



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN PORT ELIZABETH
JUDGMENT

Not reportable

Case no: P 570/12

In the matter between:

NEHAWU obo KERR HOHO

Applicant

And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MZAMO MAMA N.O

Second Respondent

**SECRETARY TO THE EASTERN
CAPE LEGISLATURE**

Third Respondent

Heard: 18 November 2014

Delivered 19 November 2014

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) on 5 November 2012. In his award, the commissioner held that Mr. Kerr Hoho, on whose behalf the applicant has initiated these proceedings, was guilty of serious acts of misconduct and that his dismissal should be upheld. The founding affidavit discloses a broad range of grounds for review. At the hearing of the application and in support of his supplementary heads of argument, Adv. Zondo, who appeared for the applicant, confined the attack on the award to the single ground that the arbitrator committed a gross irregularity by deferring to the employer on the question of sanction, thus rendering a result to which no reasonable decision-maker could come.
- [2] The material facts are not in dispute. Kerr Hoho was employed by the third respondent as a researcher. During the course of October 2011, he was charged for misconduct on grounds, amongst others, of bringing the legislature into disrepute and failing to comply with a written instruction to desist from disseminating abusive emails. Kerr was found guilty of the charges against him and dismissed. He referred a dispute to the CCMA, which culminated in the arbitration proceedings under review.
- [3] In his award, as I have indicated, the commissioner found that Kerr had committed the act of misconduct complained of. He went on to say the following:
- '36. I further find that no reasonable employer could allow a free for all to its employees in a workplace. Indeed, I find it intolerable for the applicant to grant himself a licence to cast unfair and unfounded suspicions on the integrity of fellow employees and public representatives'.
- [4] In relation to sanction, the commissioner said the following:

'40. I find that in the light of the finding in paragraph 35, 36 and 37 above, the unrepentant nature of the applicant, his previous disciplinary record, any reasonable decision-maker could have arrived at the decision of the respondent'.

[5] Adv. Zondo submitted that it was apparent from this formulation that the commissioner had applied the reasonable employer test. In other words, the commissioner had not himself considered what would constitute a fair sanction in the circumstances, he had decided the issue of sanction by reference to a range of penalties that a reasonable employer might impose. This, of course, is the approach that was expressly rejected by the Constitutional Court in *Sidumo & others v Rustenburg Platinum Mines & another* [2007] 12 BLLR 1097 (CC) where the court stated that a commissioner must determine whether a dismissal is fair and in arriving at a decision; he or she is not required to defer to the decision of the employer. What is required is that the commissioner consider all relevant circumstances (see paragraphs 78 and 79 of the judgment). Navsa AJ, who wrote for the majority, said the following at paragraph 75:

'It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for the commissioner, in the event of an unresolved dismissal dispute, to conduct arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing "discretions". The employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view'.

(See also *Engen Petroleum v Commission for Conciliation, Mediation and Arbitration & others* (2007) 28 ILJ 1507 (LAC), where Zondo JP rejected the reasonable employer test as the basis for determining the fairness of a dismissal

for misconduct, and the endorsement of that rejection in paragraph 73 of the *Sidumo* judgment.)

- [6] Adv. Mbenenge SC, who appeared for the third respondent, submitted that a more benign interpretation of the commissioner's statement on sanction should be adopted. In particular, he submitted that the applicant had not shown that the commissioner had deferred the matter of an appropriate sanction to the employer, nor that the sanction imposed by the chairperson of the disciplinary hearing had been shown to have been arrived at fairly. In particular, the offences that formed the basis of the charges against Kerr Hoho were serious and other aggravating circumstances, including the state of his disciplinary record, justified his dismissal.
- [7] It is regrettable that the terseness of the commissioner's award fails fully to reveal his reasoning in relation to sanction. However, to the extent that paragraph 40 of the award refers to the commissioner's findings of misconduct, to Kerr Hoho's 'unrepentant nature' and to his previous disciplinary record as relevant factors (which indeed they are), these are, on the face of it, viewed through the lens of reasonableness. More precisely, the enquiry conducted by the commissioner was whether the third respondent's decision to dismiss fell within a band of decisions to which a reasonable decision-maker could have come. This is manifestly not the test that *Sidumo* requires commissioners to apply. The test requires that commissioners do not defer to the sanction imposed by employers; commissioners are required to decide whether the employer's decision was fair by taking the totality of circumstances and all the relevant factors into account and by conducting a balanced and equitable assessment of all of those factors in an impartial way, avoiding the substitution of a personal opinion for that of the employer. The correct approach is set out in paragraph 78 of the *Sidumo* judgment. It requires a commissioner to take into account the totality of the circumstances, the importance of the rule found to have been breached, the reason that the employer decided to dismiss, the basis of the

challenge to dismissal, the harm caused by the employee's conduct, whether additional training or instruction is appropriate, the effect of the dismissal on the employee and the employee's service record. This is not an exhaustive list. In short: it was not open to the commissioner to ask (as he did) whether any reasonable decision-maker (i.e. employer) could have arrived at the decision to dismiss; he was obliged to undertake the analysis described above.

- [8] In the absence of any further elucidation of the evidence in relation to sanction and any assessment of that evidence which reflects a proper enquiry into what constitutes a fair sanction in the circumstances, I am drawn to conclude that the commissioner, by subjecting the third respondent's decision to dismiss to a test of what a reasonable employer might have done in the circumstances, misconceived the nature of the enquiry that he was obliged to undertake. In short, the commissioner asked the wrong question and in doing so, applied the wrong test. On this basis alone, in terms of the applicable principles regulating the right to review in terms of s 145 of the LRA, the commissioner's award stands to be reviewed and set aside.
- [9] Both parties agreed that in the event that the commissioner's award was set aside, it should be referred back to the same commissioner for him to conduct the enquiry into an appropriate sanction on the basis of the test established by *Sidumo*. This would appear to be a pragmatic and principled way forward – the papers in this matter of voluminous and this matter has taken some time to reach the point of a hearing in this court. The commissioner is best placed, having made findings in relation to conduct, to identify all of the factors relevant to sanction, properly assess them and come to a decision that is fair.
- [10] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. I must necessarily take into account the fact that the parties are collective bargaining partners and the court's reluctance to make orders for costs

in these circumstances. I must also take into account that the applicant in effect abandoned most of its grounds of review at a very late stage in the proceedings, when the issue of the commissioner's approach to sanction was raised and supplementary heads of argument filed. In the circumstances, it seems to me that the requirements of the law and fairness are best served by each party paying its own costs.

[11] For these reasons, I make the following order:

- 11.1. The arbitration award issued by the second respondent on 5 November 2012 under case number ECEL 3268-11 is reviewed and set aside.
- 11.2. The matter is remitted to the second respondent to the extent that the second respondent is directed to determine a fair sanction for the misconduct that he found to have been committed by Kerr Hoho.
- 11.3. There is no order for costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

Appearances

For the applicant: Advocate M. Zondo

Instructed by MPM Attorneys

For the third respondent: Advocate SM Mbenenge SC

Instructed by the State Attorney

LABOUR COURT