



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2664/06

In the matter between:

MAJE SEROBE

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

K.G. MNGEZANA

Second Respondent

FRED MOFOKENG

Third Respondent

Date heard: 29 October 2013

Date of judgment: 30 April 2014

Summary: Review application. Commissioner committed a reviewable irregularity by denying the applicant a fair hearing.

JUDGMENT

Molahlehi J

Introduction

- [1] This is an unopposed application to review and set aside the arbitration award under case number GAJB 4905-06 dated 30 August 2006, in terms of which the second respondent (the Commissioner) found the dismissal of the employee to have been unfair.

The background facts

- [2] The third respondent (the employee) was at the time of the alleged termination of his employment, employed as a laborer by the applicant. There are two competing versions between the parties as to what led to the termination of the employee's contract.
- [3] The version of the employee is that he was dismissed by the managing director's brother. The case of the applicant on the other hand was that the employee was charged with unauthorized absence from work. The employee was charged with absence from work for a period of 7 days.
- [4] According to the applicant notwithstanding the notice to attend the disciplinary hearing the employee failed to do so. It was for this reason that the disciplinary hearing was held in his absence.
- [5] The employee contended that he never received the notice to attend the disciplinary hearing. He however conceded having received a call from the applicant about the disciplinary hearing. On the day he received the call he advised the applicant that he was in Vereeniging and that the letter should be left with his brother.

[6]

Grounds for review

- [7] The applicant contends that the Commissioner committed gross irregularity in the conduct of the arbitration hearing, in that he allowed the employee to be legally represented without investigating the complexity of the matter. The applicant further contends that the decision of the Commissioner is unreasonable.

The arbitration award

- [8] The Commissioner rejected the version that the employee was not dismissed but simply left the work place after an argument between him and his supervisor about the loading of the truck. The Commissioner rejected the applicant's version on the basis that it was based on hearsay evidence of the managing director who was not present at the time the employee alleged to

have refused to load the truck. The person who was present when that incident occurred was the immediate supervisor of the employee who was not called to testify. According to the Commissioner no reason was furnished as to why the supervisor was not called to testify.

- [9] As concerning the conduct of the disciplinary hearing in the absence of the employee the Commissioner found that there was no satisfactory explanation as to why the disciplinary hearing was not postponed so as to afford the employee an opportunity to a fair hearing.

Evaluation

- [10] The essential ground upon which the applicant challenges the arbitration award of the Commissioner is gross irregularity and a defect envisaged in section 145 (2) of the LRA.
- [11] The test to apply when considering a review application is whether the decision reached by the Commissioner is one which a reasonable decision maker could not have reached as set out by the Constitutional Court in *Sidumo*.¹ In relation to the review based on the grounds set out in section 145 of the LRA the Constitutional Court held that they are suffused with the constitutional standard of reasonableness. This means that an award that suffers the defects set out in section 145 of the LRA fails the constitutional standard of reasonableness.
- [12] I agree with the applicant that the Commissioner's decision as to the procedural fairness of the hearing is unreasonable. It is common cause that the employee did receive the message that he should attend the disciplinary hearing. He failed to attend on the basis he did not receive the written notice. The Commissioner in fact found that the employee was aware of the date of the hearing but held that the chairperson of the hearing the hearing should have been postponed to afford the applicant an opportunity to attend. There was no evidence that the employee did request that the hearing should be postponed.
- [13] In my view, the Commissioner with due respect misconceived the case which was before him. In arriving at the conclusion that the case of the applicant was based on hearsay the Commissioner focused on the allegation that the

¹ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

employee was dismissed by his immediate supervisor. If indeed that was the case of the employee that he was dismissed by the supervisor then his defence would not have been that he failed to attend the hearing because he did not receive the notice of the hearing but that he could not attend the hearing because he was already dismissed. The employee testified that he would have attended the hearing but for the fact that he was not served with the notice of the disciplinary hearing and that his car broke down.

- [14] In response to the charge of being absent from work as alleged by the applicant the employee stated that he was absent from work due to ill-health. He suggested that the ill-health was due to the injury he suffered on his finger whilst at work. He conceded during cross examination that he did not produce any doctor's note indicating that was booked off sick.
- [15] In arriving at the decision as he did, the Commissioner denied the applicant a fair hearing resulting in his decision being unreasonable. As a result of this the Commissioner has also failed to consider whether the sanction of dismissal was in the circumstances of this case fair.
- [16] In my view, the arbitration award of the Commissioner stands to be reviewed and because of the error that the commissioners made in his approach to the matter this Court is not in a position to determine the matter. The matter accordingly deserves to be remitted to the First Respondent to be determined by a Commissioner other than the second respondent.

Order

- [17] In the premises the following order is made:
1. The arbitration award under case number GAJB 4905-06 dated 30 August 2006, is reviewed and set aside.
 2. The matter is remitted to the First Respondent for consideration afresh by a Commissioner other than the Second Respondent.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: L Charourx

Instructed by Yusuf Nagdee Attorney.

For the Respondent: No appearance.