



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA127/14

In the matter between:

POTGIETERSRUS PLATINUM MINE

Appellant

and

J KOBE AND THREE OTHERS

Respondent

Held: 8 March 2016

EX TEMPORE JUDGMENT

DAVIS JA

[1] This is an appeal against the judgment of the court *a quo* which was delivered on the 10th of March 2014. In terms of this judgment, the application for review was upheld and the dispute was remitted to the Commission for Conciliation, Mediation and Arbitration (CCMA) for a hearing *de novo*. The court *a quo* raised a host of separate justifications for why it came to the conclusion it reached; much of which I do not propose to traverse as an extensive analysis is not necessary for the resolution of this appeal.

[2] The first and second respondents were charged by their employer, the appellant, with the following:

1. Insubordination.

2. Insolence; and
3. Refusal to obey lawful instructions.

- [3] A disciplinary hearing against them was held, in their absence and, on their version, without them being notified of the date of the hearing. They were found guilty and dismissed. The version of the respondents was that they had lodged internal grievances against their supervisor, Mr D Maade. They escalated this grievance to the CCMA. Thereafter the appellant, in retaliation for this action and, in essence, laid a charge on the same facts as the grievance which they had raised. Again a process of disciplinary action against respondents took place culminating in a hearing on the 25th of August 2010. This disciplinary hearing was postponed *sine die*.
- [4] Thereafter the first and second respondent received notification of a disciplinary hearing set down for 31st of August 2010. They attended the disciplinary hearing with a union representative from FEDCRAW. They were informed by the presiding officer at the disciplinary hearing that FEDCRAW was not recognised by the appellant and that accordingly the representative could not reappear on their behalf at the disciplinary hearing.
- [5] The first and second respondent contend that the disciplinary hearing was then postponed *sine die*. The appellant submits that notification was given to first and second respondent for a disciplinary hearing to be held on the 3rd of September 2010. The fact that the respondents did not appear, according to the appellant, was due to their fault. The appellant could not be found to be at fault for the fact that, as a disciplinary hearing to which the first and second respondents did not attend, dismissal was the sanction imposed.
- [6] Of particular relevance to this dispute is that when this action by the appellant was referred to the CCMA, the LRA Form 7.1.1, that is the referral of a dispute to the CCMA for conciliation (including con-arb), contained the following: The nature of the dispute was described as an

unfair dismissal. The outcome which the first and second respondent sought was described as follows:

“Reinstatement on both the applicants without a loss of benefits or income and/or alternative compensation.”

[7] When the matter proceeded before the first respondent, the following passage appears in the record:

“Commissioner: Any opening statements to be made?

Ms Ramafalo: On our side we can just quickly mention that we are dealing here with misconduct which is running from three charges: failure to obey lawful instructions, insubordination and insolence of both applicants. We will call four witnesses to come and show that the dismissal was substantively fair; and then I think two of them would speak to the procedure and two of them will be talking to the substantive fairness.

Commissioner: Is that all? The opening statement, Mr Ngobeni?

Mr Ngobeni: Thank you, Mr Commissioner. As far as we know in this matter, the applicant is going to contest procedure. Substance will not be in dispute.

Ms Ramafalo: Yes.

Commissioner: Substance will not be an issue, which means you will curtail your proceedings.

Ms Ramafalo: Yes.

Commissioner: Proceed. Is that all?

Mr Ngobeni: Whereby the matter was postponed on the 31st. The last day was postponed on the 31st of October 2010. Thereafter there will... no date of schedule to give the applicant the opportunity of the applicant to defend the allegations. And they only received the notice of termination on the 29th of 10 2010 last year.” (sic)

[8] The thrust of the argument before the court *a quo* in so far as this

issue is concerned was that, notwithstanding the description of the relief sought by the first and second respondents, first respondent had asked of a union representative representing the two respondents as to what components of the appellant's case have been placed in dispute. When he received the answer that it was only about procedure; in particular, whether the first and second respondent had been properly notified of the disciplinary hearing at which the decision to dismiss them have been taken, the representative suggested this was the sole basis of the dispute. Substantive unfairness was not to be placed in dispute, notwithstanding that the appellant had come prepared to deal with this question.

- [9] I should add it is not surprising that the respondents were prepared to deal with those issues, because no doubt, having read the referral, they knew full well that, if reinstatement was the relief sought, it could only be predicated on a finding of substantive unfairness. Later in the record it is clear that the third respondent had raised questions of substantive unfairness. The following passage is instructive.

'Commissioner: What about the reading? What will they be seeking? What will you people... you will be seeking?

Mr Kobe: I want to be... I am saying for reinstatement that I would losing any of my monthly income..."

A litter later in the record the following occurs:

"Mr Kobe: I was prepared to change the susceptiv (sic) fairness, but I was never given a chance to that effect.

Ms Ramafalo: What do you mean by that?

Mr Kobe: Just because I was not called to the hearing and given a chance to state my case to defend myself.

Ms Ramafalo: But you had an opportunity here at the CCMA to do exactly that.

Mr Kobe: Yes, at the CCMA I was given a chance to at the CCMA how to dispute, because I was alleging that I was never given a fair chance that the company will state my case.'

[10] It is clear that Mr Kobe, notwithstanding submissions to the contrary by Mr Malan, understood that what he was seeking was to be put back in his job. This is a clear implication from the passage to which I have made reference. This issue has to be resolved by posing the question: what is the duty of an arbitrator, such as the first respondent, in the present case? It appears to me that the dispute between the parties turns on the weight of the burden imposed upon an arbitrator in these circumstances to ensure that the hearing is conducted in a fair manner and which is fair to both parties.

[11] In my view, account must be taken the fact that in South Africa many labour disputes are conducted either by an unrepresented employee or by a union representative, who with great respect to the unions, may not always be versed in the law and procedure as the employer might expect. For this reason, in *Consolidated Wire Industries (Pty) Ltd v CCMA and Others* (1999) 20 ILJ 2602 (LC) it was held:

"The parties were laymen unrepresented by legal practitioners and without the benefit of pleadings to tie the parties with a version. When a version is changed or a new version is suddenly presented, the arbitrator must take charge of proceedings. He cannot rely on the parties to realise what it expected of them unaided."

[12] This observation is pertinent to the general conditions which face labour relations in South Africa. I accept readily that arbitrators from the CCMA are confronted with a considerable burden and on onerous workload. But their task is to ensure that hearings are conducted in a fair manner. This means that when there is a manifest discrepancy between the referral and any concession made by a union representative, there is a duty upon the arbitrator to enquire thoroughly into the discrepancy.

- [13] Take the present case: The concession is made, notwithstanding that the respondents had come prepared to deal with substantive questions, that on the side of the respondents the issue of substantive fairness will not be placed in issue. A cursory examination of the referral, to which I have made reference, would have triggered a concern, which would then have necessitated a question along the following lines: 'I do not understand your concession. It appears to be at war with the referral. Your client cannot get reinstatement if the only issue which is placed in dispute is that of procedural fairness. Can you please clarify the position to me and if you are not certain, perhaps you wish to consult with your client.' This would have been the proper course of action.
- [14] Other than a perfunctory set of questions, which really did not take the matter further, nothing was done by the first respondent pursuant to the obligations imposed upon him to which I have already made reference. It is for this reason that, when the record is read at a later stage in terms of the evidence given by Mr Kobe, it is discovered that Kobe expected that, at some point, his plea for reinstatement would be considered. By then, however, the concession had been made.
- [15] But if he had raised these questions before the first respondents, a warning light should have come on and the first respondent should have asked yet again: "well, I do not understand this. I got a concession at the beginning. Now it appears, pursuant to the referral, your client is asking for reinstatement".
- [16] Mr Malan correctly conceded that there was no such interrogation by the first respondent in this case. It appears there was a significant breach of procedural fairness in the conducting of the hearing for first respondent to justify the order which was made by the court *a quo*.
- [17] I have not dealt with the question of whether the individual respondents were informed properly of the date which the hearing would trigger their dismissal was to be heard. It is not necessary to deal with those matters, although it is fair to say the following: there is considerable

uncertainty and ambiguity in the record as to precisely what happened, particularly certain contradictions between two of the appellant's witnesses.

[17] For all of these reasons, therefore, it appears that this appeal should be dismissed with costs; and accordingly the matter, pursuant to the order of the court *a quo*, should be referred back for a proper hearing before the CCMA. This is the least that justice demands in these circumstances. For this reason, the order I propose is one which confirms the order of the court *a quo*:

Order

1. The appeal is dismissed with costs.
2. The matter is referred back to the CCMA for a hearing *de novo*.
3. The CCMA is directed to send the matter to a senior commissioner for a hearing with instructions to:
 - a) Warn the parties of their fundamental rights.
 - b) To alert the parties of a witness to put a new version before the hearing.
 - c) To instruct the parties to put a version under oath of which he or she is aware.
 - d) To warn the parties an adverse inference can be drawn from the parties' acceptance of uncontested testimony placed before the commissioner.
 - e) To record the above warnings in the record.
4. A commissioner is directed to hear the applicant's version on both the substantive fairness and the procedure which applied during the dismissal.
5. In so far as the court *a quo* is concerned, there was no order as

to costs. I do not propose to make such an order on this part;
safe to say the appeal is dismissed with costs.

Davis JA

Tlaletsi DJP et Musi JA concur in the judgment of Davis JA

APPEARANCES:

FOR THE APPELLANT:

Mr Fritz Malan

Instructed by ENS Africa

FOR THE FIRST AND SECOND RESPONDENTS: Mr TP Phahla

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