



REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case Number: JR 568/2010

In the matter between:

NKALA AND FOUR OTHERS

Applicants

and

COMMISSIONER W KRUGER

First Respondent

CCMA

Second Respondent

WOOLWORTHS (PTY) LTD

Third Respondent

Heard: 7 November 2011

Delivered: 22 November 2011

Summary: application for leave to appeal against judgment and order

JUDGMENT- LEAVE TO APPEAL

MOSHOANA AJ

Introduction

[1] This is an opposed application for leave to appeal against the judgment and order of this Court issued on 27 September 2011. The parties filed written submissions in terms of Rule 30 of the Rules of this Court.

Grounds.

[2] The third respondent contends that this Court erred by misconstruing the test on review. Further the Court erred by finding that versions were not rejected when such was done. There was evidence supporting the absence of the second list. There was a resolution of the dispute by rejecting the version of the applicants. There was evidence supporting a conclusion that the applicants are guilty of insubordination. It is unfair to reinstate Mashiane. It is not the case that the first respondent misconstrued the *onus* issue.

The test

[3] It is now trite that in applications of this nature, the test is that of reasonable possibility of another court coming to a different conclusion. In assessing that the court seized which such an application should take into account the facts and the law.

Grounds considered.

The applicable test on review.

[4] It is by now settled law that the test is that of a reasonable decision maker. The grounds as set out in section 145 of the LRA are not discarded but suffused. Recently the Supreme Court of Appeal in an unreported judgment of *NUM and Another v Samancor Limited and Others Case 625/10 delivered on 25 May 2011* had emphasised the importance of the material before a decision maker to determine the reasonableness of the decision subjected to a review. It axiomatically follows that any decision that is at odds with the material before a decision maker is unreasonable and ought to be set aside. This will be the test to be applied by another court should leave to appeal be granted. The submission that this Court applied the correctness test is simply not correct. The conclusion that the 'dismissal was indeed unfair and should have been

declared as such' has nothing to do with the correctness of the decision but with the outcome a reasonable commissioner would have arrived at given the material before him or her. Accordingly, there exists no reasonable possibility that another court would come to the conclusion that a wrong review test was applied.

Versions not rejected when in fact they were.

[5] The Court's finding in this regard relates to a conclusion that the applicants *could not explain* why out of 36 employees they were the only ones not booked and why each and every one of the other employees either attended or made prior arrangements. The material placed before the first respondent revealed an explanation. Therefore, the Court was simply stating that it is improper to say there was no explanation when there was one. The first respondent as a decision maker was expected to either accept the explanation or reject same. Accordingly, there is no reasonable possibility that another court may come to a different conclusion.

Evidence supporting the absence of the second list.

[6] This issue of the second list is clearly not material at all. It does seem that there was a clear misunderstanding of what the cross-examiner was referring to. The evidence of Van Der Walt alludes to lists being placed on the notice board. Two lists (MR and SR) were introduced and formed part of the arbitration record. In argument before this Court, there was no indication that there was only one list. In fact the transcript reveals that during the cross-examination of Smit a version regarding the MR list and another list was put to which Smit testified that he was not aware of. With that debate in cross-examination, the first respondent concluded that he will decide that issue later. However, the true and real dispute was whether an instruction to count stock was given and was not followed. Even if the court were to accept that there was one list in the face of the evidence of Van Der Walt, the question whether the applicants were given instruction and failed to follow them would have remained for determination. In short, the issue of the existence or non-existence of the list is not material to the outcome. Accordingly, there is no reasonable possibility that another court may come to a different conclusion.

Resolution of the dispute

[7] The evidence of Van Der Walt revealed that there was a common practice that employees stay until the last customer left. This practice was aimed at contradicting the booking times as set out in the MR and SR list. The existence of such a common practice was placed in serious dispute. Smit testified that in one meeting where he remembers the applicants were present except one who was on sick leave an instruction was issued by him to work on stock take until it is finished. Such evidence was disputed. Clearly these two issues of instructions and the common practice were critical to the determination of the alleged misconduct of insubordination. Nowhere in the award does the second respondent resolve this dispute. In *Maepe v CCMA and Others*,¹ the LAC found that failure to deal with critical issues is misconduct. That is what this Court found. Accordingly, there is no reasonable possibility that another court may come to a different conclusion.

Evidence to support guilt

[8] It is of critical importance to consider what the allegations of misconduct were; that being the reason why the applicants were dismissed. It seems to be the third respondent's approach that because one or two witnesses said one thing or another such should be accepted without considering the other competing evidence. It is the duty of a commissioner to assess the evidence and to arrive at a conclusion. The assessment simply entails taking into account all the evidence and draw conclusions consistent with such evidence. Therefore any attempt to refer to pockets of evidence in order to substantiate a submission is not helpful. In *Sidumo*, the court mentioned that it is inappropriate for a commissioner to leave the reviewing court guessing. Nowhere in his award does the commissioner foreshadow any of the evidence flashed out by the third respondent in this application. One of the factors to be considered in dealing with insubordination as misconduct is clarity of instructions. The applicants' version was that they worked according to the allocated times. That being the case, there is no basis in fact or law that could sustain a conclusion that they failed to follow instructions to work

¹ [2008] 8 BLLR 523 (LAC).

on 11 May 2009 as alleged. Accordingly, there is no reasonable possibility that another court may come to a different conclusion.

Unfair to reinstate Mashiane

[9] This ground is not altogether clear. When this matter was argued, the submission was that Mashiane has waived her right to be employed. Now it seems the argument is that this Court erred in converting re-employment to reinstatement without finding that the determination that Mashiane was not without blame is unreasonable. In the first instance, this Court converted nothing. In terms of section 145(4), this Court is empowered to determine the dispute once it sets aside an award for any ground in law. This Court found that grounds do exist to set aside the award. Having done that, the Court had to determine the dispute if all the material is at hand for it to do so. Reinstatement is a primary remedy for unfair dismissal unless the dismissal is only procedurally unfair or the dismissed employee does not wish to be reinstated. Accordingly, there is no reasonable possibility of another court coming to a different conclusion.

No misconstruction of the onus issue

[10] Paragraph 52 of the award is clear. The 1st, 2nd and 4th applicants did not prove that their dismissal were unfair. Clearly this reflects that the first respondent awaited the applicants to prove that their dismissals were unfair. Clearly this is in direct conflict with the provisions of section 192 of the LRA. Accordingly, there is no reasonable possibility of another court coming to a different conclusion.

Conclusion

[11] Having considered the grounds of this application, I come to the conclusion that **the application for leave to appeal is dismissed with no order as to costs.**

G. N MOSHOANA

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT: Mr Khoza of RAWU, Pretoria

FOR THE THIRD RESPONDENTS: Attorney H Schensema Of Macgregor Erasmus,
Durban.

LABOUR COURT