfairness had accompanied the decision to so dismiss the third respondent.

The only issue therefore, was that of sanction. Without giving any reasons for this part of the award, the first respondent found that the dismissal of the third respondent was substantively unfair on the grounds that “the sanction of dismissal was too harsh”. Apart from this stark phrase, no explanation or justification was provided by the first respondent.

In the light thereof, the appellant brought an application to review to this finding by the respondent, on the grounds that the latter failed to take account of the evidence which had been presented to him regarding the application of the policy, regarding the absconding to which I have made
10 reference, further evidence, regarding the length and seriousness of the third respondent’s absence without leave, the impact on the appellant’s operation and the effect the decision have on the appellant’s future application of the rule against employees absconding.

The court *a quo* dismissed the review application on the basis that a reasonable decision maker, being first respondent, could in the circumstances have found that the sanction of dismissal was too harsh, such that the arbitration award could not be said to be unreasonable. In this, the court *a quo* appeared to have relied on the approach set out by the Constitutional Court in *Sidumo & Another v Rustenburg Platinum
20 Mines & Others* (2007) 28 ILJ 2405 (CC).

That decision, regarding the approach which this court must adopt, namely to determine whether the award was in accordance with that which would be made by a reasonable decision maker, was amplified by Zondo JP in *Fidelity Cash Management Services v CCMA*, (2008) 29 ILJ 964 (LAC) , when the learned judge president said that there could be no

doubt that under *Sidumo*:

10 “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
20 were D, E and F upon which he did not rely that
could have relied which are enough sustain the
decision”.

In the present case, no reasons are given. No justification is put up
by the first respondent and neither by the court *a quo*, with respect, in
respect of the conclusion that the decision was a reasonable one.

Whether the award is reasonable, must be determined with due regard to all the evidence placed before the commissioner and the issues were that were put before him or her.

In this particular case, the evidence is compelling, particularly once the third respondent's version of events is rejected by the first respondent, that is that he had absconded and once the evidence presented by the appellant regarding the impact of its employees simply absconding for a month without any reasons, was left unchallenged, as was the case in the present dispute. There were no facts with which the first respondent could
10 work, so as to justify the finding of the sanction of "too harsh". The first respondent proffered none to gainsay this particular conclusion and unfortunately neither did the court *a quo*.

In short, once the third respondent's version that he had permission was rejected, and it is found that he had absconded, and that he failed to present a plausible explanation for absconding for a period of a month then the evidence placed before the first respondent supports the finding of the sanction of dismissal. This approach to absconding had been consistently applied when employees absconded for such a lengthy period of time. In addition, there was evidence presented that the lengthy
20 seriousness of his absence without leave and the impact that this had on appellant's operations. No evidence was put up to gainsay any of this evidence.

In short, even if the lack of a reason offered by first respondent was ignored, on the basis of the *Fidelity* case, then the evaluation of the evidence supports a conclusion that absence from work for a lengthy and

unexplained failure to present himself for work was not too harsh but reasonable in the circumstances.

For these reasons therefore, I would make the following order:

1. The appeal is upheld;
2. The decision of the court *a quo* is set aside and replaced with the following order:

2.1 The review application is upheld;

2.2 The award of 20 September 2005, issued by the first respondent is reviewed and set aside and replaced as

10 follows:

3. The third respondent's dismissal is upheld in that it was substantively and procedurally fair.

PATEL JA:)

HENDRICKS AJA:) Agreed

DAVIS JA

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APPEARANCES:

Matter Unopposed. No Respondents

For the appellant: D.O.Pretorius

Instructed by: Cliffe Dekker Hofmeyr Inc

Date of Hearing: 28 May 2010

Date of Judgement: 28 May 2010

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