



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1727/09

In the matter between

AFRICAN EXPLOSIVES LTD

Applicant

and

MAAKE, FRANCIS NO

First Respondent

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY

Second Respondent

SACWU obo MOKOENA, GIFT THABO

Third Respondent

MOKOENA, GIFT THABO

Fourth Respondent

Heard: 23 October 2012

Delivered: 23 October 2012

Summary: Review application - sanction challenged - application dismissed

JUDGMENT

COETZEE, AJ

- [1] This matter is between African Explosives Ltd, the former employer ("the Employer"), and Mr Gift Mokoena, the former employee who is the fourth respondent, and others.
- [2] This is an application for the review and setting aside of an arbitration award in terms of which the Commissioner held the dismissal of Mr Mokoena to be substantively and procedurally unfair and ordered the Employer to reinstate him with full retrospective effect. There is also a second application, and that is for condonation for the delay in filing the answering affidavit on behalf of Mr Mokoena.
- [3] It is not necessary to deal with the condonation application in detail as the employer did not actively oppose the application. There are a few aspects that need to be dealt with though.
- [4] Mr Mokoena is an individual who was represented by his union, who in turn instructed attorneys to act on behalf of both the union and Mr Mokoena. The union is the third respondent in the application.
- [5] From the papers, it appears that there was a dispute between the union and its then attorneys about fees relating to previous or ongoing matters. That dispute had continued for a while. During the period of the dispute, this matter was launched and served on the union, who then handed the matter to the same attorneys that it normally instructed and with whom they had the fee dispute.
- [6] It is alarming that the union then appeared to have left the matter

in the hands of the attorneys well knowing that the attorneys were refusing to do any further work until the fee dispute had been resolved. One would have expected the union not to do so, or to instruct somebody else, or to make sure that some steps were taken in order to protect the rights of its member as well as its own rights.

- [7] This is not a case where the union can blame its attorneys for negligence because it well knew there was a dispute, and that the attorneys would do nothing at the time when they were instructed in this matter.
- [8] There is also a big question-mark in what exactly the union did in order to pursue the matter to resolve the issue with its attorneys. There is nothing by way of any letters to support their contention about the dispute and had it not been for the fact that it was an individual represented through the union who instructed the attorneys, I would have declined this application for condonation. The union and its member are saved by the fact that it was an individual who did not know any better, and who left the matter in the hands of its union. Having said that, the application for condonation is granted.
- [9] The employer dismissed the employee after the employee on two occasions during November and December tested positive when undergoing a test for alcohol. The results exceeded 0%.
- [10] The employer's policy refers misconduct when being "under the influence". The employer regards any alcohol in the blood when tested as being under the influence. The Union challenged the employer on whether the employee was under the influence or the results merely exceeded 0%. At the disciplinary enquiry, the employee admitted contravening the policy. There was no evidence that the employee was actually under the influence.

- [11] The employee testified that after the first incident, he informed his supervisors that he had a drinking problem, but nothing came of it. The employer through one witness denied the report but did not call the second person to whom the report could have been made. The report remains in dispute.
- [12] The Employee also stated that he had been drinking the previous day until 17h00 and did not believe that upon reporting for duty the next day, he would still register alcohol content in his blood.
- [13] The arbitration award of the Commissioner is somewhat peculiar in the sense that there is a finding that the rule was breached but then a finding that substantively the dismissal was still unfair. Normally, when a dismissal is held to be substantively unfair, it follows, logically, from a finding that the rule was not breached, or there was no rule, or there is something wrong with the substance of what the employee was charged with.
- [14] The only logical way to interpret this award is that there was a finding of a breach of a rule and such finding by the employer was fair, but that the sanction was found to be unfair. The Commissioner agreed that the employer in this regard acted fairly and the Commissioner arrived at the same finding.
- [15] The ultimate finding of the Commissioner that the dismissal was both procedurally and substantively unfair can only relate to the fairness of the sanction that the employer imposed.
- [16] It appears from the heads of argument that it was to some extent common cause between the parties that what really was in issue in this case was only the sanction. The employer challenged the finding of the Commissioner that the dismissal was unfair in respect of the sanction.
- [17] The employer criticised the Commissioner for either not giving

sufficient consideration to or to completely ignore two material aspects when deciding on an appropriate sanction. The first is the policy on page 37 of the papers. Paragraph 8.2 of the policy states that a first breach of the policy may lead to dismissal. This at least is a recommendation of dismissal; and secondly, that the employer consistently applied dismissal for any breach of this policy.

- [18] The employee's representative argued that the sanction imposed by the Commissioner was one that a reasonable decision maker could have made. He referred to the arbitration award. On page 158 of the record, the Commissioner deals with the various considerations in applying an appropriate sanction in this matter. The Commissioner made the following observations:

'Taking into consideration the circumstances and environment under which the applicant was working, the rule which the applicant has breached, it is an important rule as failure to obey it might result in him being a danger to himself and others. But that did not prevent the respondent from giving him a second chance by taking him for rehabilitation and see whether on his return the applicant will repeat the same misconduct. The respondent has failed to do so, despite being requested. Even if the rules state that you must declare your condition before coming to work, in the case of the applicant it was going to be difficult as he was under the impression that if he had stopped drinking at 17:00 there would be no side effect. I am mindful of the fact that ignorance of the law is no defence in our law, but each case should be treated on its own merits.'

- [19] This reasoning indicates that the Commissioner in fact had regard to the working conditions in the workplace; the danger to the individual himself and the danger to others. The Commissioner then also took into account the three years that the employee had been with the employer, which is a reasonably long period of

employment and the consideration that the employee should be treated with leniency. Considering the totality of the circumstances, the Commissioner arrived at the conclusion that dismissal was too harsh a sanction under these circumstances.

[20] The approach to determine whether this finding is one that a reasonable Commissioner could not have made must take into account the broad range of what could have been reasonable. I am not persuaded that the finding that this Commissioner has reached is one that a reasonable Commissioner could not have made.

[21] I believe that costs should follow the result.

[22] I find that the finding is, in fact, one that a reasonable Commissioner could have made. I make the following order:

22.1 The condonation application is granted.

22.2 The application is dismissed with costs.

Coetzee, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Mr. D Cithi

Of Perrott Van Niekerk Woodhouse Matyolo Inc

For the Respondent:

Adv D Brown

Instructed by Chris Billings Attorneys