



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2578 / 13

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA

(PTY) LTD (MAGARENG MINE)

Applicant

and

AMCU obo TSHEPO JIM MAKOFANE

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

WILFRED NOKO NKGOENG N.O.

Third Respondent

Decided : In Chambers

Judgment: 17 August 2015

Summary: Application for leave to appeal – Test to be applied – reasonable prospect of different conclusion.

Leave to appeal – no proper grounds made out – application for leave to appeal dismissed.

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

SNYMAN, AJ

Introduction

- [1] This matter concerned an application by the applicant to review and set aside an arbitration award by the third respondent, a CCMA commissioner, to the effect that the dismissal of the individual first respondent by the applicant was unfair. The application was brought in terms of section 145 of the LRA, and was opposed by the first respondent.
- [2] The application was argued before me on 30 June 2015 by both the applicant and first respondent and in an *ex tempore* judgment handed down following argument by the parties, on 30 June 2015, I granted the applicant's review application, reviewed and set aside the arbitration award by the third respondent, and substituted such award with a determination that the dismissal of the individual first respondent was fair.
- [3] The first respondent filed an application for leave to appeal against this judgment on 8 July 2015. The first respondent did not attend to have the *ex tempore* judgment transcribed, as it should have done, but in the interest of expedition, I will not let this stand in the way of determining this leave to appeal application now.
- [4] Both the applicant and the first respondent filed written submissions in the leave to appeal application, in terms of Clause 15.2 of the Practice Manual. Clause 15.2 of the Practice Manual provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the first respondent's leave to appeal application in chambers, based on the written submissions filed by both parties.

Test for leave to appeal

- [5] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court might come to a different conclusion to that of the Court *a quo*.¹ In *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others*² The Court held:

'I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See *North East Cape Forests v SAAPAWU and others* (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; *NEWU v LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC) and Landman and Van Niekerk *Practice in the Labour Courts* (Service 1) at A-41.'

- [6] The applicant for leave to appeal, currently being the first respondent in the review application referred to above, thus has to show in this instance that there is a reasonable prospect of another Court coming to a different conclusion. The individual grounds upon which the first respondent's application for leave to appeal is based, will be addressed in this judgment hereunder.

The merits of the application for leave to appeal

- [7] In short, the first respondent has raised two grounds in its application for leave to appeal, upon which such application is founded. The first ground is that I applied a test more akin an appeal when deciding this matter, instead of applying the applicable and proper review test. The second ground is that I committed a material misdirection in assuming that the chairperson of the disciplinary enquiry must have had regard to the issue as to whether there was a break down in the trust relationship. These grounds were then elaborated on in the first respondent's written submissions. I will address both these grounds, individually, hereunder.

¹ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) ; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) ; *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 993 (LC) ; *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC) ; *Glaxo Wellcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC)).

² (1999) 20 ILJ 2889 (LC) at 2890D.

- [8] I have little hesitation in concluding that there is no substance in the contention by the first respondent that I failed to apply the proper review test, and in essence considered the matter as an appeal. In my judgment, and after setting out the background facts, I specifically dealt with applicable review test. In particular, I dealt with the recent judgment of the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*³ and how the Court applied the review test as first enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴. I also dealt with the application of the review test in another very recent judgment of the LAC in *Head of the Department of Education v Mofokeng and Others*⁵. In the end, I decided the review application on the basis of the application of the review test, as specifically applied in all these judgments. Considering the wealth of available authority on the application of the review test, which is all in line with the manner in which I decided this review application, I see no reasonable prospect of another Court coming to a different conclusion in this respect.
- [9] In this instance, it was ultimately undisputed that the individual first respondent was guilty of the misconduct of insubordination, with which he had been charged and for which he was ultimately dismissed. That was however not the initial approach of the individual first respondent in the arbitration, and he persisted with a variety of different defences, seeking to contradict the proposition that he indeed committed misconduct. I dealt with all of these defences in my judgment. The third respondent, as commissioner, however accepted that the individual first respondent was indeed guilty of the misconduct. There was no cross-review. So, and in the end, this entire matter turned only on the issue of a fair and appropriate sanction.
- [10] This then brings me the first respondent's second ground of leave to appeal. The first respondent contends that I superimposed my view on what I considered to be an appropriate sanction arising from the misconduct of the individual first respondent, on the award of the third respondent that the

³ [2014] 1 BLLR 20 (LAC).

⁴ (2007) 28 ILJ 2405 (CC).

⁵ [2015] 1 BLLR 50 (LAC).

sanction of dismissal was inappropriate and unfair, instead of deciding whether the third respondent arrived at a reasonable decision. It is in this context that the first respondent contends that I erred on the issue of the trust relationship. I am unfortunately compelled to disagree with what the first respondent is saying. I am convinced that the first respondent's leave to appeal ground in this respect is based on the fact that it entirely misconstrues the proper review test, and what must be considered when deciding on the issue of a fair sanction.

[11] What the third respondent did in his award was to find that dismissal was not appropriate based on one ground and consideration only. This ground is that although the individual first respondent initially refused to obey the instruction, he later changed his mind and made an attempt to comply. And that is all the third respondent considered. The simple point is that this falls far short of what the third respondent is supposed to do when deciding on an appropriate sanction. It is a failure on the part of the third respondent to properly discharge his duties, and simply not a proper and reasonable determination of the issue of a fair sanction. What the third respondent needed to consider was a totality of circumstances, which includes the consideration of the issue of the breakdown or not of the trust relationship, the existence or not of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and nature of the job, the employer's disciplinary code and procedure, the nature of the misconduct and any explanation (justification) for the same, the employee's personal circumstances and service record, the consequences of the misconduct (whether any damages were suffered), and finally the reason why the employee was in fact dismissed. Because the third respondent did not consider this totality of circumstances, so to speak, his determination of what would be an appropriate sanction was a gross irregularity. There surely can be no doubt about that.

[12] But further still, it was clear from the award that the third respondent's decision on sanction was his own preference and personal view to what he believed to be fair. That is similarly an irregular approach. As was said by Ngcobo J in *Sidumo*:⁶

⁶ (*supra*) at para 178.

'... the commissioner... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair'.

Ngcobo J went further and said:⁷

'But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.'

[13] In short, the manner in which the third respondent decided that the dismissal of the individual first respondent was not appropriate constituted a gross irregularity. Because the award of the third respondent on the issue of sanction is thus a gross irregularity, the second stage of the review test then becomes applicable, being whether, in the absence of this irregularity, the ultimate outcome of an inappropriate sanction of dismissal *in casu* would nonetheless be a reasonable outcome, even on other grounds. This exercise necessitated that I had to consider the totality of circumstances referred to, for myself, in order to ascertain whether an outcome of dismissal not being appropriate was a reasonable outcome. I simply followed the following approach as set out in *National Commissioner of the SA Police Service v Myers and Others*⁸, where the Court said:

'The important considerations that a review court must take into account when deciding whether or not the sanction imposed by the arbitrator is reviewable is to test whether (i) the sanction is that of the arbitrator (the sanction must be

⁷ Ibid at para 180.

⁸ (2012) 33 ILJ 1417 (LAC) at para 99.

one that the arbitrator him/herself has decided or upheld as being appropriate); and whether (ii) on the evidence presented at the arbitration and on the facts and circumstances properly made available to the arbitrator, the sanction is one that could reasonably be imposed or upheld.'

[14] This brings me back to the first respondent's ground of leave to appeal. Even if there is an issue about the trust relationship, what about all the other factors? I considered the nature of the misconduct, which was serious, committed in the presence of other employees and persistent with up to a point where everyone had already left to their workstations. I considered the judgment in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*⁹ where related misconduct was held to be dismissable. I also considered the individual first respondent's actual lack of remorse and the fact that he offered a variety of false defences in the arbitration. I also considered that the individual first respondent had no proper explanation for what he did and could not justify his behaviour. When the individual first respondent changed his mind, it was much too late, and long after the fact. The individual first respondent also never took any remedial action from his part and came to his superiors to apologise for what he did and ask for forgiveness. I also considered the disciplinary code, which prescribed dismissal as a sanction. Based on all these considerations, it was my view that any outcome of dismissal not being an appropriate sanction could not have been a reasonable outcome. The first respondent has made out no case in its application for leave to appeal that any of these considerations and my conclusion on this basis were wrong.

[15] The first respondent in its application for leave to appeal only focussed on the issue of the trust relationship. Even assuming there was no proper evidence on record in this regard, it simply in itself could not hold sway in the light of the depth of the other considerations I have dealt with in my judgment. Considering the totality of circumstances, and applying the proper consideration of whether what the employer did was fair, I was satisfied that any determination that dismissal was inappropriate was not a reasonable outcome. I remain entirely unconvinced that there is a reasonable prospect

⁹ (2013) 34 ILJ 1440 (LAC) at para 47.

that another Court could come to a different conclusion in this regard, even in the absence of specific evidence about the trust relationship.

[16] In the circumstances, it is my view that there does not exist a reasonable prospect of another Court coming to a different conclusion. The application for leave to appeal thus must fail.

[17] As to costs, I shall follow the same approach as I did in my original judgment, and make no order as to costs.

Order

[18] In the premises, I make the following order:

18.1 The first respondent's application for leave to appeal is dismissed.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Edward Nathan Sonnenbergs Inc Attorneys

For the First Respondent: Larry Dave Inc Attorneys

LABOUR COURT