

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA89/17

MBUYISENI MOSES KHAMBULE

Appellant

and

NATIONAL UNION OF MINE WORKERS

First Respondent

IMPALA PLATINUM LIMITED

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

LANCE SELLIER NO

Fourth Respondent

Heard: 27 November 2018

Delivered: 24 July 2019

Summary: Review of arbitration award – employee dismissed for uttering to his supervisor to throw away the bag containing precious metal – company rule requesting employee to inform security and management about any parcel found on its premises- employee dismissed for uttering the words to his supervisor-

commissioner finding that employee guilty but that dismissal too harsh a sanction and evidence not led about the breakdown in the trust relationship- court finding that employer need not lead evidence of the breakdown of the trust relationship and that such emerges from the facts unless employee specifically dismissed for breakdown of the trust relationship. Further that evidence led by superior insufficient to determine the breakdown in the trust relationship as both employee and his superior continue working together after the words were uttered. Appeal upheld and Labour Court's order set aside and substituted with an order dismissing the review application.

Coram: Waglay JP, Phatshoane ADJP and Savage AJA

JUDGMENT

WAGLAY JP

- [1] This is an appeal against the judgment and order of the Labour Court (Van As AJ) reviewing and setting aside the award handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA) which found that the dismissal of the appellant (employee) by the second respondent (employer) too harsh a penalty and, as such, to be substantively unfair. It also found the dismissal to be procedurally unfair and as relief the CCMA ordered the employee's reinstatement and limited the back-pay to two months' salary as compensation.
- [2] The Labour Court, having set aside the award, substituted the award with an order that the dismissal was substantively fair but procedurally unfair and ordered the employer to pay the employee five months' salary as compensation.
- [3] The employee was employed as a Senior Process Operator at a mining refinery which produced platinum group metals (PGM). These metals are of a very high

value and susceptible to theft. The employer has a rule understood and, to the knowledge of every employee, that any PGM found at or around the refinery must be reported immediately to the security or management and must not be moved, touched or picked up.

- [4] On 19 September 2012, Steenkamp, the employee's superior who was working with the employee in a cab of an ammonia tanker, discovered hidden under the "foot-pedal" a crudely sealed black bag. Steenkamp showed the bag to the employee who told Steenkamp not to report the bag to the security but to throw it away. Steenkamp, of course, paid no heed to his underling and promptly reported both the bag and the statement made to him by the employee to the security.
- [5] An investigation was conducted. It was established that the bag contained just over 3.25 kg of PGM to the value of over R450 000.00. It does not appear that any result was forthcoming as to how the bag got to be where it was found or who was responsible for placing it there or how and who was it directed to or was to be collected by etc.
- [6] Some six months later, the employee was charged for gross misconduct. The misconduct was the statement he had made to his supervisor Steenkamp that Steenkamp should throw away the bag discovered.
- [7] In the six months preceding the disciplinary hearing, both the employee and Steenkamp took their annual leave and, when not on leave, they worked together. In essence, it can be said that a hearing could not take place for about two of the six months. This is raised because much is made of the delay in holding the hearing.
- [8] At the hearing and subsequently at the arbitration, held at the CCMA, it was found that the employee had uttered the words ascribed to him by Steenkamp. He was found guilty of gross misconduct for violating an essential and fundamental rule at the workplace by asking Steenkamp to discard the bag.

- [9] The employee was dismissed after the disciplinary hearing but reinstated by the CCMA who found that the dismissal was too harsh a penalty: It found the dismissal to be substantively unfair on the basis that it was not satisfied that the relationship between the employer and employee had broken down to the extent that dismissal was the only appropriate sanction. The CCMA did mete out a penalty which was that the employee's reinstatement was not backdated to the date of dismissal but that he was only to be paid back-pay of two months. This meant the employee suffered severe financial penalty.
- [10] The employer reviewed the CCMA's award. The Labour Court set aside the award of the CCMA as recorded earlier. The matter now comes on appeal with leave of the Labour Court.
- [11] It needs to be restated that when considering a review, the reasoning of a commissioner is no guiding light in determining whether the decision or more particularly the "order" handed down is reasonable. Put differently, a court reviewing an award need not consider the commissioner's reasoning to determine whether or not his/her reasoning justifies the award. The reviewing court, as has been repeatedly held, must consider all the evidence led at the arbitration and in the light of that evidence determine whether the award is one which any commissioner in the position of the commissioner, who determined the arbitration, could reasonably make. If the answer is in the positive, then there must be no interference with the award.
- [12] In this matter, the commissioner decided that the dismissal was unfair. It was a decision for him to make. He found that the employee had committed the misconduct complained of; that it was gross misconduct; and that dismissal for the misconduct was not an inappropriate penalty, but decided against it.
- [13] It is correct that the commissioner stated that there was unconvincing evidence that the relationship between the employer and the employee had broken down. Two comments need to be made in this respect: firstly, an employer is not obliged to lead evidence to satisfy a commissioner that the relationship has

indeed broken down, the facts should speak for themselves (see for instance the matter of *Impala Platinum Ltd v Jansen and Others*¹ (*Jansen*)), or if the employer specifically seeks dismissal on the basis of a breakdown in the relationship as was the case in *Edcon Limited v Pillemer NO and Others*,² where the charge against the employee was that her action had destroyed the employer/employee relationship then it must lead evidence to prove the breakdown; secondly, even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal in the circumstances of the matter before him is the appropriate sanction as a number of factors may play a role in coming to this conclusion and the same factors may apply differently to different category of employees. See in this regard the matter of *Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others*³ (*Glencore*) where the Court properly accepted that functional relationship between an employee and his superior may play a part in determining whether abominable behaviour displayed by an employee against his superior was an obstacle to the continued employment relationship. Even extreme inappropriate behaviour may in an exceptional case not lead to a dismissal if there is no proximity between the employee and the supervisor who he may have undermined.

[14] Here the employee does not complain that the finding of misconduct is unfair. He only challenges the Labour Court's decision on the basis that it incorrectly set aside the relief granted by the CCMA as it was not an award that was unreasonable or one that the commissioner could not reasonably make.

[15] This Court must accept the finding that the employee said to Steenkamp that he should throw away the parcel. While Steenkamp and the employee work together, the employee was not Steenkamp's supervisor. He had no control over him nor was he in standing senior to Steenkamp or that Steenkamp was beholden to him; he was Steenkamp's subordinate and the evidence demonstrates, Steenkamp simply fobbed him off and called security. Steenkamp

¹ [2017] 4 BLLR 325 (LAC).

² [2010] 1 BLLR 1 (SCA).

³ [2018] 1 BLLR 1 (LAC).

was not the superior who was going to take an instruction from this employee, in such circumstances to elevate the conduct of the employee *vis-à-vis* Steenkamp as if it would undermine the relationship and that Steenkamp would now have difficulty working with this subordinate is not only far-fetched it is simply a gross exaggeration. Furthermore, Steenkamp's evidence itself on this issue is in my view rather contrived. He says he works and worked happily with the employee before and after the employee had uttered the words to him. In fact, all was fine until some six and a half months after the event when the employee was found guilty of uttering the words Steenkamp said he did at the disciplinary hearing. According to Steenkamp, once the employee's guilt was established pursuant to the disciplinary hearing, the trust relationship was destroyed! This is extraordinary. The words were uttered to Steenkamp he could have had no doubt about it, why then does he only find the breakdown in the relationship after the employee is found to have uttered the words he said the employee had uttered and not when the employee had actually uttered them.

[16] As I stated earlier, the employee was found to have made a statement which was wrong and improper and to do so was a serious breach of the employer's code especially in an environment where one is dealing with high value metals which are susceptible to theft. It is also appropriate in cases where misconduct is found to be related to dishonesty that dismissal might be the only appropriate sanction. However, is the unchallenged finding of gross misconduct, in this case, one which amounts to such gross dishonest conduct which would justify a dismissal without question as was the case in the matter of *Jansen*. I believe the words may well have amounted to such conduct had the roles between Steenkamp and the employee been reversed with the employee being the supervisor and not where the employee could not influence Steenkamp. The nature of the conduct and its impact cannot be insulated from the role players involved.

[17] I am satisfied after considering the evidence presented at the arbitration that the award handed down by the CCMA was not one which is susceptible to interference. The commissioner found the employee had committed the

misconduct complained of and decided that a severe financial penalty was more appropriate than the employee's dismissal. On the facts of this case the commissioner's cannot be said to be unreasonable and as such, the Labour Court erred in interfering with the award.

[18] In the circumstances, the appeal succeeds. With regard to costs, I see no reasons why in terms of law and equity there should be an order as to costs.

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

- (a) The appeal succeeds with no order as to costs.
- (b) The order of the Labour Court is substituted with the following order:
"The application is dismissed."

I agree

Waglay JP

I agree

Phatshoane ADJP

Savage AJA

APPEARANCES:

FOR THE APPELLANT:

Adv Q M Dzimba

Instructed by Mothobi Attorneys

FOR THE SECOND RESPONDENT:

Adv R Itzkin

Instructed by ENS Africa

LABOUR APPEAL COURT