



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no. JR2278/2010

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

GODFREY DITSELA and 2 OTHERS

Second Applicant

and

CCMA

First Respondent

JOSIAS SELLO MAAKE N.O.

Second Respondent

POTGIETERSRUST PLATINUM LTD

(MOGALAKWENA SECTION)

Third Respondent

Heard: 18 May 2012

Delivered: August 2012

Summary: review – unfair dismissal for misconduct – reinstatement as primary remedy for substantively unfair dismissal – long delay not sufficient on its own to justify denial of primary remedy

JUDGMENT

WHITCHER AJ

Introduction

1. This is an application to review and set aside the relief awarded in the unfair dismissal dispute decided by the second respondent [“the commissioner”] under case no LP5687/2006. The award was delivered on 22 July 2010.
2. The applicant employees (“the employees), G Ditsela and A M Fatana, were dismissed for being under the influence of cannabis, and W M Baloyi for being under the influence of alcohol.
3. The commissioner found that the employees were guilty of these offences but that their dismissals were substantively unfair “for reasons of inconsistency”. He, however, found that re-instatement was inappropriate “taking into account the inordinate lapse of time between the date of the dismissals and the completion of the arbitration proceedings”. He awarded the employees 12 months compensation each. Ditsela was dismissed in November 2006, Fatana in May 2007 and Baloyi in November 2006. The CCMA conducted an arbitration in the period September 2007 to February 2008. A fresh arbitration, which is the subject of this review, was conducted in 2010. The reason for, and relevance of, the lapse of time between the date of dismissals and the completion of the arbitration is dealt with further on.

4. At the commencement of the hearing of this matter, the applicants abandoned the grounds of review relating to the commissioner's findings on the guilt of the employees and his rulings relating to the admissibility and reliability of the blood and urine tests which served as evidence in the CCMA against the employees. The applicants also abandoned the ground of review that the commissioner unreasonably dealt with the 'not-guilty' plea entered on behalf of the employees at the internal hearing. In my view, the applicants properly relinquished these and other arguments in which the commissioner's conduct was criticised with little, if any, factual basis.
5. The applicants thus limited their grounds of review to whether the circumstances justified the non-reinstatement of the employees, and to whether the commissioner supplied the minimum reasons required by law for declining reinstatement. As stated in the founding affidavit, the complaint is whether 'having found that our dismissals were substantively unfair, [the commissioner] ignored the law compelling him to reinstate us, and found that reinstatement was not appropriate.'
6. It is important to note that this case is not about the reasonableness of the commissioner's finding on sanction. If this were the case, then the manner in which the commissioner applied his mind to the impact of the misconduct on the employment relationship or the length of service of the employees would have been relevant.
7. The non-reinstatement of the employees was relief attendant upon the commissioner finding their dismissal substantively unfair because of inconsistent application of discipline. This case is thus about whether, in the circumstances, this decision on relief is one that a reasonable decision-maker would not make.
8. In general, the award thoroughly deals with the evidence and argument advanced by the parties. However, when it comes to giving reasons for the relief he orders, the commissioner has only this to say:

‘Accordingly, I find that the dismissals were substantively unfair for reasons of inconsistency. I find reinstatement inappropriate in the circumstances of this matter, taking into account the inordinate lapse of time between the date of dismissals and the completion of the arbitration proceedings and I accordingly find that maximum financial compensation will be in order.’

9. It is trite that the primary relief for a substantively unfair dismissal is reinstatement or re-employment. Section 193 (2) (a) – (c) of the Labour Relations Act envisages compensation as an alternative form of relief if the employee does not wish to be reinstated, circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable to reinstate the employee. Section 193 (2) (d) is not relevant in this case.
10. The sole reason the commissioner gives for declining to provide the employees with the primary relief for a substantively unfair dismissal is the ‘inordinate lapse of time’ between the date of dismissal and the conclusion of the arbitration proceedings.
11. The employees in this matter wanted reinstatement. For this to be denied them, the ‘inordinate lapse of time’ mentioned by the commissioner must either constitute a surrounding circumstance that makes a continued employment relationship intolerable or it must constitute a condition in terms of which it is not reasonably practicable to reinstate the employees.
12. Summarising the developments in the law of review after *Sidumo*, Anton Myburgh¹ notes that a commissioner commits a reviewable irregularity when he makes a finding that is either unsupported by any evidence, based on speculation by the commissioner or is supported by evidence that is insufficiently reasonable to justify this decision. A commissioner also reaches a decision that no reasonable decision-maker would reach if he fails to apply his mind properly to relevant legal provisions relating to the issue at hand.
13. The commissioner is perfectly entitled to take note of the delay in this matter

¹ Myburgh ‘*Reviewing the Review Test: Recent Judgments and Developments*’ (2011) 32 ILJ 1504.

reaching the CCMA, especially if the period of delay may be relevant to the retrospectivity of the relief of reinstatement. However, there is no indication in the award of any evidence being led that a continued employment relationship would be *intolerable* as a result of the delay. It could thus not be for this reason that the commissioner declined to reinstate the employees.

14. I pause to note that it is not feasible for the third respondent (“the employer”) to argue that a continued employment relationship is intolerable as a result of the severity of the employee’s misconduct. This matter of relief was not decided on the basis of the appropriateness of sanction. In any event, in finding that there was inconsistent application of discipline, the commissioner made factual findings, unchallenged by the employer, that the employment relationship was not necessarily irretrievably damaged by acts such as those that the employees committed. He found that there was no valid zero-tolerance policy in place at the employer, that the applicable disciplinary code contemplated a final written warning for the misconduct in question and that internal disciplinary chairpersons possessed a discretion to hand down such a lesser sanction. Based on these findings, reinstatement of the employees would not *ipso facto* be intolerable.

15. I could also find nothing in the award to show that the commissioner reached his decision not to reinstate the employees because it would not be reasonably practicable to do so. The duty to present such evidence fell upon the employer and it is absent from the summary and analysis of evidence in the award. In other words, while there was a delay in the matter reaching the CCMA, the remaining legal issue to which the commissioner was enjoined by section 193 of the LRA to apply his mind was the practicability of reinstatement. This would include considering, for example, whether the workplace had undergone technological innovation during the delay or whether restructuring had occurred which rendered the employees redundant.

16. In *Lubbe v SAPS and Others*,² this court considered the reasonableness of an award in which a commissioner declined reinstatement as relief based, *inter*

² *Lubbe v Roop NO and Others* (JR 1303/09) [2012] ZALCJHB 7 (20 January 2012) at para 24.

alia, on a seven year delay in finalisation of the matter. Lagrange, J stated:

‘Obviously, an employer must be alive to the fact that reinstatement always remains a possibility if the ultimate decision goes against it and it cannot rely solely on a long delay in finalizing litigation as a reason for denying the remedy the employee was entitled to in the first place.’

17. The Supreme Court of Appeal in *Republican Press (Pty) Ltd v Ceppwawu and Gumede and Others*³ held that a delay in finalising a matter does not in itself justify awarding compensation instead of reinstatement. Owing to the fact that retrenchments had since taken place and the union’s own role, without proper excuse, in causing the delay, the SCA did not order reinstatement in *Republican Press*. Importantly though, this decision was expressly not made on the basis of the length of the delay as a factor on its own at all.
18. In *Lubbe* (supra) the award was set aside on the basis that the commissioner reached conclusions that could not reasonably have been reached on the evidence before him by denying the applicant the primary remedy of reinstatement. The learned judge stated, ‘In this instance the arbitrator simply assumed, without hearing evidence on the issue, that the workplace will have changed to an extent that the applicant would be unable to adjust to it.’
19. In the present matter, the commissioner does not appear to even have assumed that the employees would be unable to resume work, either because it would be intolerable or not reasonably practicable to reinstate them. In so doing, he has effectively elevated delay as an unexamined, sufficient and stand-alone ground for denying reinstatement for dismissals that are substantively unfair. This is at variance with the governing provision of the LRA, section 193 (2).
20. The question of who was responsible for the delay was not reflected in the award and it does not appear to have been raised as a material issue by either party at the hearing. In their review papers, the applicants criticize the

³ *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others* [2007] 11 BLLR 1001 SCA at para 22.

commissioner for not enquiring into the reason for the inordinate delay, for which they blame the employer, before finding that reinstatement would not be appropriate. They claim that the delay was caused by the employer taking the first arbitration on review and then withdrawing same. The employer answered that the commissioner was not required to investigate the history of the matter. The employer goes on to say 'If this was a factor that the applicants wished to rely on, they should have placed it before the commissioner in evidence'. The duty is in fact, the opposite. It was the employer's duty, if it wished to resist the primary relief of reinstatement for a substantively unfair dismissal, to have laid an evidentiary basis for this in the evidence they led at the CCMA.

21. It is conceivable that another party in the employer's position may have cross-reviewed on the basis that the commissioner ought to have guided it on the evidence it needed to provide in order to resist reinstatement. The employer did not do so and it is therefore unnecessary to comment further on the strength of such an argument.
22. As appears from the LRA and relevant case law, a delay could only be a reason to deny an employee reinstatement for a substantively unfair dismissal if it is coupled, in evidence, to a circumstance rendering a future employment relationship intolerable or not reasonably practicable. There was though no evidence on this question before the commissioner.
23. By denying the employees reinstatement solely because of an 'inordinate' delay, the commissioner in my view decided the question of relief in a manner not reasonably supported by the evidence before him. There does not seem to have been any other evidence before him that could have legitimised the substitution of compensation for the primary remedy of reinstatement. By relying on delay as a sufficient, stand-alone basis to deny reinstatement, he also committed a reviewable error of law in deviating from the provisions of section 193 (2) of the LRA.

Conclusion

24. In am satisfied that in denying the applicant employees the primary remedy of reinstatement for their substantively unfair dismissal, the commissioner reached conclusions that could not reasonably be reached on the evidence before him. Accordingly, his award of compensation as an appropriate form of relief must be set aside.

Order

25. In view of the reasoning above:

1. The second respondent's finding that compensation of 12 months' remuneration is an appropriate form of relief is reviewed and set aside.
2. The second respondent's finding on the appropriate relief for the applicant employees' unfair dismissal is substituted with an order that the third respondent must reinstate the applicant employees with retrospective effect including backpay from the date of their dismissals.
3. The applicant employees must be issued with final written warnings on their return to work.
4. The applicant employees must be reinstated by 1 September 2012.
5. The third respondent must pay the applicants' costs.

Whitcher, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate L Tyatya

Instructed by: E.S. Makinta Attorneys

For the Third Respondent: L Louw

Instructed by: Edward Nathan Sonnenbergs