



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 3246/11

In the matter between:

SYLVANIA METALS (PTY) LTD

Applicant

And

MOHLOMELELE CHRISTOPHER MELLO N.O.

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

ESWUSA obo MOSEHLE, MOFFAT

Third Respondent

Heard: 29 May 2014

Delivered: 12 February 2015

Summary: Review application. The employee dismissed for doing work without the relevant work permit. The Commissioner finding the employee guilty of insolence which he says is different from insubordination and therefore the final written warning for insubordination not applicant for that reason.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the first respondent (the Commissioner), under case number MEGA 31647, under the auspices the third respondent, the CCMA dated 24 November 2011. In terms of the arbitration award, the Commissioner found the dismissal of the individual third respondent, Moffat Mosehle to be substantively unfair and ordered that he be reinstated with a back-pay of R336 432, 00.

The background facts

- [2] The background facts in this matter are generally common cause. The individual third respondent, (the employee) who was prior to his dismissal employed as a mechanical fitter was charged and dismissed for misconduct relating to an alleged breach of the workplace rule and insubordination. The charge of the breach of the rule relates to the allegation that he worked on the blower machine without a work permit. The second charge concerned the alleged gross insubordination and insolence in that he walked out of the meeting during the discussion regarding his breach the rule governing the work permit.
- [3] The employee and his union were unhappy about the decision to dismiss him and accordingly referred a dispute to the CCMA concerning an alleged unfair dismissal. The dispute after failure of the conciliation was arbitrated, by the Commissioner who as indicated above found in favour of the employee and ordered that he be reinstated.

Case of the applicant during the arbitration hearing

- [4] In support of its case that the dismissal of the employee was for a fair reason the applicant presented its version through the testimony of two witnesses. The first witness was Mr Tshepo Malema, the plant manager. He testified that the applicant has a rule which requires employees to obtain a work permit before performing any task. The rule according to him covers even situations where the members of the engineering team come across any malfunctioning equipment as was the case in the present instance. In such a situation the member of the engineering team would report to the process people who will then issue a work permit. In the case of the employee, he was supposed to report to the shift foreman. The shift foreman is responsible for issuing a work permit and also providing leadership in addressing the problem that may have arisen in relation to the equipment.
- [5] In the present instance the person who the employee ought to have contacted about the adjustment of the valve on the blower was Mr Lesenya, the engineering foreman, and in his absence it would have been Mr Wessels, the production manager.
- [6] Mr Malema further testified that the employee knew about the need of obtaining a work permit whenever work was to be done on any equipment. He also stated that not so long before the incident involving the employee he (Mr Malema) had reminded the employees about the importance of risk assessment and the work permit. This was following the near fatality incident that occurred not so long before the incident in question.
- [7] Mr Lesenya was also charged regarding the incident of working without a work permit but was however not found guilty because according to him he was a bystander whilst the employee was adjusting the valves.
- [8] The incident which led to the charges against the employee was reported to Mr Malema by Mr Wessels. On receipt of that report he convened a meeting in his office with a number of the management

team including the employee. Initially there was no response to his enquiry as to what happened. He then reminded the team about the recent near fatality incident. At that point the employee enquired from him as to what standard he was using. According to him the employee raised his voice, told him that he was not going to work according to his standard and walked out of the meeting.

- [9] In response to a question of clarity by the Commissioner as to whether the main problem related to the employee walking out of the meeting, Mr. Malema respondent as follows:

“Yes because one of my views when I called him in that meeting it was not to say I nail anybody, it was to say I want to go to the root of, of the action so that I come with corrective measures.”

- [10] In clarifying further the issue of both the changes to the Commissioner, Mr. Malema, stated that the main charge was about the task of adjusting the valve without a work permit. The charge of insubordination related to the employee waking out for the meeting and saying that he will not work according to the rules of the company according to Mr Malema.

- [11] In relation to the exchange between him and the employee during the meeting, Mr Malema did not dispute having cut the employee short during the meeting whilst he was trying to explain what had happened. His explanation for doing that was that he wanted to make his point or needed to be listened to.

- [12] In the context of assessing the conclusion reached by the Commissioner it seems apposite to quote what Mr. Malema said during the arbitration hearing. In responding to a question of clarity from the Commissioner Mr. Malema said:

“I cut him short because I wanted to explain my views because that was my chance to talk because when I gave him the chance to explain what has happened he never explained.”

- [13] The second witness for the applicant was Mr. Wessels, who testified about the near fatal incident which took place 2 to 3 weeks before the one that gave rise to the dismissal of the employee. According to him the near fatal incident occurred because some work was performed without the work permits and risk assessment. Following that accident SAMANCO issue to communiqué regarding the need to ensure that work permit was issued before any task could be performed.
- [14] Mr. Wessels further testified that the communication made it very clear that there is a zero tolerance concerning work done without the work permit.
- [15] In relation to the incident in question, Mr. Wessels testified that he was walking from his office to the workshop when he noticed "guys working on the Blower or in the vicinity" thereof. He then proceeded to the plant where he discovered that the process used to sift platinum minerals from other things was operating at a lower level. He was then informed by Mr. Lesenya that the employee had performed a task without the work permit. He then checked on the relevant documentation and indeed found that the work permit for the work done by the employee had not been issued.
- [16] Regarding what transpired in the meeting which was convened by Mr. Malema, Mr. Wessels testified that the employee amongst other things said that he would not work according to Mr. Malema's standard and thereafter stood up and left the meeting.
- [17] During cross-examination Mr. Wessels could not say what kind of work the employee had performed on the blower machine. According to him, he assumed that he was changing the v-belts because one of them had the belt in his hand.
- [18] In relation to the adjustment of the valve Mr. Wessels testified that he had previously attended to such a task which is not done on a regular basis. He also testified that the valve adjustment had to be reported to Mr Malema if it was done on the basis of a "call out".

- [19] It was apparent during cross examination that the version presented during the arbitration hearing was different to that presented at the disciplinary hearing. In this respect, Mr Wessels testified at the arbitration hearing that they always obtained a work permit whenever they had to adjust the valve. This was contrary to what he had stated during the disciplinary hearing. He later stated that the reason for saying that there was no need for a work permit when adjusting a valve during the disciplinary hearing was because he did not understand the question.
- [20] Mr. Wessels later produced various books used by the applicant to record the work permits. He however could not produce any showing that a work permit was issued previously for adjusting the valve.

The case of the employee

- [21] The employee does not deny that he attended the valve on the blower without a work permit. He contended that as a qualified and competent person he was entitled to adjust the valve without having to obtain a work permit.
- [22] As concerning what transpired at the meeting he confirmed the version of the applicant except for stating that he left the meeting because Mr. Malema interrupted him when he tried to explain what happened and that was the reason he decided to leave the meeting.

The grounds of review

- [23] The applicant's grounds of review can be summarised in the following respects:
- 23.1 The first respondent failed to properly apply his mind and failed to have proper consideration of the facts and the law; thus exceeding his powers in this regard.
 - 23.2 the first respondent failed to properly, justifiably and reasonably determine and assess the evidence properly before him.

- 23.3 the first respondent failed to have any regard to the principle in relation to previous disciplinary history of the third respondent;
- 23.4 the first respondent misconstrued the issue that he was required to determine at the arbitration proceedings;
- 23.5 the first respondent did not properly apply his mind to the facts or the law in reaching his conclusion;
- 24.6 the award reached by the first respondent is not a determination that a reasonable decision-maker could have arrived at under the circumstances of this matter. In the heads of argument the applicant focused the challenge on the relief granted by the Commissioner and failure to take into account the previous final written warning that had been given to the employee.

The arbitration award

- [24] In his analysis of the evidence which was presented before him the Commissioner found that the reason for the dismissal of the employee was because he worked on the blower machine without a permit and also for insubordination in that he walked out of the meeting whilst his superior was still talking to him.
- [25] In relation to the charge of operating the blower machine without a work permit the Commissioner found that there was no need for a permit to adjust the blower valve in the blower machine. The Commissioner made this finding on the basis that the applicant had failed to prove that there was a policy requiring a permit before adjusting the blower valve. The other reason for that finding is that if there was a need for a permit before adjusting the valves the employee's immediate supervisor who observed him as he was working on the machine would have stopped him or would have given him such a permit. In other words the employee's supervisor found nothing wrong with him adjusting the valves without the permit.

[26] As concerning the charge of insubordination the Commissioner found that the employee had committed misconduct in that he was disrespectful to his manager. He however found that the misconduct was not serious enough to warrant a dismissal. The appropriate sanction according to the Commissioner in relation to this charge was a warning. In finding that the sanction of dismissal was not appropriate for the employee walking out of the meeting whilst his superior was still talking to him, the Commissioner took into account that the applicant was previously issued with a final written warning. He however distinguished the offence for which the employee had received the final written warning and the charge of insubordination relating to him walking out of the meeting. The distinction is based on the finding that the written warning was for insubordination whereas the walking out of the meeting was not insubordination but rather insolence.

Principles governing review

[27] The test to apply when considering an application for review is now well known. The test to apply is that of a reasonable decision maker which incorporates the grounds set out in section 145 of the LRA. The broad principles governing this test is summarized in the often cited case of *Fidelity Cash Management Service v CCMA and Other*,¹ in the following terms:

“The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA Commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstance of the case.”

¹ [2008] 3 BLLR 197 (LAC) at para 97.

- [28] The Court further held that the test excludes the consideration that the reviewing Court may have arrived at a decision different to that of the Commissioner. The other principle enunciated by the Court is that the task of determining the fairness or otherwise of a dismissal is in terms of the LRA is given to the Commissioner.
- [29] It is also now well established that the reasonableness or otherwise of the arbitration award must be determined objectively taking into account the issues raised during the arbitration hearing including all the relevant evidence properly presented before the Commissioner. In this regard the Labour Appeal Court per Waglay JP in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,² held that in determining the reasonableness or otherwise of an arbitration award the reviewing court must consider the totality of the evidence as was presented before the Commissioner and then decide whether the decision made by the arbitrator is reasonable.

Evaluation

- [30] In my view, considering the totality of the evidence which was before the Commissioner in this matter, except for the issue of the relief, there is no basis to interfere with arbitration award. Put in another way the decision reached by the Commissioner is reasonable when regard is had to the evidence as appears on the transcript of the arbitration proceedings. However, the finding made concerning the relief of reinstatement is, with due respect unreasonable when regard is had to the record. The reasons for these findings are set out below.
- [31] I deal first with the issue of the alleged breach of the rule concerning the alleged performance of the task of adjusting a valve without a work permit. It has not been disputed that the employee sought to fix the problem of valve because he noticed that it had a leak. It was also not disputed that he was qualified and competent to fix the valve.

² [2014] 1 BLLR 20 (LAC) at para 18.

- [32] The version of the employee that he had previously worked on the valve without a work permit that was not challenged. Mr Wessels conceded that work had previously been done on the valve. He initially sought to project the view that such work was done only after obtaining the work permit. He indicated that he could proof that fact by producing books where the record of such work permit could be found. The various books which he contended contained evidence of work done on the valve with a work permit failed to support his version.
- [33] The applicant has also failed, in my view, to produce proof as to when were employees including the employee informed that the rule regarding work permit would apply to even work performed on equipments including on the blower. And more importantly there is insufficient evidence to show that the applicant regarded failure to obtain a work permit before working on the blower a serious offence that could result in the sanction of dismissal. The testimony of Mr Malema is far from supporting the proposition made by Mr Wessels that there was zero tolerance to performing any task including that of working on the blower without a work permit. It should be noted that Mr. Malema did not dispute that work was previously done on the blower without a work permit.
- [34] The proposition that the applicant regarded failure to obtain a work permit before attending to the blower was a serious offence has to also be assed in the context where the employee's immediate supervisor was present during the course of the performance of the task by the employee. The supervisor was charged regarding the incident but was found not guilty.
- [35] Turning to the second charge against the employee, it is common cause that Mr. Malema convened a meeting with the management team including the employee after being informed by Mr. Wessels of the incident of work being done on the blower without a work permit. It is common cause that the employee attended the meeting as per the instruction. The charge against him concerns his failure to stay in

attendance of the meeting. The Commissioner as indicated above found the employee guilty of misconduct. It is apparent from the reading of the arbitration award that he found the dismissal to be inappropriate sanction.

[36] The finding that the dismissal was unfair despite the employee being guilty of misconduct is reasonable in my view, when regard is had to the facts and the circumstances surrounding the departure of the employee from the meeting. It is in this respect common cause that although the applicant was accused of wrong doing, he was not given an opportunity to explain what happened. Mr Malema testified as indicated earlier that, "I cut him short because I wanted to explain my views because that was my chance to talk."

[37] The Commissioner cannot be faulted in concluding that the dismissal was unfair despite the finding that the employee was guilty of insolence when regard is had to the above including the following:

- a. There is no evidence that the employee was instructed to remain in the meeting as soon as he stood up and was walking out of the meeting.
- b. There is no evidence that he was warned of the consequences that would follow his departure out of the meeting without permission particularly when regard is had to the environment that prevailed prior to his departure.
- c. There is no evidence that the trust relationship had broken down because of the conduct of the employee.

[38] As concerning the charge of insubordination the applicant contends that the decision of the Commissioner is unreasonable because he failed to take into account the fact that the employee was previously issued with a final written warning concerning insubordination.

[39] The validity of the final written warning, which was made by agreement between the parties at conciliation, for insubordination has not been

challenged. It is however not the rule of our law that a dismissal would follow automatically where there is a valid final written for the similar offence for which an employee has been found guilty of. It has of course been accepted in our labour relations that previous record of disciplinary offence by an employee being part of progressive discipline would carry considerable weight in support of the reason for dismissal. In other words previous records of misconduct do not on their own constitute the reason for dismissal but rather is a factor to be taken into account in weighing whether dismissal would, having regard to the totality of the facts and the circumstances of the case, be an appropriate sanction.

[40] The other ground of review upon which the applicant relies on in challenging the arbitration award concerns the relief made by the Commissioner. The approach to adopt when dealing with the issue of relief where the dismissal of the employee has been found to be unfair is dealt with under the provisions of section 193 of the LRA. The relevant provision of section 193 of the LRA for the purpose of this judgment reads as follows:

- “(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—
 - (a) the employee does not wish to be reinstated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[41] In interpreting the provisions of section 193 of the LRA the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*, held that:

“It is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion.”

[42] In *Dunwell Property Services CC v Sibande and Others*³, Labour Appeal Court in dealing with the issue of the dismissal of the employee which was found to have been unfair held that this Court erred in ordering the reinstatement of the employee in circumstances where the employee send a letter to the Department of Home Affairs after his dismissal castigating the conduct of certain members of management.. Although the LAC found that the dismissal of the employee to have been unfair it also found that the contents of the letter addressed to the Department of Home Affairs evinced an irretrievable breakdown in the employment relationship. The principle to apply in considering whether reinstatement is an appropriate remedy according to the LAC and per Ndlovu JA is the following:

“In order to determine whether or not an unfairly dismissed employee should be reinstated, as contemplated in section 193(2) of the LRA, the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus, and that “[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.”

³ (2012) 2 B;;R 131 (LAC) The same approach was adopted in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*³, 2010(5) BCLR 422 at para 42 where the Constitutional Court held that: ‘The remedies awarded in terms of the provisions of section 193(2) of the LRA must be made in accordance with the approach set out in *Equity Aviation* (*supra*). That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an inquiry into fairness with notions of a legal onus.’

- [43] In the present instance whilst the Commissioner has noted the existence of final written warning but did not regard the offence of walking out of the meeting by the employee as gross insubordination. The Commissioner found the employee “guilty” of insolence which is not serious enough to render continued employment intolerable. The question to answer in terms of the principles discussed earlier in this judgment is not whether the Commissioner’s finding was wrong or incorrect but rather whether it was reasonable. In my view having regard to the totality of the facts and the circumstances of this case the Commissioner cannot be faulted for finding that the employee was not guilty of gross insubordination. It is also apparent from the reading of the record that the applicant did not lead any evidence showing that the relationship between the parties has as a result of the offence irretrievably broken down.
- [44] The applicant in contending that the relationship has broken down relies mainly on the answers given by the employee during cross examination. The applicant interprets the answer given by the employee to be saying he would not in future take instructions from Mr Molema. The proper analysis of the answers given by the employee in relation to taking instructions from Mr Malema, indicates that he regarded the question to relate to formal and policy related instructions. The employees answer was that he would only perform any such instructions from Mr Malema if it is writing. This may be interpreted to mean that in order to avoid the conflict that has arisen in relation to the work permit he will require instructions to be in writing. There seems to be nothing unreasonable about that.
- [45] The proper analysis of the answers given by the employee in relation to taking instruction from Mr Malema, indicates that he regarded the question to relate to formal and policy related instructions. The employees answer was that he would only perform any such instructions from Mr Molema if it is in writing. This may be interpreted to mean that in order to avoid the conflict that has arisen in relation to the

work permit he will require instructions to be in writing. There seems to be nothing unreasonable about that.

- [46] In my view applying the reasonable decision maker test, I found no basis to interfere with the decision of the Commissioner. I also do not see any reason why the costs should not follow the result.

Order

- [47] In the premises, the applicant's application to review the arbitration award made under case number MEGA 31647 dated 24 November 2011 is dismissed with costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Hardus Lee of Snyman Attorneys

For the Third Respondent: Andrew Goldberg of Goldberg Attorneys