



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 29/11

In the matter between:

CADBURY SA (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER ERNA LOOCK

Second Respondent

ROSEMARY NASSON

Third Respondent

Heard: 14 August 2012

Delivered: 14 May 2013

Summary: A commissioner's failure to consider relevant and material evidence renders his or her award reviewable based on the process followed in conducting the arbitration.

Section 145 of the LRA review-dismissal for misconduct.

JUDGMENT

LALLIE, J

Introduction

[1] The applicant seeks an order reviewing and setting aside or correcting the arbitration award of the second respondent (the commissioner) in which she found that the applicant had dismissed the third respondent, Ms Nasson (Nasson), unfairly.

[2] Nasson started working for the applicant as a seasonal worker in 1987. She was dismissed in August 2009 while holding the position of team manager. Her internal appeal was dismissed. She referred an unfair dismissal dispute to the first respondent where the commissioner issued an arbitration award that the dismissal was substantively unfair but procedurally fair and ordered her reinstatement. In this application the applicant seeks an order reviewing setting aside and substituting that award.

Background

[3] In 2009 employees of the applicant committed an act of misconduct involving absenting themselves from work. The applicant responded by instructing its team managers to take disciplinary action against them. Some team managers including Nasson refused to carry out the instruction. Other team managers were issued with final written warnings but a disciplinary inquiry was held into three acts of misconduct against Nasson two of which are stated below as she was on a final written warning for similar misconduct:

‘Insubordination in that

(a) On the 15th April you were tasked to have one on one counselling session with your team (namely Mnconywa L, Mngcete L, Styebi E, Jantjies N, Nkewu N, Baba) that took sick leave prior and post Easter holidays.

(b) On the 29th of May you were instructed to discipline all employees in your shift that participated in the illegal strike action.’

She was found guilty of both acts of misconduct and dismissed.

[4] The commissioner found that the applicant had failed to prove that Nasson had blatantly defied an instruction. She added that Nasson attempted to follow the instruction although she failed to follow it in the manner that was expected of her. She found that dismissal was not an appropriate sanction on the grounds that Nasson had 20 years' service, it would have been more appropriate to deal with the misconduct as a performance issue and the applicant had failed to prove that she had made herself guilty of misconduct.

[5] The applicant sought to rely on a long list of grounds for review. In essence they are that the arbitration award stands to be reviewed and set aside because the commissioner's findings are unjustifiable, unreasonable and not based on the evidence which served before her. The applicant submitted that it led sufficient evidence to prove that Nasson's dismissal was substantively and procedurally fair. Part of the applicant's evidence which the commissioner unreasonably and unjustifiably disregarded was that it always follows misconduct procedures in cases of insubordination. Nasson could not furnish any explanation for using a counselling form different from the one the applicant provided. Another attack on the award was based on the commissioner's failure to reject Nasson's evidence that she kept the one on one chat forms in her possession and did not hand them to Mr Ntshudu (Ntshudu) even after she had held the one on one counselling with employees and after she had been charged with insubordination.

[6] The applicant submitted that the commissioner acted unreasonably by disregarding its evidence that Mr Ndingela (Ndingela) counselled some employees who should have been counselled by Nasson for taking sick leave before or after the a public holiday. She also disregarded the applicant's evidence that the team managers, including Nasson, were reminded on four occasions to conduct the counselling sessions. She further unreasonably failed to consider that Nasson's version that she prepared the one on one chat forms on 16 April 2009 was improbable as she could give no reason for not disclosing to Ntshudu on 17 April, 20 April and 4 May 2009 when she was reminded to hold the one on one counselling sessions that she had already done so. The applicant further submitted that it was improbable that Nasson issued final written warnings for participation in the unprotected strike before a decision for such warnings to be issued was made by the senior management.

Review

[7] The applicant's review application is processed based. It is the applicant's case that the commissioner's finding is inconsistent with the evidence which served before her and her conduct of the arbitration led her to reach a conclusion which a reasonable commissioner could not reach. Commissioners' duties regarding the manner in which they should conduct arbitration proceedings is expressed as follows in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*:¹

'[16] Since *Sidumo*, the Constitutional Court has again had occasion to consider the role of commissioners and their process-related obligations when conducting arbitrations. In *CUSA v Tao Ying Metal Industries and Others*². It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his/her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administration.

[17] In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[8] In *Hernholdt v Nedbank Ltd*,³ it was held that:

'This approach has been followed subsequently by this court in *Ellerines Holdings Ltd v CCMA and Others* and appears to have been endorsed by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others* where it was stated that it is now axiomatic that a commissioner is required to apply his or her mind to the issues before him. One of the duties of a commissioner is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award or decision or

¹ [2008] 2 ILJ 2461 (CC) also reported at [2009] 1 BLLR 1 (CC)-ED.

² [2009] 11 BLLR 1128 (LC) Ed at 134 D-G.

³ [2012] 33 ILJ 1789 (LAC) at para.39.

finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were.'

[9] The CCMA failed to file the entire record of the arbitration proceedings. It filed only its portion. However, nothing turns on the omission as the applicant's case is based on the arbitration award and it made no reference to the record in its heads of argument. Mr Unwin for the third respondent referred to the record briefly. Applicants are not required to file the whole record of the arbitration proceedings in all review applications. Rule 7A (5) requires the applicant to file the portion of the recording as maybe necessary for the purpose of the review. The filed portion of the record is sufficient for purposes of this application. The absence of the portion which was not filed neither prejudiced the parties nor prevented me from taking a proper or fair decision on this application.

[10] The applicant's evidence on charge (a) was that the respondent, in defiance of his instruction, did not conduct the one on one counselling sessions. Nasson failed to submit to the human resources office the completed counselling forms at the required time and after she was reminded on 17 and 20 April and on 4 May 2009. She also did not disclose that she had already held the counselling sessions an all the occasion she was reminded. She only submitted them at the disciplinary enquiry. When the forms were scrutinised it was discovered that she gave the employees counselling on the same date which turned out to be a date on which all the employees were not on duty. Some of the employees she claimed to have counselled were counselled by Dingela, another team manager. Nasson's version of the issue was that she conducted the counselling but did not record it on the prescribed forms. She used a different form which provided detailed explanation, dated all the forms 16 April 2009 and recorded names in her diary under 15 April.

[11] Had the commissioner applied her mind to the evidence before her, she would have found Nasson's version untrue. Had Nasson's evidence on the use of the incorrect form and her diary been true, she would have presented factually correct information. She would have submitted the forms by the due date, told Ntshudu on all three occasion he reminded her or shortly after gaining the knowledge that the applicant was taking her omission to submit the forms seriously and not allow herself to be subjected to a disciplinary enquiry when she was in possession of the relevant forms, completed in terms of the applicant's instructions.

[12] In respect of charge (b) the applicants' evidence was that Nasson had not carried out its instruction to issue the employees who reported to her with final written warnings. She did not submit warnings on their due date and submitted them at the disciplinary enquiry in June. She claimed to have issued them in April. An examination of the warnings reflected that Nasson had issued them two weeks before management took the decision that they be issued. The warnings also reflected that the employees refused to sign them. Contrary to the applicant's policy Nasson did not get a witness to sign the warnings and confirm the employees' refusal. At the time the applicant took the decision to dismiss Nasson she had given no explanation for the way she had completed the warnings. Had the commissioner applied her mind to the evidence she would have accepted the applicant's version and drawn a negative inference on Nasson's credibility for offering, for the first time at the arbitration, explanation for the irregularities in completing the warnings.

[13] The commissioner's conclusion that the applicant failed to prove that Nasson was guilty of blatantly defying an instruction is in contrast with her findings that on the direct evidence before her it was clear that Nasson did not follow the instruction in the manner expected of her. Insubordination is refusal carry out lawful instructions. In this regard see *Acrylic Products (Pty) Ltd and Another v CWIU and Another*⁴. The commissioner's finding is that to justify dismissal insubordination must be gross in that it must be serious, persistent and deliberate. It disregards the fact that Nasson was on final written warning for similar misconduct. When an employee is on a final written warning it means that the employer may dismiss him/her when there is a recurrence of similar misconduct. In this regard see *NUM and Another v Amcoal Collieries t/a Arnot and Colliery and Another*⁵

[14] The commissioner's decision that the applicant should have treated the misconduct which led to Nasson's dismissal as a performance issue instead of misconduct as it had done so in the past is not supported by the evidence before her. It is common cause that Nasson was on a final written warning for similar misconduct. This is an indication that the applicant had treated similar conduct as misconduct. Nasson led no evidence to the effect that she lacked capacity to perform her duties.

⁴ [1997] 4 BLLR 370 LAC.

⁵ [2000] 8 BLLR 869 (LAC).

[15] The commissioner disregarded material and relevant evidence which, had she applied her mind to, she might have reached a different result and found Nasson's dismissal substantively fair. In the circumstances the arbitration award stands to be reviewed and set aside.

[16] I have considered arguments on behalf of Nasson which are based on the result based test for review. The authority sought to be relied upon is not opposite as the applicant's case is process based. I do not agree that the flaws in the commissioner's reasoning are not sufficient to set the award aside. The difficulty with this argument is that it loses sight of the commissioner's duty to apply her mind to the issues in the matter before her.

[17] The applicant sought an order substituting the commissioner's finding that Nasson's dismissal was substantively unfair with an order that her dismissal was both substantively and procedurally fair. I am satisfied that I have been provided with sufficient information for making a determination on the fairness of Nasson dismissal. For the reasons I have given for finding the commissioner's award reviewable, I am of the view that the commissioner did not apply her mind to relevant and material evidence before her. The record proves that Nasson was given clear instructions to conduct counselling and later to issue employees who reported to her with warnings. The instructions were clear and lawful. Nasson understood them but elected not to execute them.

[18] The explanation proffered by Nasson for committing both acts of misconduct which led to her dismissal was patently false. The acts of misconduct she made herself guilty of were serious. She did not claim to have been incapable of executing the reasonable and lawful instructions issued to her. Consistently with her colleagues, Nasson was disciplined and she was justifiably given a sanction more severe than her colleagues' as, unlike them, she was on a final written warning for similar misconduct.

[19] I have considered the evidence in mitigation especially her length of services of twenty one years. I am however of the view that the gravity of the misconduct she made herself guilty of and the fact that she was on final written warning for similar misconduct out-weighed mitigation by far. Her dismissal was appropriate. In this

regard see *Toyota South Africa Motors (Pty) Ltd v Radebe and Others*.⁶ I therefore conclude that Nasson's dismissal was substantively fair.

Cost

[20] The applicant sought a costs order against Nasson. Section 162 of the LRA enables this court to make costs orders according to the requirements of the law and fairness. Amongst the factors to be taken into account in deciding whether to grant a costs order is the conduct of the parties in proceeding with or defending the matter before this court. I have considered the submissions on behalf of both parties on the question of costs. I am not convinced that Nasson unreasonably defended this application. She was armed with an arbitration award in her favour which she sought to protect. In the circumstances I am of the view that granting a costs order will not be appropriate.

[21] In the premises, the following order is made :

21.1 The arbitration award issued by the second respondent under case number ECPE 4132-09 and dated 6 December 2010 is reviewed and set aside and substituted with the following:

21.2 The third respondent's dismissal was substantively and procedurally fair.

21.3 No order is made as to costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

⁶ [2000] 3 BLLR 243 (LAC)

For the Applicant:

Adv Grogan

Instructed:

Joubert Galpin & Searle

For the first Respondent:

Mr Unwin of Chris Unwin Attorneys

LABOUR COURT