



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no: JR 1078/09

In the matter between:

MMARGORY JACOBS

FIRST Applicant

JAFTHA SONIA

Second Applicant

LINKS IRENE

Third Applicant

and

DAVID LEVY

First Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL (MEIBC)

Second Respondent

BETA SCAN ELECTRONICS

Third Respondent

STINGER ELECTRONICS

Fourth Respondent

Heard: 24 April 2012

Delivered: 10 July 2012

Summary: Review application-dismissal for failing to comply with the changed policy on the period of leave- insubordination arising from the applicants failing to report for work after being told to do so.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application to review and set aside the arbitration award by the first respondent (the arbitrator) under case number MEGA 7135 dated February 2009. In terms of the arbitration award, the arbitrator found the dismissal of the applicants to have been fair.

Background facts

- 2] The facts of this matter are fairly common cause except those relating to whether or not the applicants were entitled not to report for work earlier than they did at the end of their leave period. The facts are fully summarised by the arbitrator, including the testimony of the various witnesses that testified during the arbitration hearing.
- 3] The applicants are former employees of the third respondent who were prior to their dismissal employed by the third respondent for a period of about 8 years. The applicants say that during that period they had clean disciplinary records. The applicants were charged and dismissed for, 'Desertion without leaves and Gross insubordination.'
- 4] It is common cause that the applicants were prior to the period that led to this dispute entitled to a four weeks annual leave. The annual leave was taken during the December/January shut-down.

- 5] The dispute in the current matter arose because of what happened prior to the shutdown and opening of the factory at the end of 2004 and the beginning of 2005. The version of the third respondent is that prior to the shut-down of the business during December 2004 it informed all its employees including the applicants that because of the business imperatives the shut-down would be for a period of three weeks and not four weeks as was the case previously.
- 6] The applicants disputes that they were told that the period of their leave period was reduced to three weeks. In applying the four weeks leave period, the leave would have ended on the 10 January 2005 and the three week period would have ended on 4 January 2005.
- 7] The deponent to the founding affidavit says that she was surprised when she received a call from the son of the main member of the third respondent, Mr Van Berg, saying that 'jy moet vereewig bly.' She says she was surprised by this comment and, accordingly, went to the third applicant to check as to when were; they expected to report for work. The third applicant informed the first applicant that she had received a similar call from Mr Van Berg.
- 8] The applicants reported for work on 10 January 2005 and on arrival they were informed by the respondent to wait before assuming their duties. They were thereafter served with suspension notices.
- 9] The respondent's version at the arbitration hearing was that two weeks before the December shut-down the employees were informed that it was decided that the leave period was three weeks because of the backlog that had developed. The employees were also told that the week taken from their leave would be compensated for during the year. The employees were told to report for work on 3 January 2005. This arrangement was according to the respondent accepted by all the employees.
- 10] The applicants as stated earlier did not unlike other employees report for

work on 3 January 2005 but report on the 10 January 2005. Mr Van Berg, the managing member contacted the applicants including another employee who did not report for work on 3 January 2005. That employee said that she did not know that she was supposed to report for work earlier than usual but agreed to report immediately thereafter. The first applicant's reply according to the third respondent, when asked why she did not report for work, was that she was not aware but she would in any case not have been able to report earlier because she was busy arranging for her child to go back to school. The third applicant also said that she did not know that she had to return earlier. She also said that she was not able to return earlier because she had a sore knee. The second applicant also said that she did not know about the arrangement that they had to report for work. Unlike the other two, she simply said she was not willing to return earlier.

Grounds for review

11] The challenge to the arbitrator's arbitration award is based on the following grounds of review:

17.8.1 The Award "makes you whistle" and "shocks a sense" of fairness.

17.8.2 There is no rational objective basis justifying the connection made by the First Respondent between the material properly available to him and the conclusion he eventually arrived at.

17.8.3 The evidence presented at the Arbitration does not support the Award and interference with the Award is warranted.

17.8.4 Based on evidence and facts before the First Respondent, a reasonable person would have concluded that dismissal was unfair.

17.8.5 The conduct of the First Respondent when endorsing dismissal warrants interference (sic) that he failed to apply his mind to

relevant issues. In doing so, the Arbitration proceedings and exceeded his powers.’

The arbitration award

- 12] Although the applicants were charged with deserting the work, the arbitrator found them guilty for absence without leave and failure to follow a lawful instruction. In this respect, the arbitrator says that the respondent incorrectly classified the conduct of the applicants but that did not detract from the procedural fairness during the disciplinary hearing as the applicant understood the substance of the charges they had to answer to.

- 13] The arbitrator accepted the version of the respondent that it had informed the applicants and others that the shut down for that December/January was going to be for only three weeks. The arbitrator seems to have found that there was no way that the applicants would not have known about the shortened period of closure because, there would have ‘been vigorous discussion between the employees in the two weeks prior to the annual shut down.’ It was for this reason that the arbitrator found that the applicants were fully aware of the instruction to return to work on the 3 January 2005. The conduct of the applicant was according to the arbitrator compounded by their failure to comply with the instruction which was given to them to return to work on 4 January 2005.

- 14] It is apparent that the arbitrator accepted the version of the third respondent and in particular found that its version was credible as there was no basis for it (third respondent) wanting to get rid of the applicants. In this respect, the arbitrator had the following to say:

‘ . . . Lastly, it is most unlikely that the employer would attempt to ‘set up’ the applicants by secretly informing only the other employee to return to work on 3rd January. Apart from the fact that this would have been difficult to achieve as it is common cause that they all worked in close proximity to each other there would be an overwhelming risk that such a

strategy would not remain a secret for very long. Furthermore, the working relationship between the employer and employees was good and it (sic) that circumstances, the employer would want to want to reopen with only 50% of his workforce being present. . .’

Evaluation

- 15] As a general rule, an employer is entitled to dismiss an employee who absents himself or herself from work without authorisation. However, even where absenteeism has been proven, the employer still has the duty of showing that the dismissal was fair. The period of absence from work, the number of times that the employee has been absent from work and the reasons given for being absent from work are some of the factors to take into account in considering the fairness of the dismissal.
- 16] In general, it would not be fair to dismiss an employee on the occurrence of the first absenteeism. However, the employer may be entitled to dismiss even on the first occasion of absenteeism depending on the length of the period of absence and the impact that absence from work may have on the operations of the employer.
- 17] The offence of absence of work without authorisation is regarded as more serious when the employee had been instructed to report for work. Failure by the employee to provide a satisfactory explanation for his or her absence from work will, in the absence of other factors, such as length of service, ultimately be regarded as being fair.
- 18] In summary, the arbitrator in determining whether the dismissal for absenteeism was fair has to take into account the misconduct itself and the circumstances surrounding that misconduct. In other words, the arbitrator has a duty in considering the fairness of the dismissal to take into account all the surrounding circumstances. In this respect, the

arbitrator has to weigh any important circumstances that may mitigate the offence committed by an employee.

- 19] It is trite that the responsibility to determine the fairness or otherwise of a dismissal rests with the arbitrator and no one else in our labour law dispensation. In conducting an arbitration hearing, the arbitrator has to consider all relevant factors and circumstances of the case. In this respect, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ held that:

‘[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.

[79] 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.’

- 20] The factors which an arbitrator has to take into account in assessing the fairness or otherwise of the dismissal was set out in *Sidumo* and subsequently summarised in *Fidelity Cash Management Service v CCMA and Others*,² by the Labour Appeal Court (the LAC) as follows:

¹ 2008 (2) BCLR 158 (CC) at paras 78-79.

² (2008) 29 ILJ 964 (LAC) at para 94.

- ‘(a) take into account the totality of circumstances;
- (b) consider the importance of the rule that had been breached;
- (c) 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;
- (d) consider the harm caused by the employee’s conduct;
- (e) consider whether additional training and instruction may result in the employee not repeating the misconduct;
- (f) consider the effect of dismissal on the employee; and
- (g) consider the employee’s service record.

21] The LAC further held that:

‘[95] 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 of the circumstances, a fair sanction in such a case. In answering that question, he or she would have to use this 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 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.’³

22] In the present case, the arbitrator in arriving at the conclusion that dismissal of the applicants was fair, failed to take into account some critical factors in assessing the fairness of such dismissals. In the first instance, the absence and failure to comply with the instruction to report

³ Id at para 95.

for work on the 3 January occurred in circumstances where for 8 years the applicants had been with the third respondent, have always taken leave during December/January shut-down.

- 23] It is common cause that the employees had a clean disciplinary record for that period of 8 years. It is important to note that on the version of the applicant the parties had a good relationship with each other during that period. This version has not been disputed by the respondent.
- 24] The employees placed in dispute the allegation of the respondent that they were told two weeks before the shut-down that they would be taking leave only for three weeks and that they were required to report on 3 January 2005. Because the respondent had the duty to prove that the dismissal was fair, the burden was on it to show that not only was the announcement in the reduction of the leave period made but that it was made in the presence of the applicants.
- 25] The key witness for the respondent concerning the announcement that the employees were informed about the shortened leave period was the factory manager, the financial manager and one of the employees.
- 26] Mr Berry testified that he informed the employees about the reduction in the period of leave and that they should all have heard him because they all they all work in close proximity with each other in the production line.
- 27] The financial manager testified that the decision to shorten the leave period was taken by Mr Bart, Mr Waiter and her. She also testified that some employees did approach her to enquire as to why was the leave period shortened. She says she referred them to Mr Bart and someone else.
- 28] The fourth witness of the respondent was Ms Nakedi one of the employee who returned to work on 4 January 2005. It would appear that the respondent called her as a witness to support a version that every employee was present when the announcement in question was made

and therefore each one of them knew that they had to return to work on the 3 January 2005. Her testimony did not support the version of the respondent in this regard. The pertinent question asked during evidence in chief was who told her about the change in the leave period. She responded by saying that it was Mr Bart. However, when asked whether Mr Bart was the one who told them personally about this arrangement, she responded as follows: 'No –I was not there when Bart told them.'

29] The witness then says that she was told by the employees about the announcement of the shortened leave period. As indicated earlier, she also indicated that she did not report for work on 3 January but reported for work on 4 January after she was called to do so by the third respondent.

30] Turning to the issue of insubordination, I do not believe that it was fair to dismiss the employees for failing to comply with the instruction to report for work in the circumstances of this case. It is particularly unfair if regard is had to the point already made that the practice of the 4 weeks leave had been in practice for the last 8 years and the manner in which the reduction of the period was introduced is in doubt even on the version of the respondent.

31] The following factors ought to have been taken into account in assessing the impact that failure to obey the instruction as alleged by the respondent may have had on the relationship:

31.1 What impact did the incident of failing to obey the instruction to report for work on 4 January 2005, by the applicants had on the credibility of the manager or the supervisor at the respondent's workplace.

31.2 The prejudice that the alleged incident of refusing or failing to report earlier for work may have had on the business interest of the respondent.

31.3 There is no evidence that the incident of failing to report undermined in any serious manner the overall authority of the manager or supervisor.

31.4 There is no evidence that the alleged conduct of failing to obey the instruction was of an on-going nature.

31.5 There is no evidence that the applicants would not been able to make up for the damage in the relationship, if at all.

31.6 There is no evidence of the likelihood of repeat of the conduct of refusing to obey lawful instructions.

31.7 There is no evidence that the damage caused by failure to obey the instructions to report for work could not be remedied by progressive discipline.

32] In assessing the conduct of the employees in relation to the charge of insubordination, not only was the arbitrator duty bound to take into account that the incident occurred in context where the period of leave had been shortened, but also there was no credible evidence that the applicants were present when the announcement was made about shortening the leave period.

33] It is also unfair because in the circumstances of this case, if the respondent had regarded the failure by the applicants to report for work on 3 January as serious enough to warrant a dismissal, it ought to have warned them when they were phoned, firstly that their failure to comply with the changed policy was a serious matter and further that their failure to report for work the following day could be followed by severe punishment. This aspect should have weighed in favour of the applicant when considering the appropriateness of the sanction which the arbitrator was in law obliged to consider. Had the arbitrator applied his mind to the appropriateness of the sanction, he would have found that the dismissal was too harsh a sanction in respect of both offences.

34] In light of the above, it is respectfully submitted that the arbitrator in arriving at the conclusion that the dismissal was fair, made a decision which a reasonable decision maker could not have made. If the arbitrator had applied his mind properly to the facts and the circumstances of this case, he ought to have found that the dismissal of the applicants was substantively unfair.

35] As concerning the issue of costs, I see no reason why the costs should not follow the results.

36] In the premises, the following order is made:

36.1 The arbitration award of the first respondent made under case number MEGA 7135 dated 23 February 2009 is reviewed and set aside.

36.2 The arbitration award of the first respondent is substituted with the following award:

- “1. The dismissal of the applicants was substantively unfair.
2. The Respondents are ordered to reinstate the applicants retrospective to the date of their dismissal without loss of any benefits.”

36.3 The respondents are to pay the costs of the Applicants, the one paying the other to be absolved.

Molahlehi J

Judge of the Labour Court of

South Africa

Appearances:

For the Applicant: Retail and Allied Workers Union

For the Respondent: Advocate N du Toit, instructed by Malan Muller Attorneys