



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not reportable

Case no: JA28/15

In the matter between:

BRIDGESTONE SA (PTY) LTD

Appellant

and

NATIONAL UNION OF METALWORKERS

UNION OF SOUTH AFRICA

First Respondent

MODISE, ALBEN

Second Respondent

WILLEM KOEKEMOER N.O

Third Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Fourth Respondent

Heard: 19 February 2016

Delivered: 15 June 2016

Summary: Review of arbitration award – Appropriateness of sanction – commissioner finding that employee's dismissal not a fair sanction – Role of commissioner regarding sanction restated- commissioner taking into account relevant mitigating factors – award falling within the band of reasonable outcome – Appeal dismissed with costs.

Coram: Tlaletsi DJP, Musi et Sutherland JJA

JUDGMENT

TLALETSI DJP

- [1] This appeal, which is with leave of the court *a quo*, is against the whole judgment and order of Cele J, in terms of which, the appellant's application to review and set aside an arbitration award issued by the third respondent, an arbitrator appointed by the fourth respondent, the Commission for Conciliation Mediation and Arbitration (the CCMA) was dismissed with no order as to costs.
- [2] The dispute, which was the subject of arbitration, emanates from the dismissal of the second respondent (the employee) for allegedly contravening a Health and Safety rule of his employer, the appellant. It was alleged that the employee was driving a forklift with cell-phone headsets on his ears connected to his cell-phone.
- [3] At the disciplinary enquiry, the employee pleaded guilty in relation to the alleged misconduct and gave a reason that he was waiting for a telephone call as his mother was ill. He was found guilty on his plea and a sanction of summary dismissal was imposed. Aggrieved by his dismissal, a dispute of unfair dismissal was referred by his union (the first respondent) to the CCMA and was arbitrated after unsuccessful conciliation.
- [4] The arbitrator was required to determine the substantive fairness of the dismissal and if the dismissal was found to be unfair, to determine the appropriate relief for the employee.
- [5] The appellant tendered the evidence of two witnesses, namely, Morake who was the production foreman to whom the employee reported, as well as Van Wyk the departmental manager who presided over the disciplinary inquiry of the employee.
- [6] Morake testified that the utilisation of a cell-phone by an employee was strictly forbidden because it created potential danger not only to himself but also to co-workers on site. An exception to the rule was that managers were allowed to use cell-phones but only in certain designated areas where risk was not a factor. Morake testified that the staff was regularly made aware of the

importance of the rule and the serious light with which the appellant viewed a contravention of the rule. On the day of the incident, he noticed the employee driving a forklift having his headsets on his ears and confronted him. The employee apologised and gave an explanation that he was awaiting a call from his mother who was sick. He disputed that the employee told him that he confused his headsets for his safety earplugs. He explained that there was no need for the employee to put on his earplugs because the area in which he was working was less noisy.

- [7] Van Wyk testified that in tendering his plea of guilty at the disciplinary enquiry, the employee mentioned that his mother was sick and that he was aware of the rule he admitted violating. Although he considered other sanctions short of dismissal, such a sanction would have sent out a wrong message.
- [8] The employee testified that he indeed had his cell-phone headset on his ears. He was in a state of confusion because of his sick mother and mistook his headset for his earplugs. He was well aware of the rule that prohibited the use of cell-phones in the plant. He only pleaded guilty at the disciplinary inquiry for having his headset plugged onto his ears but not for using a cell-phone as it was plugged onto the ears. His cell-phone was not in his possession, at the time, as he kept it in his locker.
- [9] In the evaluation of the evidence, the arbitrator found no reason to reject the evidence presented on behalf of the appellant since the witnesses were credible, withstood stringent cross-examination and presented their evidence without hesitation. She found the employee's version that he only pleaded guilty to having his headset on his ears as mere fabrication and rejected it. She found the version that the employee operated a forklift whilst having his headset on his ears and connected to a cell-phone more probable and accepted same. She further found that the employee was aware of what was expected of him because there had been constant reminders to the staff of the importance of the safety rule, and he failed to comply.
- [10] In considering the sanction, the arbitrator took into account the fact that the employee pleaded guilty at the disciplinary inquiry; he had a clean disciplinary

record and that there was no evidence that the appellant suffered any harm as a result of the employee's conduct. She further found no reason why "a corrective measure of some sorts could not have been applied", that he "could not conclude that the element of trust in the employment relationship was severed beyond repair by the isolated contravention by the employee. 'The limited nature of my award, however, emphasises that the safety regulation is there to be adhered to and remains a rule to be respected and adhered to at all times'".

[11] The arbitrator in conclusion made the following award:

'Award

1. In finding that the respondent did not prove that the dismissal of the applicant was substantively fair.
2. After considering the evidence at these proceedings and the totality of the circumstances, I believe it would be fair to order as follows:
 - a) The respondent, BRIDGESTONE SA (PTY) LTD, must re-instate the applicant, MR ALBEN MODISE.
 - b) The re-instatement must be effected as from 19 August 2013, and not from the date of his dismissal, on the same terms and conditions of employment that applied to him prior to his dismissal.
 - c) The period from date of dismissal until date of reinstatement must be regarded as unpaid leave.
 - d) I give no order as to back-pay.
 - e) The applicant must report for duty at the respondent at its Brits branch on 19 August 2013.
 - f) A final written warning is to be issued pertaining to the applicant's contravention of the safety regulation.
 - g) I give no order as to costs."

- [12] Aggrieved by the award, the appellant sought to review the award on the basis that the arbitrator;

‘Committed gross misconduct and failed in his duty to consider the evidence before her and to have due regard to the applicable legal principles; failed to apply his mind to the material/facts/evidence presented by the appellant in relation to the issue of sanction; not considering the employee’s final written warning for unrelated misconduct; finding that there was no evidence of the trust relationship being broken on the face of the evidence presented by the appellant; failed to take into account how the employee conducted himself in the arbitration by departing from his previous plea of guilty at the disciplinary inquiry.’

- [13] In dismissing the application for review, the labour court evaluated the award with regard to the arbitrator’s findings and concluded that the decision reached by the arbitrator is not one that a reasonable decision-maker could, in the circumstances of the case, not reach. It recorded that the appellant had persisted in submitting that the rule had been applied consistently without any evidence placed on record that there had been previous cases of employees using cell-phones at the workplace who were treated the same way as the employee.

- [14] The appellant raised several grounds in its notice of appeal upon which the judgment of the Labour Court is challenged. These are, inter alia, that the Labour Court erred:

14.1 In its approach to the issue of consistency particularly in attaching undue weight to the issue as a factor having a bearing on the appropriateness of the dismissal.

14.2 In its approach to the issue of progressive discipline by disregarding the employee’s adverse disciplinary issue of sanction and that the absence of a disciplinary record militated against the sanction of dismissal where the misconduct pertains to violation of a safety rule.

14.3 In disregarding the absence of remorse on the part of the employee.

14.4 In its assessment of the evidence regarding the earphones worn by the employee, by expressing misgivings regarding whether the earphones were connected to a cell-phone and by concluding that the decision reached by the commissioner was not one that a reasonable decision maker could not come to.

[15] Mr Itzkin who appeared on behalf of the appellant in this Court contended that the court *a quo* erred in dismissing the review application because the decision reached by the commissioner to the effect that dismissal was not an appropriate sanction, was manifestly a decision that a reasonable decision-maker could not reach on the application of the review test espoused in various judgments of this Court and other courts. Counsel referred to the grounds of appeal referred to in the preceding paragraph in support of his contention that the court *a quo* erred. He emphasised two issues, namely: that the seriousness of the transgression as well as the dishonesty of the employee by fabricating a defence at the arbitration which is indicative of lack of remorse. Counsel concluded, with reference to the decision of this Court in *Head of the Department of Education v Mofokeng and Others*¹ that what he referred to as errors and defects in the award of the commissioner are such that they led to the commissioner arriving at an unreasonable result.

[16] On behalf of the respondents, Mr Van der Riet SC, submitted that the facts in this case are in all respects similar to the facts in *Sidumo and Another v Rustenburg Platinum Mines and Others (Sidumo)*² and that it cannot be said that the decision in this matter is a decision that a reasonable commissioner could not reach. He submitted that the court *a quo* was alive to the review test and applied it correctly.

[17] As shown by counsel's submissions, the real issue is whether on the facts of this case, the court *a quo* applied the review test as espoused by the Constitutional Court in *Sidumo* as well as subsequent judgments of this Court and the Supreme Court of Appeal. It is not necessary therefore to go through

¹ [2015] 1 BLLR 50 (LAC).

² [2007] 12 BLLR 1097 (CC).

all the judgments on the test as both counsel are aware of the test. However, the following extract from *Sidumo* would suffice:

'To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'³

It is the commissioner's sense of fairness and not that of the employer that matters.. Therefore it is the award of the commissioner which is the subject of review.

[18] In *Sidumo*, the Court expressed itself as follows regarding what is expected of the commissioner when considering the fairness or otherwise of the sanction:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'⁴

[19] Section 138(6) of the Labour Relation Act 66 of 1995 (LRA) enjoins Commission for Conciliation, Mediation and Arbitration's (CCMA) commissioners to take into account any code of good practice issued by National Economic Development and Labour Council (NEDLAC) or guidelines published by the CCMA in accordance with the provisions of the LRA that is relevant to the matter being arbitrated. In the same vein, section 188(2) of the LRA decrees that any person considering whether the reason for dismissal is

³ *Sidumo* supra at para 79.

⁴ At para 78.

a fair reason or whether the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of the LRA. The section makes specific reference to Schedule 8, the Code of Good Practice: Dismissal ('the Code').

[20] Item 3(3) of the Code provides *inter alia*, that:

'Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences'.

[21] Item 3(4) of the Code provides that dismissal is not appropriate for a first offence, except in cases of serious misconduct that renders a continued employment relationship intolerable. Serious misconducts that the Code considers to be of such a nature to attract dismissal include, gross dishonesty, wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Each case however, should be considered on its unique circumstances.

[22] When deciding whether dismissal is the appropriate sanction, item 3(5) of the Code states that:

'When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.'

[22] Finally, item 3(6) stipulates that the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

[23] In *casu*, the commissioner moved from the correct premise as to what was expected of him. He was spot on as regards the question to be asked namely, whether the dismissal of the employee was fair, taking into consideration the totality of the circumstances. He concluded that despite the employee being guilty of the transgression of which he was reasonably expected to be aware, having rejected his new defence at the arbitration as a fabrication, the sanction of dismissal was nevertheless substantively unfair and cited among others, the following reasons;

- a) the employee had pleaded guilty from the beginning;
- b) he had a clean record of not having transgressed a safety rule;
- c) no evidence of the appellant having suffered actual harm;
- d) no indication that the trust relationship was severed beyond as a result of this isolated incident;
- e) no reason why a corrective measure of some sort could not be imposed.

[23] The commissioner was further alive to the seriousness of the transgression and emphasised that the rule had to be adhered to at all times. To punish the employee for the transgression, the commissioner not only imposed a final written warning, but also deprived the employee of back pay he would ordinarily be entitled to for reinstatement for the period from 29 April to 19 August 2013.

[24] The commissioner has in my view applied his mind to all relevant factors and to the determination of an appropriate sanction. He gave reasons why he arrived at his conclusion. A decision based on his reasons and the circumstances of the case cannot be said to be a decision that a reasonable decision-maker could not reach. It has been held in *Sidumo* that it needs be recognised that different commissioners may arrive at different conclusions on the same facts. His decision falls within a band of reasonable decisions in the circumstances of the case.

[25] In *Sidumo* where a security guard at a mine was dismissed for failing to apply search procedures properly on persons leaving the mine premises and employed for specifically for that function, the Constitutional Court reasoned as follows:

[116] In respect of the absence of dishonesty, the Labour Appeal Court found the Commissioner's statement in this regard "baffling". In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine's valuable property which he did not do. However this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.

[117] The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo's attitude and efficiency. In my view, the Commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of the appropriateness of the sanction.'

[26] In the result, I find that whatever errors and or misdirections are to be found in the judgment of the court *a quo*, same are immaterial as regards the real question that had to be answered which is whether on the material that served before the commissioner, can it be said that the decision he reached is one that a reasonable decision-maker could not reach. The answer is simply 'NO'.

[27] What remains is the question of costs. Both counsel submitted that costs should follow the result. I am satisfied that in the circumstances of this case it would be in accordance with the requirements of the law and fairness that costs should follow the result.

[28] In the result, I make the following order:

The appeal is dismissed with costs.

Tlaletsi DJP

C J Musi *et* Sutherland JJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT:

Mr. R Itzikin

Instructed by Mervyn Taback Incorporated.

FOR THE RESPONDENT:

Mr J G Van der Riet SC

Instructed by Cheadle Thompson & Haysom Inc.