



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: P233/10

In the matter between:

IKWEZI MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

KELVIN KAYSTER N.O

Second Respondent

SOUTH AFRICAN MUNICIPAL

WORKERS' UNION

Third Respondent

M BLOUW

Fourth Respondent

Heard: 16 November 2011

Delivered: 8 December 2011

Summary: Review – not unreasonable to find sanction of dismissal inappropriate where employee guilty of publishing criticism about employer – award upheld

JUDGMENT

BHOOLA J

Introduction

[1] This is an application to review and set aside the award of the second respondent (the arbitrator) dated 4 January 2010 in terms of section 145 of the Labour Relations Act (“the LRA”).¹

Background facts

[2] The material facts are largely common cause. The fourth respondent (Blouw) wrote a letter to the editor of a local newspaper, the Eastern Province Herald, which was published under his name and designation as “shop steward”. The letter read as follows:

The Ikwezi (morning star) municipality, which is supposed to be the hope for the community of Jansenville and Klipplaat, has not lived up to its name and is in a chaotic situation. The financial situation has reached a catastrophic state. The 2004-05 budget is about R8.7million, of which 56 per cent is for salaries and allowances, and only 44 per cent for service delivery. The district municipality has intervened financially on numerous occasions. The provincial government contracted administrative and financial mentors, and bought new computers but, this did not improve the financial situation or administration. The municipality’s debt is about R1,9 million, but large numbers of indigent house owners have huge credits in their accounts. Newly appointed managers are working separately from those perceived as coming from the old order, which makes it difficult for the council to take informed decisions on crucial matters. Officials are barred from writing official letters without sanction of the municipal manager. This means that if the municipal manager is out of the office for a couple of days, municipal business must come to a standstill. We urge the MEC for local government to send an

¹ 66 of 1995.

investigation team to Ikwezi and, if our allegations are found to be true, that corrective measures be taken.

[3] As a result of this publication Blouw was charged on two counts of misconduct and found guilty on the first, which is as follows:

You conducted yourself in an unseemly and or gross manner. In that on or around the period August 2004 you:

- 1. Published, or caused to be published false, damaging and malicious information about your employer and senior officials of your employer, and in doing so, tarnished the good name and reputation of the said employer and officials, or your actions have the potential of causing same.*

In doing so you contravened clauses 1.2.3 and 1.2.9 of the Standard of Conduct as contained in the Disciplinary Code.

[4] The Standard of Conduct, also referred to as the municipal code, requires of employees that they “perform their tasks and job responsibilities diligently, carefully and to the best of their ability” and “refrain from any rude, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee or a member of the public”.

[5] The chair of the disciplinary enquiry, Claassen, found Blouw guilty on one of the two charges he faced. He recommended a dismissal despite Blouw’s clean record and length of service because he found the transgression to be a serious breach of trust that brought the applicant’s name into disrepute. Blouw did not testify at his disciplinary enquiry.

The arbitration award

[6] Following the referral of an unfair dismissal dispute the arbitrator found that Blouw’s dismissal was procedurally fair but substantively unfair. His reasons for the finding of substantive unfairness were *inter alia*:

(a) Blouw's argument that he was not aware of the rule prohibiting he was charged for was "a little vexatious". A reasonable employee should know that s/he may not make false, damaging or malicious allegations against his/her employer.

(b) Blouw could not be blamed for reaching the conclusion that the financial situation was catastrophic. Any reasonable employee would assume that the financial situation of an employer is catastrophic if the employer is unable to fulfil its most important obligation towards its employees, i.e. the payment of salaries. The employee can therefore not be blamed for drawing that conclusion.

(c) The letter creates the impression that managers were responsible for the poor state of the applicant's affairs and finances;

(d) The facts warranted a finding that the letter placed the applicant in a bad light, and was on an overall conspectus of the evidence both damaging and malicious.

(e) Blouw was an "argumentative and evasive witness" which reinforced the arbitrator's view that he had indeed intended to bring the managers into disrepute.

(f) One of the fundamental requirements of an employment relationship was for the employee to advance and the employer's interests and to act in good faith

[7] Turning his attention to sanction the arbitrator considered the submission that the sanction of dismissal was inappropriate. He referred to the obligations on commissioners set out in *Sidumo*², and which requires him to give consideration to the position and interests of both the employer and employee in order to make a balanced and equitable assessment. The arbitrator referred to the sanction of dismissal was being justified "only when the employment/trust relationship had broken down irretrievably". He noted that the applicant had

² *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

submitted that Blouw had committed a serious offence which tarnished the its reputation and that he showed no remorse when he argued that he may say what he chooses about his employer without having to face the consequences. Blouw, on the other hand, submitted that the former managers are no longer employed by the applicant and he will not have issues with the current administration if he were to be reinstated. He also cited his 23 years of service and clean disciplinary record, and argued that the applicant had failed to submit evidence of the breakdown in the trust relationship and had not applied progressive discipline.

[8] The arbitrator records the following conclusion on sanction:

Although the parties agreed that the employee will not rely on the defence that he wrote the publication in his capacity as shop steward, I have considered in mitigation that his sense of responsibilities as a shop steward probably played a role in tempting him to make the publication. I do however not accept it as a defence. I have also considered that he indeed had very long service with the employer and had a clean record. It is correct that Hanabe and Joubert are no longer with the municipality and there is no evidence before me that the current administration may have a problem with him. Rudman also testified undisputedly that the employee was a good worker. Although the employee appeared argumentative I got the impression that he is a seasoned municipal employee who may still have lots to offer the municipality by virtue of his experience. In view thereof I find that dismissal was too harsh in the circumstances and that it was substantively unfair.

Grounds of review

[9] Mr Wade, appearing for the applicant, submitted that there was a disjuncture between the finding of guilt and the determination of sanction. This implied that the arbitrator had abrogated the responsibility entrusted to him under *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.³ Mr Wade submitted that the applicant's pleaded emphasis is that the arbitrator's

³ 2008 (2) SA 24.

disregard of relevant and material evidence constituted a gross irregularity in the conduct of the arbitration, although it is still open to it to challenge the award under the test of reasonableness. The challenge is therefore based on a gross irregularity arising from the arbitrator's failure to apply his mind to the material facts.

[10] Mr Wade submitted that the arbitrator had regard to two dubious factors in mitigation of sanction. In regard to the factor that Blouw was not financially trained, this was hardly a mitigating factor as it was obvious that someone who is not financially trained should not make dubious statements about finances. Secondly, the arbitrator had regard to the fact that he made the statement in his capacity as a shop steward in contravention of an agreement between the parties (the existence of which was disputed by Blouw and which appeared to relate to relying on his status as a shop steward in defence). The arbitrator found that Blouw was guilty of very serious misconduct which had potentially serious consequences for the applicant, but disregarded this completely when it came to determining the appropriate sanction. This is an aberration that justifies setting aside the award on review. More importantly, the arbitrator disregarded his own finding that Blouw had acted maliciously and vexatiously and that he was a poor witness. The other factors disregarded by the arbitrator include that Blouw felt no remorse; that he attacked the integrity and ability of his colleagues; that he did not even believe his own allegations; that he did not utilise alternative internal remedies at his disposal to address his concerns; that he was intent on causing the applicant harm; that he intended maliciously attacking the very council that employed him and that he tried to mislead the arbitrator.

Evaluation of merits

[11] The sole issue on review, as articulated by Mr Grogan, is whether this Court should interfere with the arbitrator's finding that dismissal was an inappropriate sanction in the circumstances. Mr Wade submitted that this refers to a pure penalty review for unreasonableness, which is not the basis of its attack. In this vein Mr Grogan submitted that the gravity of the misconduct is only one of the many factors to be taken into account by the arbitrator as set out

by the Constitutional Court in *Sidumo*. Seen in context the publication of the letter did not constitute misconduct of such gravity so as to automatically warrant dismissal. It reflects the kind of criticism that appears in the media daily. In any event, there is no misconduct, however serious, that automatically licences an employer to dismiss an employee. The LAC confirmed in *Toyota South Africa Motors (Pty) Ltd v Radebe and Others*⁴ that mitigating factors must always be considered. This would mean that even where an employee is found guilty of serious misconduct, on consideration of all the facts dismissal may not be determined to be an appropriate sanction. The applicant's submission that there is in essence a contradiction between the finding that the employee is guilty of misconduct and the remedy of reinstatement cannot therefore be sustained. The ultimate test is whether the arbitrator applied his mind to determining whether the sanction is appropriate in the circumstances having regard to, among other factors, the misconduct committed.

[12] Mr Grogan submitted that the question this Court is therefore required to ask is as follows: is the finding that dismissal was an inappropriate sanction so unreasonable that it falls outside the band of reason within which two reasonable people might reasonably disagree? The applicant submits that the arbitrator failed to have regard to a number of critical facts. It implies that writing a letter critical of the employer inevitably leads to collapse of the employment relationship. The applicant also asserts that the central allegations in letter, other than the disclaimer, are largely unwarranted. However, the "sting" of the letter, on a dispassionate reading, is merely that the municipality is in financial distress, its administration leaves much to be desired and its affairs need to be investigated by the MEC for local government. The applicant's concern with the reinstatement order would appear to emanate from its concern that the allegations were untrue and that it had been placed in a bad light. Blouw's explanation for his conduct however, is that he wanted to provide an opportunity for the applicant to put its version and, if necessary, to prompt corrective measures. This motive is consistent with the contents of the letter. Although the truth of the allegations is not relevant to these proceedings, the arbitrator had regard to the disclaimer in the final paragraph of the letter in which Blouw calls

4 [2000] 3 BLLR 243 (LAC) at para 44.

for an “investigation if the allegations are true”.

[13] Of course the question as formulated would not be appropriate if one were to approach the matter as a process-related review based on the arbitrator disregarding material evidence in determining what is an appropriate sanction. This, as Mr Wade submitted, is not an attack directed at the reasonableness of the outcome. The arbitrator must consider all the evidence and cannot simply disregard critical factors. On this test Mr Wade submitted, the letter can on no interpretation be read benignly – it must be seen in the context of Blouw’s evidence and on that evidence the arbitrator found he acted for ulterior purposes and attempted to create an incorrect impression of the applicant. The disclaimer does not absolve him from the consequences of a seriously malicious statement, although acting maliciously destroyed his relationship with his employer. The issue is whether he believed in what he was saying, and the arbitrator had no regard to this factor. The award is so inherently contradictory in that the arbitrator correctly records the law and finds that it is breached by acting against the employer’s interests, but then proceeds to reinstate the employee. In any event the 5 years’ of income that he was deprived of by the arbitrator is not a penalty, the arbitrator was trying to be fair to the employer and attempting to balance interests as he was required to do. In the end where he found that the relationship was affected detrimentally he could not have reinstated the employee, but he nevertheless proceeded to do so in flagrant disregard of his duty to evaluate all the material evidence.

[14] Mr Grogan submitted however that none of the facts alleged by the applicant to have required the arbitrator to apply his mind are material. Lack of remorse is not relevant in the absence of evidence that Blouw lied: In this regard remorse is relevant to serious misconduct as dealt with in *Maepe v CCMA and Another*.⁵ Secondly, there is no evidence other than the letter itself that his conduct was vexatious and malicious, and given the disclaimer the letter on its own hardly justifies that conclusion. Thirdly, the letter does not mention any managers by name and a number of the municipality’s own witnesses testified to the chaos in the administration. The witness Rudman

5 [2008] 8 BLLR 723 (LAC).

testified that the applicant had a problem with Blouw and he would have liked Blouw to come back. There was moreover no evidence that Blouw had acted dishonestly. Lastly, there is ample authority that where a commissioner does not specifically say something in the award it does not mean that he did not apply his mind to that fact. The arbitrator states this clearly in his award.

[15] Mr Wade correctly submitted that the test is not what the arbitrator would do or this Court would do on the same facts – the test is designed to avoid arbitrary interference. The issue is that the arbitrator applied the wrong test in reflecting on what an employer does with an employee who is found to have acted maliciously. Thus while commissioners should not defer to the sanction imposed by employers, they are required to consider all relevant factors, including the reason for the employer establishing the rule and prescribing the penalty of dismissal, in the process of determining whether the sanction of dismissal was fair. Commissioners cannot decide on sanction afresh nor can they do so on the basis of what they would have done in the employer's shoes. Nor can this Court step into the Commissioner's shoes and determine what it would have decided on the relevant and material facts.

[16] In *Sidumo*, in giving clear direction to Commissioners on their duties Navsa J held:

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 has been breached. The commissioner must of course consider the reason the employer imposed the sanction of 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.

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.*⁶

[17] In *Fidelity Cash Management Services v CCMA and others*⁷ Zondo JP, (as he then was) applied this test, setting out a detailed list of what Commissioners are required to do. The Court held:

Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was, in all the circumstances, a fair sanction in such a case. In answering that question, he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of the dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.

[18] The arbitrator was required therefore to determine whether dismissal is an appropriate sanction in this context and was required to apply his mind to all relevant and material facts and circumstances in doing so. *Sidumo* also requires a balancing of interests and this is what the arbitrator did. He in fact deprived Blouw of five years' salary. This is a significant penalty, for an act which may have been an error of judgment on his part but which was not the dire misconduct the applicant depicts it to be. No names are mentioned in the letter and there was no suggestion that he was dishonest in doing what he did. The arbitrator did what he was required to do and did not defer to the employer on sanction but exercised his own sense of fairness and made a value judgment on the facts before him. For these reasons any interference with the sanction he determined would in my view directly violate principles and precepts following from *Sidumo*. In the end he found that there was no evidence that the

⁶ *Sidumo* supra at paras 78-79.

⁷ [2008] 3 BLLR 197 (LAC) at paras 94-95.

relationship of trust had been irretrievably damaged and in these circumstances, having had regard to all relevant facts, it cannot be said that reinstatement is not an appropriate remedy. I cannot agree with Mr Wade therefore that the arbitrator manifestly relinquished the authority conferred on him by *Sidumo* in a manner that would justify setting aside the award. There is no evidence that he failed to apply his mind to the material facts and circumstances and which resulted in the proceedings being tainted by gross irregularity with the result that a fair trial was denied to the applicant. Nor indeed can it be said even on a pure penalty review that the outcome was so unreasonable that it could not have been made by a reasonable arbitrator on the evidence before him. In the circumstances, the award stands to be upheld on either test, and there is no reason in fairness and justice why costs should not follow the result.

Order

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

The application is dismissed with costs.

Bhoola J

Judge of the Labour Court

APPEARANCES

APPLICANT: R B Wade SC
Instructed by Wikus van Rensburg Attorneys, Port Elizabeth.

THIRD AND

FOURTH RESPONDENTS: J G Grogan

Instructed by, Wheeldon, Rushmere and Cole,
Grahamstown