

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

CASE NO: JR2322/10

In the matter between

ROLFES RESINS

Applicant

And

**NATIONAL BARGAINING COUNCIL FOR
CHEMICAL INDUSTRY**

First Respondent

FAIZEL MOOI NO

Second Respondent

SACAWU obo BETHUEL MBELE

Third Respondent

Date heard: 7 December 2012

Date of ex tempore judgment: 7 December 2012

Date edited: 12 March 2013

EX-TEMPORE J U D G M E N T

VAN NIEKERK J

[1] This is matter number JR2322/10, it is an opposed review argued yesterday. The application is brought to review and set aside an arbitration award made by the second respondent, to whom I shall refer as the Commissioner, on 30 August 2010.

[2] The factual circumstances are recorded in the arbitration award and do not warrant repetition save to note that the employee, on whose behalf

the third respondent acts in this matter, was dismissed on a charge of misconduct. The employee originally faced three charges of misconduct. He was given final written warnings on two of those charges, and dismissed ultimately for refusal to obey an instruction.

[3] The Commissioner found that the employee had been given an instruction which he refused, and came to the conclusion that for a number of reasons the instruction was reasonable and that the employee had committed an act of misconduct.

[4] The Commissioner then turned to the question of sanction, and that is really the issue on which this case turns. In paragraph 19 of the award the Commissioner says the following:
Firstly the preamble to the section states:

"Should you commit any of the following offences and the severity of the breach warrants dismissal, you will be dismissed."

From the part that I have highlighted it is clear that while the offence attracts a sanction of dismissal, the sanction is only warranted if the offence is severe enough.

[5] The Commissioner then records the view that the offence concerned was not severe enough to attract the sanction of dismissal. He provides two grounds for this conclusion. The first is that while the applicant had a severe hand injury in the past, this did not justify his failure to carry out the instruction. It was relevant however in relation to sanction on the basis that the employee had what the arbitrator called a 'subjective fear' about his ability to carry out the instruction.

[6] On that basis the Commissioner held that the refusal did not amount to

gross insubordination and should have attracted a lesser sanction such as a final written warning as suggested by the portion of the disciplinary code to which he referred.

- [7] Secondly, the Commissioner found that there was a degree of inconsistency in relation to sanction in that on the two charges for which the applicant received a final written warning, the one being insubordination, and that there was an insufficient distinction between insubordination on the one hand and the refusal to comply with an instruction on the other in these circumstances.
- [8] On that basis the Commissioner found that if the applicant in these proceedings was of the view that one charge of insubordination or refusal to follow an instruction was not so severe as to warrant dismissal then clearly the other similar charge where the applicant had a subjective medical concern, was also deserving of a final written warning.
- [9] Further the Commissioner noted that the employee had eight years' service with the company, which he considered to be a strong mitigating factor. For those reasons, the Commissioner came to the conclusion that dismissal was too harsh a sanction for the proven misconduct and he ordered that the employee be reinstated, not from the date of dismissal but from the date of the arbitration award, namely 16 August 2010.
- [10] Given that the employee was dismissed on 19 April 2010, this is not an insignificant period during which the applicant was effectively suspended without pay.
- [11] The legal principle to be applied is well-established. The Constitutional

Court in *Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] 12 BLLR 1097 (CC) fixed the threshold as one of reasonableness. This Court is entitled to intervene and set aside a Commissioner's award if, and only if the award represents a decision to which no reasonable decision-maker could come on the available evidence.

- [12] *Sidumo*, that case too concerns the appropriateness of sanction and the Court was careful to point out that Commissioners should not defer to employers in regard to the question of sanction. It is for the Commissioner applying the test of fairness that is established by the Labour Relations Act, to determine whether, having regard to the facts of each case, it can be said that dismissal is an appropriate sanction.
- [13] It is evident from the test or the threshold applied by the Constitutional Court that Commissioners have significant leeway in determining the fairness of sanction, and that this Court's powers are limited in relation to interference with the exercise of the discretion afforded Commissioners. As I have indicated, provided the Commissioner's decision falls within a band of reasonableness, it is not for this Court to interfere even if it would have come to a different conclusion in relation to sanction on the same facts.
- [14] Insofar as the applicant has contended that the factors to which the Commissioner had regard are irrelevant, I cannot agree with that submission. First, as I have indicated the Constitutional Court required Commissioners to have regard to all of the relevant factors. In my view that is what the Commissioner did in the present instance. There is no inherent contradiction in a finding that while a past medical incapacity was no reason to refuse to do an instruction it was not relevant in relation to the question of sanction, particularly when viewed subjectively from the position of the employee.

- [15] Further in my view there is no inherent illogicality in relation to the Commissioner's view on the issue of consistency, nor was it unreasonable for the Commissioner to assume that the employer was prepared to tolerate an instance of what it labelled as insubordination, but that it considered in the same circumstances, the refusal to obey an instruction which is after all a form of insubordination as warranting dismissal.
- [16] In particular the Commissioner had regard, as he was obliged to do, to the employee's length of service, which was not insignificant, some eight years.
- [17] In these circumstances I am not satisfied that the applicant has established a basis on which this court is entitled to interfere with the Commissioner's award either in relation to the reasonableness of outcome or in relation to the conduct or process related conduct by the Commissioner in coming to the decision he did.
- [18] In relation to costs there is no reason why costs should not follow the result.

For those reasons I make the following order:

1. The application is dismissed with costs.

André van Niekerk

Judge of the Labour Court