



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

JUDGMENT

Case no: JR 248/2011

In the matter between:

FARMERS MEAT SUPPLY

Applicant

and

VUSI MGWENYA (N.O.)

First Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

Second Respondent

ABEL MATSANA

Third Respondent

Heard: 05 February 2013

Delivered: 12 March 2013

Summary: (Review – Dismissal - misconduct - commissioner misconstruing duties on appropriate test of fairness -award set aside).

JUDGMENT

LAGRANGE, J

Background

- [1] The third respondent in this matter, Mr A Matsana, was charged and found guilty of "neglect of duty/failing to comply with duties and responsibilities in that you did not cut 200 kg of meat as you are supposed to on 28 July 2010." At the time of his dismissal on 4 August 2010 the applicant's duty was to strip meat from carcasses. The target set was that he was expected to strip 200 kg of meat per day. Between 26 June and 28 July 2010, he fell considerably short of this target on approximately 10 days.
- [2] The first respondent ('the arbitrator'), who arbitrated the ensuing unfair dismissal dispute, decided that Matsana's dismissal was substantively and procedurally unfair and awarded him five months salary, amounting to only R13,000. The arbitrator's reasoning is summarised below.
- [3] Firstly, the arbitrator found that even though Matsana had been dismissed for misconduct, he was of the view that the dispute was essentially a poor work performance issue because the employee had failed to reach specific targets and the employer had not followed the procedure set out in Item 9 of Schedule 8 to the Labour Relations Act 66 of 1995 ('the LRA'), being the Code of Good Practice for Dismissal ('the Code') dealing with dismissals for poor work performance. Further, the arbitrator found that the employer had failed to follow the substantive test for dismissal for poor work performance as set out in Item 8 of the Code. The arbitrator then proceeded to evaluate what the employer did by the procedural and substantive criteria set out in Items 8 and 9 of the Code. The employer was found wanting in both respects and this was the basis for the arbitrator's conclusion that the dismissal was substantively and procedurally unfair.
- [4] Although he concluded that the dismissal was substantively and procedurally unfair, the arbitrator decided not to reinstate Matsana because he had testified himself about the unhealthy working relationship between him and his manager. Accordingly, the arbitrator was of the view

that it would be intolerable to reinstate him and awarded compensation instead.

The review application

- [5] Even though it was somewhat poorly phrased, the principal ground of review relied on by the applicant is that the arbitrator misdirected himself by evaluating the fairness of Matsana's dismissal according to the standards of a dismissal for poor work performance. In the case of ***Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC)**, Zondo JP, as he then was, held that:

*"[32] It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal."*¹

- [6] In this instance, there is no suggestion that the applicant gave misconduct as a reason for dismissal in order to conceal the real reason for the dismissal. I believe it would be wrong to interpret the dictum above to mean that if an employer relies on one lawful reason for dismissal, the adjudicator is entitled, *mero motu*, to decide that the employer ought to have relied on a different lawful ground for dismissal and then evaluate the fairness of the dismissal as if the employer had chosen that alternative justification, rather than to evaluate the fairness of the dismissal with reference to the actual ground relied on by the employer. I think that the LAC envisaged that the kind of scenario, where such an exceptional

¹ At 975

approach would be justified was the type of case where there is reason to believe that the employer deliberately relied on one lawful reason for the dismissal to disguise an unlawful real motive.

- [7] I fully appreciate why the arbitrator might have felt that the employer would have better dealt with this case as a matter of poor performance, but what he ought to have decided was whether or not the employer had been able to prove that Matsana's non-performance amounted to misconduct which justified dismissal. Clearly, non-performance according to the required standards of the workplace could either be on account of an inability of the employee to perform to the required standards or an unwillingness to do so. If an employee is charged with misconduct, but pleads an inability to perform for one or other reason as a defence, then if the evidence shows that there is good reason to believe that the non-performance is not wilful, then dismissal for misconduct would not be justified.
- [8] In this instance, I am satisfied that this was not a case in which the arbitrator was entitled to determine the fairness of the dismissal based on a reason other than the ground of misconduct actually relied on by the applicant.
- [9] Although the record is complete, this is a matter in which the parties might wish to make further submissions in argument based on the fairness of the dismissal on the grounds of misconduct, as opposed to its fairness as a dismissal for work performance. Accordingly, I believe this should be remitted to be determined on the existing record subject to the parties being able to present further argument.

Order

- [10] The award issued by the first respondent dated 27 December 2010 under case number MP6482-10 is reviewed and set aside.
- [11] The matter is remitted to the second respondent to be set down before a commissioner other than the first respondent for arbitration on the existing record and subject to the parties being permitted to make further submissions in argument on the procedural and substantive fairness of the dismissal for misconduct.

[12] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: S U Roeloffs instructed by Vogel Malan Attorneys

FIRST RESPONDENT: M Bayi of General Industrial Workers Union of
South Africa

LABOUR COURT