



REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no. JR 882 - 09

In the matter between:

**RUSTENBURG PLATINUM MINES
LIMITED (RUSTENBURG SECTION)**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

MUDAU N.O

Second Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Third Respondent

VAN DER MERWE PJ

Fourth Respondent

Heard: In chambers

Delivered: MARCH 2012

Summary: Application for leave to appeal against a judgment in a review application. Application dismissed.

JUDGMENT

REDDY AJ

Introduction

- [1] This is an opposed application for leave to appeal against the whole judgment handed down on 20 September 2011.
- [2] The applicant raises five grounds of appeal each of which I deal with in turn. I do not intend repeating the factual issues and grounds of review raised in the main review application as these are comprehensively dealt with in the main judgment.

The commissioner erred in determining the appropriateness of sanction

- [3] The applicant submits that the commissioner did not have the power to determine the appropriateness of the sanction after he had found that the dismissal of the employee was substantively unfair.
- [4] The applicant's main submission in this regard is that the parties agreed in the pre-arbitration minute that the commissioner needed only to decide if the employee had broken the rule and not whether the dismissal was fair, as the parties had also agreed that once the rule was broken, it resulted in a dismissible offence.
- [5] The applicant's submission ignores the notion that even if the rule was broken and a dismissible offence resulted, it is not axiomatic that a dismissal would be justified, appropriate or fair. Paragraph five of the pre-arbitration minute records the agreement between the parties that the commissioner is required to decide whether the employee was dismissed fairly or not.

- [6] Not only did this agreement empower the commissioner to look into the appropriateness of the sanction but the principle of fairness dictated that he consider, *inter alia*, the consistent application of discipline, the employee's disciplinary record and whether the employment relationship had irretrievably broken down.
- [7] The above issues are fully and plainly dealt with in the judgment. Apart from repeating those submissions made during the review hearing, the applicant takes its argument no further in its application for leave to appeal. In the circumstances, I find that there are no prospects of the Labour Appeal Court arriving at a different conclusion to that reached by me.

The commissioner erred in not making a credibility finding against the employee

- [8] The applicant submits that because the employee changed his plea from guilty (in the disciplinary hearing) to not guilty (in the arbitration hearing) it amounted to the employee's version of events changing fundamentally. It also repeats its submission in the review hearing that the commissioner ought to have made a credibility finding against the employee for testifying that he was misled into initially pleading guilty.
- [9] The commissioner found that the employee was not misled into pleading guilty in the disciplinary hearing. The applicant submits in the application for leave to appeal that the employee and his witness's versions on this issue differ. The applicant draws a distinction between the employee's words that Mostert "told me to plead guilty" and the employee's witness's words that Mostert suggested that

the employee plead guilty. Apart from a denial by Mostert during the arbitration hearing, this distinction was not interrogated before the commissioner by the applicant and it was not raised during the review hearing. In any event, the above words are not so materially distinct so as to impugn the employee's credibility, rather it confirms the employee's belief that he would not have been dismissed had he pleaded guilty in the internal hearing. The commissioner's finding that the employee was not misled to this effect leaves the conclusion that the employee incorrectly relied on this belief when pleading guilty. The applicant has not submitted how a credibility finding against the employee, in light of the evidence that does not justify a dismissal, would have resulted in the dismissal being fair.

- [10] The employee's change of plea does not amount to a fundamentally changed version of events. A plea is merely a response by the employee to the question of whether he admits or denies that he is guilty of the offence with which he is charged. A plea is not a version of events.
- [11] The employee's version of events was that he was instructed to oversee three sites, he had not given the instruction for the workers to start working but merely to enter the area and see if it was safe, he had not seen the misfires as he had not entered the area and he was at the other site when the workers commenced the drilling.
- [12] The applicant has not submitted in its application for leave to appeal how the employee's factual version changed. In the absence of such submission there is no merit in the argument that the commissioner ought to have made a credibility

finding against the employee. There is accordingly no prospect of the Labour Appeal Court coming to a different conclusion to that reached by me.

Reliance on legislation

[13] The applicant submits that the commissioner did not consider relevant legislation in terms of which the employee was appointed to the position in question.

[14] The applicant has not submitted what impact the legislation had on the facts that were before the commissioner. The undisputed evidence by the employee that he was instructed to oversee three sites on the day in question, he had not given the instruction to start drilling but merely for the workers to inspect the area for safety, that he was at one of the other two sites when the workers commenced drilling, and that he ought not to have been taken away from the site in question by those in authority. Whilst there may have been legal and safety imperatives for the employee to remain at the site in question and complete his usual duties, the applicant has not submitted what the employee was expected to do in the face of instructions to do just the opposite. There is very little reliance that an employer can place on legislation, when its own instructions to an employee run counter to the applicable legal provisions. I accordingly find that the Labour Appeal Court will not arrive at a different conclusion to that reached by me.

Trust relationship

[15] The applicant's submissions in this regard do not take the issue any further than what was before me at the review hearing. There is no merit in the submissions

made by the applicant in this regard. I accordingly find that the Labour Appeal Court will not arrive at a different conclusion to that reached by me.

Inconsistent application of discipline

- [16] The applicant submits that it was agreed in the pre-arbitration agreement between the parties that discipline was consistently applied. It accordingly refers to paragraph 3.11 of the minute which records that 'Inconsistent application of discipline is not in dispute.'
- [17] Apart from the above recording implicitly indicating otherwise, that is that the parties agreed that discipline was inconsistently applied, the applicant has not explained why it did not challenge the employee's evidence that discipline was not consistently applied in the past.
- [18] The applicant submits that it would have led evidence in this regard had it been agreed between the parties that this issue was in dispute. Even if my interpretation of paragraph 3.11 is incorrect and it was not disputed between the parties that discipline had been consistently applied, this became an issue in dispute when the employee and his witness led evidence to this effect. The applicant could have placed on record before the commissioner that this was not previously an issue between the parties, but seeing that it had become an issue, it would attempt to cross-examine the two witnesses and apply to re-open its case should the need arise. The applicant did none of this and left the employee's version unchallenged.

[19] In the circumstances, the commissioner correctly found that discipline had been inconsistently applied. There is no prospect of the Labour Appeal Court coming to a different conclusion to that reached by me.

[20] In the circumstances, I make the following Order:

1. The application for leave to appeal is dismissed.

Reddy AJ

Appearances:

NONE

APPEARANCES:

NONE

LABOUR COURT