



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA27/15

INTERSTATE BUS LINES (PTY) LTD

Appellant

and

DANIEL PHAKWE

First Respondent

THE SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

Second Respondent

Dell, C (N.O.)

Third Respondent

Heard: 24 May 2016

Delivered: 22 November 2016

Summary: Review of arbitration award – by agreement between parties arbitrator tasked to determine only the fairness of the sanction based on written submissions and a joint bundle of documents – arbitrator taking in consideration mitigating factors in arriving at his decision – arbitrator alive to the employee's misconduct hence the order of reinstatement was without back-pay – arbitrator adopting a correct approach to the fairness of the dismissal that balances the interests of the parties – arbitration award falling within the band of reasonable outcome. Appeal dismissed.

Coram: Tlaetsi AJP, Ndlovu et Sutherland JJA

JUDGMENT

- [1] This is an appeal against the whole of the judgment of the Labour Court (Steenkamp J) which dismissed the appellant's application to review and set aside an arbitration award dated 14 December 2010 issued by the third respondent (the arbitrator) acting under the auspices of South African Road Passenger Bargaining Council (the Bargaining council). The award related to an alleged unfair dismissal dispute referred to the Bargaining council by the first respondent (the employee) against his erstwhile employer, the appellant.
- [2] The arbitrator found the sanction of dismissal against the employee, on 17 February 2010, for the misconduct inappropriate and directed the appellant to reinstate the employee with a final written warning valid until 30 December 2011. The reinstatement directive was conditional on the employee forfeiting emoluments due to him from the date of dismissal until the reinstatement date determined as 3 January 2011. The appellant applied and was refused leave to appeal by the Labour Court. He is in this Court with leave granted on petition to this Court. The appeal is limited to the sanction imposed by the arbitrator and confirmed by the court *a quo*.
- [3] The factual background leading to this dispute is either common cause or not disputed. The employee was at all relevant times employed as a bus driver. His dismissal arose from an incident that took place on Saturday 23 January 2010 at the appellant's Thaba Nchu bus depot. Upon arrival at the depot to resume his duties, the employee wanted to park his private motor vehicle at a parking area located on the premises. He apparently had to use his private transport because the employer failed to fetch him from home as it was the practice. He was refused entry by the security officer employed by the company contracted to the appellant to man the entrance. The security officer told him that he had received an instruction that parking inside the premises was reserved for management staff only, and not bus drivers. The employee said he was not aware of such instruction and did not believe the security officer. According to him, in the past, employees generally, including bus drivers, were allowed to park their private vehicles on the premises, especially on Saturdays when most of management staff were not working and thus the

parking space was available inside premises. A verbal altercation ensued between the two, with the employee insisting that he was entitled to park his motor vehicle on the premises, as there was no parking space available outside the premises. He could not accept the security officer's explanation that he had received an instruction not to allow employees to park their vehicles on the premises. He believed that he was being singularly targeted by the security officer. Having failed to convince the security officer, the employee, apparently out of anger, left his motor vehicle parked across the depot entrance and left for his duties. Soon thereafter, he left the depot driving a bus to attend to his tasks for the day.

- [4] The appellant alleged that as a result of the employee's conduct, two buses that were to enter the depot to be refuelled could not gain entrance to the premises. The one had to refuel at a private filling station at an additional cost to the appellant, and the other ran out of fuel on the road. The appellant further alleged that some of the buses commenced their shifts late as a result of the employee's conduct.
- [5] About a month later, the employee was indicted on a misconduct charge of "*sabotage or any act by an employee to interfere with the normal operations of the employer*". A disciplinary hearing was scheduled for 17 February 2010. He was found guilty as charged and dismissed.
- [6] Dissatisfied with his dismissal, the employee referred an unfair dismissal dispute to the second respondent which was arbitrated after failed conciliation. The parties agreed not to lead any evidence in the arbitration and agreed to present written submissions since the guilt of the employee for the misconduct was conceded. What the arbitrator was required to determine was the fairness of the sanction of dismissal in the circumstances of the matter.
- [7] The arbitrator, having considered the parties' submissions, held that the sanction of dismissal was unfair. He reasoned that: there was no intention on the part of the employee to sabotage the appellant's operations because his actions were directed at the security officer; the employee was refused access to the premises without prior notice that he would no longer be allowed to park

on the premises; the employee had an “impeccable and clean record” dating back from 2002 when he assumed his employment; there was clear provocation for him to embark on his actions and that it was not a “planned and/or pre-empted” action but a once off incident which was unlikely to be repeated.

[8] The arbitrator proceeded thus:

‘...However, in balancing the interest of the employer party and taking into consideration that the actions of the employee party cannot be condoned and this must therefore be clearly indicated to the employee party. I am therefore of the opinion that dismissal was not the appropriate sanction in this matter and that an alternative sanction should and could have been imposed.

However, to indicate to the employee that his actions were wrong and that he should take responsibility for such actions I intend making the award, which would be in the circumstances then fair to both the employer party and the employee party’.

[9] The appellant, unhappy with the award, sought to have it set aside on review. The Labour Court recorded that counsel for the appellant contended that the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have reached. The learned judge proceeded to mention that counsel for the appellant had “*wisely abandoned the argument in the Heads of Argument drafted by his attorney that the arbitrator had exceeded his powers and further that the arbitrator could only interfere with the sanction imposed by an employer where the sanction is unreasonable to the extent that it would fill a reasonable arbitrator with a sense of shock*”.

[10] The court *a quo* was satisfied that the arbitrator followed a process that was agreed upon by both parties, properly considered all the submissions made before him in light of relevant case law, applied his sense of fairness to the issue before him and dealt with the substantial merits of the dispute. Significantly, the court *a quo* found that the arbitrator imposed a heavy penalty on the employee in that the employee would in addition to a final written warning forgo a substantial back pay of almost a year. The review application

was nevertheless dismissed on the basis that the award fell within a range of reasonable outcomes.

[11] The appellant has raised a number of grounds upon which the judgment of the court *a quo* is attacked. In summary, the appellant contends that the court *a quo* erred in dismissing the review application and by awarding costs in favour of the employee. The court *a quo* is, *inter alia*, accused of erring in fact and law in the application of the legal principles relating to the determination of a fair sanction and the application of the review test.

[12] At the hearing of the appeal, we directed the parties to address us on the meaning and implications of the remarks made by the arbitrator under the heading “Survey of Evidence and Argument” that “only written arguments were submitted and forwarded” to him by the respective parties. It was not clear as to whether the agreement of the parties was intended to limit the arbitrator to only consider the written submissions in deciding the dispute. If that was the case it would suggest that the matter was to be decided without any shred of evidence being relied on as a basis to support the decision. None of the parties had dealt with this issue in their Heads of Argument.

[13] Mr *Snyman*, who appeared on behalf of the appellant, was quick to submit that on the face of it, the arbitrator did not rely on any form of evidence to decide the dispute and that this fact alone is a valid ground for this Court to set the judgment of the court *a quo* aside and order that the dispute be referred back to the bargaining council for arbitration *de novo* by another arbitrator. He relied on the decisions of the Labour Court in *Arends and others v SA Local Government Bargaining Council and Others*¹ and *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others*² in support of his submission.

[14] In response, Mr *Wilke*, who appeared on behalf of the employee contended that it would be impermissible to refer the matter back as contended on behalf of the appellant because this was never a ground of review raised by the appellant. He relied on the decision of the Constitutional Court in *Commercial*

¹ (2015) 36 ILJ 1200 (LAC).

² (2013) 34 ILJ 2347 (LC).

*Workers Union of South Africa v Tao Ying Metal Industries and Others*³ where it was held, *inter alia*, that a party who seeks to review an arbitral award is bound by the grounds contained in the review application and that he/she may not, on appeal, raise a new ground of review. Counsel contended that this matter should therefore be decided on the onus principle alone without relying on a new ground of review. He submitted that should it be found that no evidence was properly adduced in the arbitration proceedings, it would automatically follow that the appellant had failed to prove that the dismissal was fair and the appeal should be dismissed.

[15] The bargaining council has filed as part of the record of the arbitration proceedings, a document purporting to be a transcript of the proceedings. The document is headed "*Preparation For RPNT 560*". It contains names of witnesses and a list of questions that the arbitrator intended to ask the respective witnesses. The document further reveals that Chantel Vos introduced herself as the appellant's representative and indicated that they wished to submit a bundle of documents. In the opening address, she outlined the factual background underlying the dispute and a brief summary of all the witnesses who testified for the parties at the disciplinary inquiry. She indicated that three witnesses testified for the appellant namely, Samosha- the security officer who manned the gate; Lehare- who testified about the busses that could not be refuelled and Mafa who issued the instruction for the employees' motor vehicles not to be parked inside the depot except if they were to be cleaned. Mana and Rammile testified for the employee. The transcript further contains a heading "*Closing Statement and Argument*". However, it is only the appellant's representative's closing statement that is reflected, which is similar (word for word) to the written closing statement that was submitted on behalf of the appellant.

[16] It is significant to note that the parties' closing statements refer to the evidence that was tendered at the disciplinary inquiry as well as the photographs of the scene. The record of the proceedings of the disciplinary inquiry is part of the appeal record. It is not a direct transcript of the

³ (2008) 29 ILJ 2461 (CC).

proceedings but notes made by the chairperson relating to the evidence and questions put to the witnesses who testified. The note further records the address by the parties' representatives, the chairpersons' reasons and verdict, address on sanction and the pronouncement of the sanction by the chairperson.

[17] In my view, it is evident that implicit in the parties' agreement that no evidence be tendered during the arbitration proceedings and that only closing arguments be submitted was that the record of the disciplinary inquiry would be part and parcel of the arbitration and that it would supply the factual basis upon which the fairness of the sanction is to be assessed. It is for this reason that the arbitrator made reference to some factual background, which could only be extrapolated from the record of the disciplinary inquiry that must have been presented to him as part of the bundle. Although the record of the disciplinary inquiry is not a model of a perfect record of the proceedings, it does however provide key elements of the evidence tendered as well as the submissions by the parties. Further, most of the evidence is common cause and this appeal is limited to sanction only. What would therefore be more relevant in addition to the common cause factual background would be the evidence on aggravating and/ or mitigating circumstances as well as the reasons of the chairperson of the inquiry on the sanction he imposed. All these factors are found on the record as it stands.

[18] Sending the matter back for arbitration *de novo* would not only go against the choice of the parties but would also be prejudicial to them. The same witnesses who testified will have to be recalled to repeat what they have already testified about. There is no guarantee that they will all be available to testify given the time elapsed since the dispute arose. Furthermore, sending the matter back to the Bargaining council for arbitration *de novo* would defeat the purpose of expeditious adjudication of labour disputes. In my view, it would be in the interests of justice and fairness that the matter be finalised on the record as it stands.

[19] The circumstances of this case are by far distinguishable from the circumstances in the cases referred to us by Mr *Snyman*. In *Arends and*

Others v Local Government Bargaining Council and Others, the parties had agreed not to lead any evidence and simply presented documents and made oral and written arguments. There was no pre-arbitration minute nor did the parties provide the arbitrator with any agreed set of facts. This Court correctly found that the absence of any evidence; the absence of a stated case; and the manner of its presentation makes it impossible for the court on appeal to determine whether the dispute is indeed one about the implementation of a collective agreement and how it should be resolved. There was absolutely no evidential material for the arbitrator and ultimately the Labour Court to work on in resolving the dispute. The *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* case had to do with the conduct of the arbitrator in the conduct of the arbitration proceedings and not necessarily a case presented without evidence being tendered.

[20] The proper test to be applied in a review of an arbitration award on sanction is whether the decision of the arbitrator about the fairness of the sanction imposed by the employer is a decision that a reasonable arbitrator could not reach.⁴ It is the call of the arbitrator and not that of the Labour Court to assess the fairness of the sanction of the employer. An arbitrator is tasked to objectively, impartially and fairly determine whether a sanction of dismissal in the circumstances of the material placed before her/him is fair. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, the Constitutional Court held that:

‘ 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

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

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.

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'.⁵

[20] In terms of the **Code of Good Practice: Dismissal**, an employer must in addition to the gravity of the misconduct consider factors such as the employee's circumstances including the length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself. In terms of article 5, employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

[21] In this case, the arbitrator followed a process that was agreed to by the parties. It is, therefore, unfair to accuse him of failing to have had regard to the nature of the misconduct, the complete breakdown in the trust relationship, the lack of remorse by the employee and prejudice to the appellant. The arbitrator was alive to the nature and seriousness of the misconduct hence his remark that the actions of the employee cannot be condoned and punished him by not awarding him emoluments that would have been due to him from the date of dismissal to the date of reinstatement. What the arbitrator effectively did was to direct that the employee be re-employed to his previous position with a final written warning. His other entitlements and rights barring back pay would remain intact as if he had not been dismissed.

[22] The arbitrator's approach of the need to balance the interests of the parties in assessing the fairness of the sanction imposed by the employer was in my view the correct approach under the circumstances. The balancing of the

⁵ Ibid at paras 78-79. *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at paras 94-95. *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

interests of the parties to the dispute is what the arbitrator is enjoined to do in terms of the Code of Good Practice on dismissals for misconduct and the *dicta* of this Court and the Constitutional Court referred to above. The Constitutional Court in *NEHAWU v The University of Cape Town and others*⁶ instructively held as follows:

‘Security of employment is a core value of the LRA and is dealt with in Chapter VIII. The chapter is headed “Unfair Dismissals”. The opening section, section 185, provides that “[e]very employee has the right not to be unfairly dismissed.” This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both. Section 185 is “a foundation upon which the ensuing sections are erected.”⁷ (References omitted).

The arbitrator was further alive to the fact that the Labour Relations Act 66 of 1995 advocates’ progressive discipline and that dismissal should be implemented as a last resort.

- [23] The appellant did not lead any evidence to suggest that the trust relationship between the appellant and the employee had been destroyed as a result of the employee’s conduct. It is, of course, acceptable that the breakdown of trust may be inferred from the nature and seriousness of the misconduct, the conduct of the employee after the misconduct and from any other factors justifying such an inference. However, there exists, in this case, no such circumstances justifying such a conclusion. The submissions in the Closing Argument is not evidence from which it can be justifiably inferred that the trust relationship had been broken. On the contrary, the arbitrator found, *inter alia*, that the actions of the employee were not directly intended against the appellant but against the security officer without realising the consequences of his actions; that the employee had a clean record and did not pose any threat or further danger to the appellant. Added to these factors, is that it took the appellant almost a month to charge the employee for the misconduct. In that period, the employee continued to perform his normal duties. There is no

6 (2003) 24 ILJ 95 (CC).

⁷ At para 42.

evidence placed on record to suggest that he reoffended or that the trust relationship proved intolerable.

[24] The award of the arbitrator contains reasons for his conclusion that the sanction imposed by the employer is under the circumstances unfair. I am not persuaded that his conclusion on the process agreed to by the parties and material placed before him does not fall within a band of reasonable decisions. Similarly, the court *a quo* committed no misdirection in concluding that there was no need to interfere with the award of the arbitrator. The appeal, therefore, falls to be dismissed. In my view, it would be in accordance with the requirements of the law and fairness that each party pays its own costs on appeal.

[25] In the result, the following orders are made:

- a) The appeal is dismissed.
- b) There is no order as to costs.

Tlaletsi AJP

Ndlovu *et Sutherland JJA* concur in the judgment of Tlaletsi AJP.

APPEARANCES:

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FOR THE FIRST RESPONDENT:

Mr FJ Wilke

(Original heads of argument prepared by Mr
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LABOUR APPEAL COURT