



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA36/2014

In the matter between:

ISIKHONYANE CLEANING SERVICESS

(PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION

First Respondent

NORMAN MBELENGWA

Second Respondent

SATAWU obo RAMALEPE MATLATSO

Third Respondent

Heard: 27 May 2015

Delivered: 05 October 2015

Summary; Review of arbitration award – employee dismissed for absconding during strike notwithstanding employer’s informing employee that strike not affecting management staff of which employee was part – arbitrator upholding dismissal – employer failing to adduce evidence that employment relationship broken down in circumstances where another employee who committed same misconduct reinstated albeit in a lower position – principle of consistence discipline restated - arbitrator committing reviewable irregularity – Labour Court’s judgment upheld – appeal dismissed with costs.

Coram: Davis JA, Ndlovu JA, And Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

- [1] This is an appeal against the judgment and order of the Labour Court (Molahlehi J) handed down on 30 July 2013, reviewing and setting aside the award of Mr Norman Mbelengwa (“the arbitrator”) of 12 December 2011, acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). The court *a quo* granted leave to appeal.
- [2] The following facts are common cause. The appellant conducts business in the cleaning services industry (“the industry”) and employed Ramalepe Matlatso (“the employee”) as a supervisor at its Carlton Centre, Johannesburg site. During the period of 08 August to 31 August 2011, there was a protected strike within the industry in which the appellant’s employees participated. On the day of the strike, appellant’s management called a general meeting to discuss about employees’ participation in the strike. At the meeting, the employees were informed that the third respondent, (a union of which the employee was a member) had issued a strike notice in terms of which, its members were to embark on a strike from that day and that management were not concerned by the strike. The employee left her workplace around 12h00 on the day of the strike and did not report to work for the duration of the strike (i.e from 08 August to 31 August 2011). The employee did not inform the appellant of her whereabouts and only returned to work on 01 September 2011 after the strike had ended.
- [3] On 12 September 2011, the employee was served with a notice of a disciplinary inquiry relating to her absence from work and was charged with the following:

‘Absent from work from the 08/08/11 (12h00) until the 31/08/11 without a valid reason.’

- [4] At the disciplinary hearing chaired by Ms Meida Mohlala (“the chairperson”), the employee was found guilty as charged and dismissed. In terms of item 14 (Category C) of the appellant’s disciplinary code, “deliberate continual absenteeism or dereliction (absence from work for more than 5 consecutive days without notifying the Company)”, is a misconduct warranting a dismissal. The employee lodged an appeal against the decision of the chairperson of the disciplinary hearing, to dismiss her. However, the employee did not attend the appeal hearing, and her dismissal was confirmed.
- [5] The third respondent, acting on behalf of the employee, referred an unfair dismissal dispute to the CCMA. When conciliation failed, the dispute was referred for arbitration on the ground that the employee’s dismissal was substantively unfair.

Arbitration

- [6] At the arbitration hearing, the appellant (who bore the *onus* of proving that the dismissal was fair) presented evidence to the effect that at the general meeting held on the first day of the strike, it was made clear to the administrative staff, supervisors and managers that they were not affected by the strike as they belonged to a different bargaining unit. Further, on the day of the commencement of the strike, one of the appellant’s managers enquired about the whereabouts of the employee and no one knew where she was. The employee denied that she was absent from work without a valid reason/permission as she had participated in the national strike. The employee further testified that, after leaving the workplace at around 12h00, she had telephoned her team leader (a certain Anna) and informed her that she was joining the strike. The employee further testified that at the meeting held on 08 August 2011, people in attendance were informed by management that everyone was free to join the strike.
- [7] The arbitrator rejected the employee’s evidence that she was absent from work during the strike because of participating in the strike. The arbitrator further rejected the employee’s evidence that at the meeting held on the day of the strike, employees were told they were free to join the strike. The

arbitrator concluded that the employee did not present any valid or justifiable reason for her absence and found her guilty of the misconduct she was charged with. The arbitrator concluded that the employee's dismissal was substantively fair because the appellant had showed a valid reason for her dismissal.

- [8] The third respondent, acting on behalf of the employee, launched review proceedings in the court *a quo* in terms of section 145 of the Labour Relations Act¹ ("LRA") for the review and setting aside of the arbitrator's award and sought the reinstatement of the employee. The third respondent contended that the arbitrator had committed a gross irregularity in upholding the employee's dismissal in the absence of any evidence adduced by the appellant to the effect that the employment relationship had irretrievably broken down.
- [9] The court *a quo* found that the arbitrator committed a gross irregularity in failing to interrogate whether the employment relationship had irretrievably broken down. Despite the guilt of the employee for the misconduct for which she was charged with, the court *a quo* had difficulty with the sanction of dismissal under the circumstances. The court *a quo* concluded that the arbitrator had not applied his mind when considering the sanction in that he had failed to appreciate that neither at the disciplinary hearing nor at the arbitration hearing did the appellant present any evidence showing that the employment relationship had irretrievably broken down. In this regard, the court *a quo* took into account the fact that in terms of the written submissions handed in at the arbitration hearing,² the appellant had submitted that it was prepared to treat the employee in the same manner as it did with another supervisor, Thelma Nong ("Nong"), who had been found guilty of the same misconduct and was demoted to the position of a cleaner. Furthermore, the appellant had submitted that it was willing to reinstate the employee as a cleaner, without her losing her years of service. The court *a quo* concluded that in the absence of any evidence showing that as a result of the

¹ 66 of 1995.

² At the end of the arbitration, there was agreement that the parties would not make closing argument but would hand in written submissions.

misconduct, the employment relationship had broken down, the arbitrator had made a decision which no reasonable decision-maker could reach with the available material:

‘[23] ...The sanction of dismissal was inappropriate because the third respondent did not regard the offence as being serious enough to warrant a dismissal and also that the trust relationship between the parties had not broken down. The reasonable decision in the circumstance of this case would have been to order reinstatement with a final written warning.’

[10] The test to be applied in review applications has been set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ thus :

‘[110] To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’⁴

[11] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,⁵ (*Gold Fields*) the court stated that:

‘[14]This implies that an application for review sought on the grounds of misconduct,⁶ gross irregularity in the conduct of the arbitration proceedings,⁷ and/or excess of powers⁸ will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is

³ 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC).

⁴ At para 110. In *Edcon Limited v Pillemer NO and Another* (2010) 1 BLLR 1 (SCA); (2009) 30 ILJ 2612 (SCA) the court held that: “[23] It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner’s conclusion is rationally connected to his/her reasons taking into account of the material before him/her.”

⁵ [2014] 1 BLLR 20 (LAC).

⁶ S 145(2)(a)(i) of the LRA.

⁷ S 145(2)(a)(ii) of the LRA.

⁸ S 145(2)(a)(iii) of the LRA.

alleged, the inquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material⁹.

[12] The appellant's grounds of appeal are that the court *a quo* erred in:

- 13.1 failing to appreciate that in the absence of the employee showing remorse, there was no possibility of the employee being rehabilitated and the employment relationship restored;
- 13.2 concluding that there was no evidence presented that the employment relationship had broken down;
- 13.3 considering whether dismissal was an appropriate sanction; and
- 13.4 incorrectly applying the test set out in the *Herholdt v Nedbank Ltd and Another*¹⁰ read with *Gold Fields*.

[13] The main contention of the appellant in challenging the decision to reinstate the employee is that the employee had not shown any remorse and had foregone the opportunity to appear at the appeal hearing where it was the intention of the appellant to reinstate the employee subject to a demotion to the position of a cleaner.

[14] Item 7(b)(iii) and (iv) of the Code of Good Practice: Dismissal provides as follows:

'Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (b) if a rule or standard was contravened, whether or not –

...

- (iii) the rule or standard has been consistently applied by the employer; and

⁹ At para 14.

¹⁰ [2013] 11 BLLR 1074 (SCA).

- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.”

- [15] Once the arbitrator found the employee guilty of the misconduct with which she was charged, the next inquiry the arbitrator ought to have undertaken was whether dismissal was an appropriate sanction under the circumstances.
- [16] In upholding dismissal as a sanction, the arbitrator failed to consider whether the employment relationship had irretrievably broken down, warranting a sanction of dismissal.
- [17] Generally, it is not appropriate to dismiss an employee for a first offence.¹¹ In considering whether dismissal is an appropriate sanction, an employer is expected to consider the seriousness of the misconduct, the employee's length of service, any previous disciplinary record and the employee's personal circumstances, the nature of the job and the circumstances leading to the misconduct. The employee has been in the employ of the appellant from November 2000 until her dismissal on 21 September 2011. There is no record of the employee committing any offence.
- [18] At the arbitration hearing, the appellant, submitted that it was prepared to treat the employee in the same manner as the other supervisor, Nong, who was demoted to the level of a cleaner for the same misconduct. This is a clear indication, as correctly found by the court *a quo* that in the absence of any other evidence adduced as to the breakdown of the employment relationship the employee's reinstatement would not have made the employment relationship intolerable. There is nothing distinguishing the employee's misconduct from that committed by Nong so as to warrant differential treatment.
- [19] Furthermore, during the cross-examination of the appellant's witness, Mr Michael Mziwakhe Mngomezulu, the appellant's managing director, the issue of Nong was raised and his response was that the matter was being handled by the Human Resources Department. This fact should have alerted the arbitrator that the misconduct for which the employee has been found guilty is

¹¹ Item 4 of Schedule 8 of the Code of Good Practice: Dismissal.

not considered serious enough to warrant a dismissal. In view of an indication by the appellant that it was considering it would reinstate the employee if she were prepared to accept the offer of a demotion, there appears to be no basis why the employee was treated differently from Nong. Item 3(6) of the Code of Good Practice: Dismissals, provides that for a fair dismissal the rule or standard must be applied consistently by the employer.

[20] Nothing turns on the appellant's submission that the employee by not attending the appeal hearing had forfeited the opportunity to have the sanction of dismissal changed to that of a demotion. The appellant did not adduce any evidence that it was ever hinted to the employee that the appellant was considering imposing a lighter sanction than a dismissal at the appeal hearing.

[21] I am of the view that the failure by the arbitrator to consider the appropriateness of the dismissal under these circumstances is a reviewable irregularity.

[22] I am therefore of the view that taking into account that the employee had a clean record and that another supervisor was not dismissed for the same misconduct in circumstances where there is no evidence showing that as a result of the misconduct, the employment relationship had become intolerable, the decision to dismiss the employee is not one that a reasonable-decision-maker could reach with the available evidence.

[23] With regard to costs, there is no reason why the appellant should not pay the costs of this appeal.

[24] Accordingly the following order is made:

1. The appeal is dismissed.
2. The decision of the Labour Court is upheld.
3. The appellant to pay the costs of the appeal.

Mngqibisa-Thusi AJA

Davis and Ndlovu JJA concur in the judgment of Mngqibisa-Thusi AJA

APPEARANCES:

FOR THE APPELLANT: Mr S Snyman of Snyman Attorneys

FOR RESPONDENT: Mr S Mabaso of Mabaso Attorneys