

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

Case no: JR1350/06

In the matter between:

EQUITY AVIATION SERVICES (PTY) LTD

Applicant

and

AWUZA obo KRUGER L

First Respondent

**COMMISSSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER JOHNSTON N NO

Third Respondent

REASONS

MOSHOANA AJ

Introduction

[1] On the 19th March 2008, I made an order in the following terms:-

1. The application for review is dismissed with costs.

[2] Hereunder shall follow the reasons for such an order.

Background facts

- [3] The employee, Mr. Kruger was dismissed on the 20th of August 2004 for failing to follow a reasonable instruction. The employee was aggrieved by such a dismissal and then referred a dispute to the second respondent for the purposes of determining the fairness of his dismissal. After hearing evidence the third respondent issued an award wherein he found that the dismissal was unfair procedurally and substantively and ordered reinstatement without any loss of remuneration and benefit with effect from the date of dismissal. Further he ordered the employee to be paid as backpay an amount equivalent to 20 (twenty) months compensation in the amount of **R229 160.00 (Two Hundred and Twenty Nine Thousand One Hundred and Sixty Rand)**. The said reinstatement was to occur within 14 (fourteen) days of the date of award and he made no order as to costs. The applicant aggrieved by the award of the third respondent launched an application for review in terms of the provisions of Section 145 of the Labour Relations Act. Such an application was opposed.

The attack

- [4] In its founding papers the Applicant states that the applicable grounds of review were those set out in section 145 and as expanded by the Labour Appeal Court in the **Carephone** decision. The applicant challenged the finding, to a point of its correctness, of the procedural unfairness. The grounds raised were to the effect that there was no complaint at the disciplinary enquiry and accordingly the employee was afforded an opportunity to prepare for her case. The Applicant further challenged the finding by the Third Respondent to the effect that the notification to attend hearing was vague as it refers to a

failure to obey a reasonable instruction but not specify which instructions it refers to.

- [5] On the findings of substantive fairness, the submission was to the effect that same is irrational and unjustifiable and reference was made to definition of insubordination dealt with by various authorities. The applicant with reference to the evidence that was before the third applicant concluded that he misdirected himself and such a misdirection resulted in a failure of justice, alternatively the finding is irrational and unjustifiable. Edmonds appearing for the first respondent, submitted that the award is reasonable and in so far the applicant seeks to attack the relief of reinstatement such was not pleaded as a ground in the applicant's papers. Such issue was only brought to light in the supplementary heads of argument filed days before the hearing of this matter.

Analysis

- [6] In this matter, the applicant sought to rely on the provision of section 145(2) as expanded in the **Carephone** decision. It does appear that effectively the applicant suggested that the third respondent exceeded her powers. However with proper consideration of the grounds and submissions made in court, it was clear that the applicant was attempting to appeal as opposed to reviewing the award. Insofar as the challenge for procedural unfairness, it is apparent that the contention of the applicant is that that finding effectively is wrong since the employee had received a fair hearing. In dealing with procedural fairness, the third respondent in his award, said the following:

"In terms of item 2(1), Schedule 8 of the Labour Relations Act, a dismissal is unfair if it is not effected for a fair reason and in

accordance with a fair procedure... Item 4 (1) of Schedule 8 lays out the basis for a fair procedure. The notification to attend a hearing is vague in that it refers to a failure to obey a reasonable instruction but does not specify which instructions it refers to. Given that the applicant testified that she had been threatened with disciplinary action over her refusal to work shifts, I believe it is reasonable that she might have been unsure as to which offence she was being charged with. Mr Dawson denied that he had threatened the applicant with disciplinary action if she refused to work shifts, but was contradicted by Mr. Roman's testimony in this regard. It is difficult to see how she might adequately prepare to defend herself when she was not sure of the basis of the alleged misconduct. The appeal hearing was, in terms of the company policy, to have been held within ten (10) days of the date of dismissal, on 20 August 2004. Despite this the appeal was postponed three times and the applicant notified by telegram. The final date proposed was 19 September, a full month after the date of dismissal. However, the applicant had, by this stage, already referred the matter to the CCMA on 15 September 2004. The respondent referred to an undated and unsigned letter purportedly sent to the applicant after 19 September, informing her that as she had not attended the appeal hearing, the company deemed the matter to be closed. Interestingly, this document was not sent by registered letter and there is no proof that it was ever served on the applicant. It also seems odd that the respondent would send the applicant a letter when it had previously communicated with her by telegram. I am not satisfied that the dismissal was procedurally fair".

- [7] From the body of the award as quoted, it is apparent that the third respondent made a finding of procedural unfairness and supported that finding with what was before him. Surely the third respondent cannot be faulted. Although the court sitting in the position of the third respondent could have arrived at a different conclusion, probably the one contended by the applicant before it, but that is not the test

in review proceedings. Accordingly I find no basis upon which this finding should be disturbed. To the extent that it was argued that such amounted to a gross irregularity in the proceedings. I refer to the decision of **Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) BCLR 158 CC** at paragraph **262** where Ngcobo J said the following:

*"The basic principle was laid down in the often quoted passage from **Ellis v Morgan** where the court said:-*

But an irregularity in proceedings does not mean an incorrect judgement, it refers not to the results but to the methods of a trial such as for example some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined".

- [8] Indeed if one has regard to the charge itself, the charge simply read as follows:

"Insubordination in that you failed to obey a reasonable instruction given to you on the 13th August 2004 by the Assistant Station Manager".

- [9] Indeed it does not state what the instruction was, it only gives the date which the instruction was given. In view of the evidence that was before the third respondent, although disputed, there is a basis to find that the charge sheet was vague. In as far as the days within which to lodge an appeal, again the third respondent states that in terms of the company policy the appeal ought to have been launched within a certain period of time and any non-compliance with own policy does in appropriate circumstances amount to an irregularity procedurally to the extent that the subsequent dismissal may be viewed as being procedurally unfair. Accordingly the finding of procedural unfairness could not be interfered with. It does appear that the applicant relied, probably correctly so before the **Sidumo** judgement, to the test in the

Carephone decision. The test in the Carephone decision has been jettisoned by the **Sidumo** judgement and indeed replaced with the test developed in the **Bato star** decision, which is, the decision by a decision maker should be one that a reasonable decision maker would arrive at. The applicant in its supplementary heads, mounted various challenges onto the merits and infact made reference to certain portion which appears to have been incorrectly typed in the award. In effect the applicant wished for a different decision than the one that the third respondent arrived at.

[10] The applicant further mounted attacks that the third respondent in assessing the evidence did not apply the test that would be required in such instances as he did not evaluate the credibility of the witnesses. Clearly a commissioner in an arbitration process is guided by the provisions of section 138 of the LRA.

[11] In dealing with the substantive issues the third respondent had the following to say:-

"I am not satisfied that the applicant contravened the rule against insubordination. An employee who fails to complete a task to a manager's entire satisfaction is not automatically insubordinate. If all employees performed their task hundred percent (100%) satisfactory, hundred percent (100%) of the time there would be no need for managers. Mr. Dawson stated that he did not see this as a case of poor work performance, but one of insubordination because the applicant had "an attitude problem". He also went on to say that her failure to follow his instruction was deliberate act to undermine his position. Quite why manager in such a senior position would feel so threatened by a relatively low level employee is not clear. The respondent failed to introduce any other evidence to backup this assertion regarding the Applicant's attitude, and had infact just

months prior to this incident given her an award for loyalty to the company and for going an extra mile during the strike. Mr. Dawson testified that the applicant had refused to follow out his instructions during a period of a week, and during this period he had received complaints from the client saying that they had not dealt with her. His credibility in this regard was undermined because as the evidence unfolded it emerged that this incident infact occurred over just two days, the Thursday on which the instruction was given and the Friday when another meeting was held”.

- [12] I do not find any basis upon which I can interfere with that finding of substantive unfairness. In the **Sidumo** judgement paragraph **118** Navsa J said the following:

"CCMA figures reveal that each year between seventy thousand (70 000) to eighty thousand (80 000) cases are referred to the CCMA for conciliation in respect of dismissals. Given the pressures under which commissioners operate and the relatively informal manner in which proceedings are conducted, and the further fact that employees are usually not legally represented, it is to be expected that awards will not be impeccable.

To my mind having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. This is one of those cases where the decision makers acting reasonably may reach different conclusions. The Labour Relations Act has given that decision making power to a commissioner.”

The issue of costs

[13] Both parties submitted that there is no reason why costs should not follow the results. I had no reason not to sanction the submission that costs should follow the results.

[14] For the reasons set out above, the order made on 19th March 2008 stands.

Moshoana AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the applicant	: Adv Tiry
Instructed by	: Hofmeyer Herbstein & Ginwala Inc
For the respondent	: AUSA obo L. Kruger
Date of hearing	: 19 March 2008
Date of reasons	28 March 2008