

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR113/08

In the matter between:

AMANDLA TOKWE

APPLICANT

AND

BONGE MASOTE N.O.

1ST RESPONDENT

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

SOUTH AFRICAN BROADCASTING

CORPORTATION LIMITED

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued by the First Respondent (the Commissioner) in which he found that the Applicant was fairly dismissed by the Third Respondent. The Applicant did not pursue the point *in limine* about the alleged late filing of the answering affidavit.

[2] The application for review is opposed by the Third Respondent.

Background facts

- [3] The Applicant who was employed by the Third Respondent as a Forensic Auditor was charged and dismissed for misconduct concerning failure to disclose her business interest in a close corporation, Sivini CC.
- [4] The Third Respondent came to know about the interest of the Applicant in Sivini when its manager Mr Naiker was contacted during February 2007, by an official of the Special Investigation Unit (“SIU”) who was conducting a reference check on the Applicant. The reference check was done because the Applicant had applied for another job with SIU. During this telephone conversation, the SIU official enquired from Mr Naiker if he was aware that the Applicant had an external business interest.
- [5] Following the information regarding the external business interest of the Applicant, the Third Respondent, on 9th March 2007, dispatched to the Applicant, a notice of intention to suspend her in terms of clause 12 of its personal regulations. In the notice of intention to suspend the Third Respondent indicated the following:-

“It is alleged that you have been conducting business outside of your normal duties without the knowledge of the employer. In terms of your conditions of employment interests should be declared to the employer. (own emphasis) The employer views this is a serious allegation since, should it be true, such conduct may expose the corporation to a conflict

of interests and may compromise the corporation in as far as the protection of its intellectual and other property is concerned. You are hereby requested to make representations on Monday 12th March 2007 at 12h00 why you should not be suspended in terms of clause 12 of the Personnel Regulations of the SABC pending an investigation into these allegations.”

- [6] In response to this letter the Applicant in her letter dated 12th March 2007 stated the following:-

“Amandla Tokwe acknowledges that I am a registered member of Sivini Express – CK 2003/040469/23 as from 17 October 2006.

Sivini Express is a dormant business and hence nullifies the allegation that I have been conducting any business outside my normal duties as detailed in the SABC Personal Regulations.

As the above indicates, no interests in terms of benefit or income were gained by myself from the business. Therefore to my knowledge and understanding, there was no interest to declare. (own emphasis).

Should the business have been trading and generating any income for myself, I would have declared those interests.”

- [7] On 13th March 2007 the Applicant was suspended from duty pending investigations and institution of a disciplinary hearing.

[8] Ms Sethosa for the Third Respondent argued that a further attempt was made to have the Applicant make a proper disclosure in terms of for S.49 of the Third Respondent. Mr Ningiza, for the Applicant contended that what was discussed in this meeting was the various options put to the Applicant to address the issue of the failure to disclose her business interest.

[9] On 26th March 2007, the Third Respondent formally charged the Applicant with the following misconduct:

“Charge 1.

It is alleged that you failed to comply with the duties of your service contract, indicating a breach thereof in that you failed to disclose your business interest in the company registered as Sivini Express CC as required by your terms and conditions of your employment.

Charge 2.

It is alleged that you used the property of the SABC for private purposes without permission in that you solicited work for a company in which you have a business interest that you have not declared in terms of your employment contract.”

[10] The Applicant was found guilty of the second charge and not guilty of the first charge.

Grounds for review and the award

- [11] The Applicant challenged the Commissioner's award on both the procedural and substantive findings. In as far as procedural fairness is concerned the complaint of the Applicant is that the Commissioner committed misconduct in that he did not deal with overwhelming evidence showing that the Third Respondent became aware of the alleged offence on 4th October 2006 and that taking disciplinary action six (6) months later was procedurally unfair.
- [12] The Commissioner considered the Applicant's evidence on the alleged delay in instituting disciplinary action and found that each case must be determined on its own merits and circumstances, and determination of the reason/s for the delay.
- [13] The Applicant contended that she declared her business interest through a letter after she was instructed to do so by Naicker. The Third Respondent on the other hand contended that the letter of the Applicant did not constitute a disclosure as it did not comply with S49 form through which disclosure of business interests are to be made. The Third Respondent further contended that the Commissioner was not required to decide whether the letter written by the Applicant on 12th March 2007 constituted a disclosure or not including whether or not the fact that Sivini was a dormant company justified non-disclosure.
- [14] The other complaint of Applicant against the award is that the Commissioner failed to take into account the issue of inconsistent application of discipline in that some employees found to have been involved in the same offence of non disclosure of interest. Except for the allegation of inconsistency the Applicant

has not furnished any further details. There are also no details as concerning the circumstances of those employees to compare with those of the Applicant.

[15] As concerning substantive fairness the Applicant contended that the Commissioner did not:

- (a) capture all the evidence presented before him;
- (b) deal the Applicant's version in its entirety particularly in relation to the version put to the Third Respondent's witnesses;
- (c) did not apply his mind to the evidence placed before him; and
- (d) dismissal was not an appropriate sanction.

[16] In addition to finding that the rule was valid and reasonable the Commissioner found that the employee was aware of its existence. The Commissioner in concluding that the employee had broken the trust relationship between herself and the Third Respondent took into account the breach of the rule, the seniority and the sensitivity of the job performed by the employee. The rule which the employee was accused of breaching is quoted in the arbitration award as follows:

"2. DUTIES OF EMPLOYEES

(b) An employee may neither directly nor indirectly have an interest in another business or profession, nor do any other work part time or otherwise, nor hold a public office, without the prior written permission of the Group Chief Executive. (my own underlining)."

[17] The Commissioner in his reasoning rejected the submission of the employee that the business of Sivini was dormant and therefore did not derive any financial benefit from it. In his further reasoning the Commissioner states:

“It is clear that whether a business is dormant, trading or a benefit is derived out of it or not, disclosure of the interest in the business is a requirement. The employee party’s further argument that the employer party did not suffer any prejudice as a result of non- disclosure, is hereby rejected, because the above quoted rule does not provide for exoneration from compliance for this reason.”

Evaluation of the Award

[18] In my view the inquiry which the Commissioner needed to conduct during the arbitration hearing extended beyond the breach of the rule. It is however clear from the reading of the Commissioner’s award that his inquiry focused only on the existence of the rule, its reasonableness and whether it had been contravened by the employee. Accordingly, the Commissioner failed to appreciate that his task extended to having to determine whether or not the dismissal was an appropriate sanction having regard to the totality of the circumstances of this case. Had he applied his mind to the fairness of the sanction, the Commissioner ought to have found that the dismissal was not an appropriate sanction. In failing to conduct the inquiry into the appropriateness of the sanction the Commissioner committed a gross irregularity, which resulted in his award

failing the reasonable standard set out in *Sidumo v Rustenburg Platinum Mine Ltd* (2007) 28 ILJ 2405 (CC).

- [19] The standard set out in *Sidumo* is that of a reasonable decision-maker which requires the Court before interfering with the arbitration award to inquire into whether the decision of the Commissioner is one which a reasonable decision-maker could not reach. Dealing specifically with the issue of the evaluation of the appropriateness of the sanction the Constitutional Court in *Sidumo* had this to say:

“[78] 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.”

- [20] In *Fidelity Cash Management Services v CCMA & Others* [2008] 3 BLLR 197 (LAC), at para 94 the Court emphasised that the above factors were not exhaustive and indicated that other factors to take into account are:

“...The Commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute, including the Act. In this regard, sections 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to that the dismissal is fair.”

- [21] It is an established principle of our law that not every proven offence by an employee would automatically lead to a dismissal. Having established that an employee is guilty of an offence the employer has to determine from the range of sanctions available which one is a fair, taking into account the totality of the circumstances of the case. In this respect as stated by Ngcobo J in *Sidumo*, the employer has some form of a discretion that he or she has to exercise (at paragraph 18). In assessing whether the employer acted fairly in imposing the sanction of a dismissal the Commissioner has to ask himself or herself whether the employer's decision is in the circumstances of that particular case fair. In this regard as stated earlier the Commissioner's task extends beyond enquiring about the existence of the rule, its reasonableness and breach thereof. The enquiry entails looking into the totality of the circumstances surrounding the offence, how important is the rule that has been breached and why did the employer impose that sanction. See *Edcon Ltd v Pillemer* (2008) 29 ILJ 616

(LAC). In short the Commissioner should in performing this task be guided by the principle of progressive discipline which amongst other things would entail assessing the prospects of correcting behaviour and using the incident as a learning process. The attitude and the response of the employee when called upon to account for his or her conduct would in my view serve as a useful indicator of the willingness of the employee to continue with the employment relationship and in particular that he or she is willing to learn from the experience. This would also serve as an indicator that training could correct behaviour and ensure that there is no repeat in the future. Training may also serve to create a common understanding on the interpretation and application of a rule or policy.

[22] In applying the above principles to the facts of this case it is clear that the Commissioner failed to appreciate the case of the employee including the circumstances and the context within which she was dismissed. Firstly it was not the case of the employee neither that of the Third Respondent that the rule provides for the concept of “*prejudice*”. The contention of the employee was that even if she was guilty of failing to disclose her interest in Sivini, the Third Respondent did not suffer any prejudice as a result thereof.

[23] Similar to *Sidumo*, the failure to disclose in this matter did not result in any loss to the Third Respondent nor did it involve any monetary gain or any other benefit to the employee. The conduct of the employee did not involve an intentional disregard of the policy but rather an error in the interpretation of what was required by the policy. In the circumstances of this case it can not be

said that the interpretation of the extent of the disclosure by the employee was unreasonable or reckless. Her interpretation was that the disclosure was required in a case where an employee was involved in a company that was actively involved in business as opposed to a dormant company. Her response when called upon to account ought to have been taken into account when assessing the fairness of the dismissal sanction. She did not deny her involvement with Sivini.

[24] Another point which the Commissioner ought to have been taken into account had he applied his mind to the assessment of the fairness of the sanction is the comment made by the chairperson of the disciplinary hearing regarding the clarity of the rule. Contrary to the submission of Ms Sethosa for the Third Respondent, that the record of the disciplinary hearing was not submitted during the arbitration hearing, Naiker made reference to the report of the chairperson of the disciplinary hearing during his cross-examination. He in his regard made reference to the inaccuracies in the report and sought to correct them. He did not take issue with the comment of the chairperson when he said:

“It is the panel’s view that the process governing this requirement of declaration of interest in the SABC is not clearly articulated and therefore acknowledge a flaw in the system.”

[25] In the light of the above it is my view that the award of the Commissioner stands to be reviewed. I see no reason in both law and fairness why costs should not follow the results.

[26] In the premises the following order is made:

(i) The arbitration award issued by the Commissioner under case number GAJB18159-07 dated 29 November 2007, is reviewed and set aside with costs.

(ii) The award is substituted and should read as follows:

“(a) The dismissal of the Applicant, Ms Amandla Tokwe, was unfair in that the sanction imposed was in the circumstances unfair.

(b) The Third Respondent is ordered to reinstate the Applicant retrospectively to the date of her dismissal without loss of salary and benefits.”

Molahlehi J

Date of Hearing : 17th February 2009

Date of Judgment : 27th February 2009

Appearances

For the Applicant : Mr T Ningiza of Ningiza Horner Attorneys

For the Respondent: Ms T H Sethosa of Maserumule Incorporated