



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR1697/12

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES

Applicant

and

PSA obo WILLIE J RICHARDS

First Respondent

SEELE MOKWENA N.O.

Second Respondent

GENERAL PUBLIC SERVICE SECTORAL

Third Respondent

BARGAINING COUNCIL

Heard: 15 January 2014

Delivered: 18 February 2014

Summary: Review application in terms of section 145 of the LRA – Commissioner reinstated an employee who allowed a prisoner to escape under his guard – Commissioners’ decision one that a reasonable decision maker could reach – review dismissed.

JUDGMENT

CHAVOOS AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act, 66 of 1995 as amended (the “LRA”) to review and set aside an arbitration award of the second respondent (the “Commissioner”) under the auspices of the General Public Service Sectoral Bargaining Council (the ‘Third Respondent’). In terms of his award, the Commissioner found that the dismissal of the First Respondent was substantively unfair and ordered his reinstatement to the position of Correctional Officer Grade II on the same terms and conditions that existed before his dismissal. The reinstatement was issued without payment of arrear salary to the First Respondent. The First Respondent was required to report for work within five days of receipt of the award.

Background

- [2] The Third Respondent was employed by the Applicant at its Zonderwater Correctional Centre as a Custody Officer and was dismissed on 7 July 2011 for dereliction of duty as a consequence of an inmate escaping under his custody.
- [3] The initiator of the disciplinary hearing, who presented the case on behalf of the Applicant at the disciplinary hearing, did not seek his dismissal and argued for a lesser sanction ie one month’s suspension without pay.
- [4] No evidence pertaining to a breakdown in the relationship of trust was placed before the chairman of the disciplinary hearing nor was it contended by the Applicant that the First Respondent was an operational risk to his employer.

- [5] The above notwithstanding, the chairman of the disciplinary hearing dismissed the First Respondent.
- [6] It appears from the minutes of the disciplinary hearing that one of the main reasons for the Chairman dismissing the Third Respondent was consistency. According to the Chairman, he was aware of other cases where employees had been dismissed as a consequence of prisoners escaping under their guard and the dismissed employee's conduct was declared as grossly negligent. This issue was not raised by the employer representative at the disciplinary hearing nor was there any evidence placed before the hearing regarding the circumstances of these "two cases" referred to by the Chairman.
- [7] It is common cause that the First Respondent pleaded guilty to the complaint of dereliction of duty, cooperated during the investigation, showed remorse, had a clean disciplinary record and was employed for some 13 years and 5 months prior to his dismissal.
- [8] The First Respondent's dismissal was upheld on appeal and he subsequently referred an alleged unfair dismissal dispute to the Commissioner for Conciliation, Mediation and Arbitration (CCMA).
- [9] The only issue that was placed in dispute before the Commissioner was that of sanction and the parties agreed to dispose of the matter by way of written argument.
- [10] The written arguments presented by both parties form part of the record.
- [11] In summary, it was argued before the Commissioner that the offence committed by the First Respondent was serious enough to warrant dismissal. It was submitted by the employer that consistency should be the only test to be used in determining the sanction, together with the merits of the case. It was further contended that the trust relationship between the First Respondent and the Applicant had irretrievably broken down.

- [12] The First Respondent, on the other hand, contended that the Chairperson's reasoning for dismissing him was due to consistency in that the Chairman indicated that he was aware of cases where other prison officials were dismissed as a result of inmates having escaped under their guard. He indicated that the Chairman had ignored representations made by the employer representative in the disciplinary hearing in the employee's favour, namely that the area under his watch was a bushy area, other teams with prisoners had arrived and the prisoners intermingled with each other wearing the same uniform. The First Respondent's supervision of his prisoners was thus made difficult as his area of supervision was thus broadened. The First Respondent further contended that the aggravating circumstances argued by the initiator were in fact mitigating circumstances for the Third Respondent in that the initiator, upon arguing sanction, indicated that the First Respondent pleaded guilty, did not waste the state's time, provided his full support during the investigation, showed remorse and had to contend with other prisoners who were intermingled with the prisoners that he was required to oversee.

Arbitration award

- [13] In assessing the fairness of the dismissal, the Commissioner took into account the Code of Good Practice, and in particular Schedule 8 which provides guidelines in determining the fairness of dismissals and noted that the First Respondent had pleaded guilty to the complaint.
- [14] He then turned his focus to the consistent application of the rule as, according to him, it formed part of the Chairman's motivation for the sanction of dismissal.
- [15] He found that the Chairman of the enquiry did not deal with the consistent application of the workplace rule when determining the fairness of the dismissal, other than simply indicating that after he had considered everything he decided to terminate the relationship based on

consistency. No evidence on comparative matters was referred to nor was any evidence led in respect of similar cases in order to justify the Chairman's decision.

- [16] The Commissioner found that the consistent application of a workplace rule could not be justification for a blanket imposition of the same sanction in the event of the rule being transgressed and that each case needed to be determined on its merits.
- [17] The Commissioner took into account issues mentioned by the chairman which, the initiator argued to be in the First Respondent's favour, namely that all the prisoners under the First Respondent's guard and those guarded by other officials were mixed and wore the same uniform and that the area in which the prisoners worked was a bushy area. In making these observations, the Commissioner found that the chairman failed to deal with such submissions and provided no indication as to how they influenced his decision to dismiss the first respondent.
- [18] The Commissioner found no wilful neglect of duty to have been proven.
- [19] Ultimately, the Commissioner found that the chairman's knowledge of other employees being dismissed in circumstances where employees had escaped under their watch appears to have eroded the Chairman's focus on the First Respondent's transgression and inadvertently influenced his decision.
- [20] He also found that there were no deliberations before the chairman of the disciplinary enquiry or for that matter the applicant's heads of argument, to suggest that the relationship between the Applicant and the First Respondent had irretrievably broken down.
- [21] He noted that the initiator's submissions in aggravation were in fact in support of the First Respondent's mitigating circumstances.

- [22] In light of all the above considerations, the Commissioner found the First Respondent's dismissal to be unfair.

Evaluation

- [23] It is contended by the Applicant that the Commissioner disregarded the plea of guilty and did not limit his enquiry into the appropriateness of the sanction in that he revisited the merits and reached the conclusion that the dismissal was substantively unfair. In the circumstances, it is contended that the Commissioner addressed the wrong question.
- [24] I am in disagreement with such submission as it is apparent from the commissioner's award that he, in his analysis of arguments, specifically indicated that the Applicant had pleaded guilty to the offence and that it was not his intention to deal with all the factors as set out in the Code of Good Practice regarding guidelines for fair dismissals. Insofar as the Commissioner revisiting the merits are concerned, it is quite apparent that the Commissioner took into account the written submissions before him regarding the fairness of the sanction. He could not consider the issue of fairness without considering the merits of the offence and in particular the reasoning of the chairman in determining the sanction of dismissal. The Commissioner was precisely required to consider whether the employer had dismissed the employee for a fair reason and in doing so was required to determine whether the employer's reasoning to dismiss was fair.
- [25] It is also contended by the Applicant that the Commissioner disregarded the chairman's considerations with regard to consistent application of the rule, gravity and nature of the offence. I disagree. On the contrary, the Commissioner found that the chairman's sole focus on the issue of consistency was misplaced in that it eroded his focus on the transgression and inadvertently influenced his decision. Insofar as the gravity of the offence is concerned, he points out that the initiator of the disciplinary hearing supported the first respondent's mitigating

circumstances. He found there to have been no wilful neglect of duty on the part of the First Respondents whilst acknowledging that the First Respondent was blame-worthy for his conduct as he was tasked to guard the offender. He took into account all the surrounding circumstances and observations made by the chairman of the disciplinary hearing, all of which appeared to be common cause and found there to have been no wilful neglect.

[26] The issue at hand relates to substantive unreasonableness, the test for which is set out in the judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*¹, namely 'is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

[27] In terms of *Sidumo*, I am required to consider the reasoning of the Commissioner to see how he arrived at his decision, to determine whether his finding was reasonable. This Court must also consider whether apart from the Commissioner's reasons, the result is one that a reasonable decision maker could reach in light of the issues in evidence.

[28] This Court cannot set aside an award simply because it would have arrived at a different result. Two recent judgments have emphasised this principle. The judgments are:

28.1 *Herholdt v Nedbank Limited (COSATU as amicus curiae)*.² The court held:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a

¹ [2007] 12 BLLR 1097 (CC)

² (2013) 34 ILJ 2795 (SCA) at para 25.

gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable’.

28.2 *Gold Fields Mining SA (Proprietary) Limited (Kloof Gold Mine) v CCMA and Others*³ :

“What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not self-standing. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications.

Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork ground insulated from or standing independent of the *Sidumo* test.

Where an arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision.

Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome.

- (i) in terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the

³ JA2/2012([2013] ZALAC 28 (4/11/2013)

arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

- (ii) did the arbitrator identify the dispute he [or she] was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?
- (iii) did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- (iv) did he or she deal with the substantial merits of the dispute? and
- (v) is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

[29] Whilst I can understand the applicant's position and can appreciate the seriousness of the offence this court, as per the words of Willis JA in the matter of *Palaborwa Mining Company Limited v Cheetham and Others*⁴:

'...has to constantly remind itself that in assessing the reasonableness or otherwise of a decision of a CCMA commissioner, it need not necessarily agree with the decision of the commissioner'.

⁴ [2008] 6 BLLR 553 (LAC)

- [30] In terms of *Sidumo*, the determination of fairness of a dismissal falls within the domain of the commissioner.
- [31] The Applicant has not met the threshold for a successful review.
- [32] This may well be a case where reasonable commissioners may differ and, in as much as I may have sympathy for the applicant, it is the applicant who has made its bed and must lie in it. Its elected representative at the disciplinary enquiry argued the case on the basis that there was no wilful neglect on the part of the first respondent and argued that there were various obstacles before the third respondent when the prisoner escaped. He in essence found that the conduct of the first respondent, although not blame-worthy, justified a sanction other than dismissal, particularly in light of the Applicant's length of service, clean disciplinary record, cooperation in the investigation, plea of guilt and remorse shown.
- [33] The chairman tasked with ultimately making the decision himself did not do justice to the matter in failing to provide a clearly coherent and logical explanation regarding his reasoning for dismissing the First Respondent, other than indicating that this was consistent with what the Applicant would do. No evidence regarding the breakdown of the relationship of trust or the fact that the First Respondent was an operational risk to the Applicant was suggested or led before the chairman of the disciplinary enquiry nor was this a factor in his deliberations for justifying dismissal. All of these issues were considered by the Commissioner in arriving at his decision that the sanction of dismissal was inappropriate.
- [34] There was also no evidence placed before the Commissioner regarding reinstatement being an inappropriate remedy.
- [35] Whilst there may have been commissioners that might have differed with the outcome reached by the commissioner simply based on the fact that the employee's care and duty was to guard prisoners to ensure that they

do not escape, I cannot find that, based on his reasoning and the material placed before him, the Commissioner's decision was one that no reasonable commissioner could reach.

[36] In considering the transgression of the First Respondent as well as his blame-worthy conduct, I find that it would be unfair to saddle the Applicant with a cost order in these circumstances.

[37] In the premise, I make the following order:

37.1 The review application is dismissed;

37.2 There is no order as to costs.

Chavoos AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

F van der Merwe

FOR THE THIRD RESPONDENT:

Advocate M B Matlejoane

Instructed by the State Attorney

LABOUR COURT