



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

CASE NO: JR 2448/14

In the matter between:

**GLENCORE OPERATIONS SOUTH
AFRICA (PTY) LTD (MOTOTOLO)**

Applicant

and

**GIWUSA obo PIET BALOYI
THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

Second Respondent

SIPHO TALANE N.O.

Third Respondent

Heard: 03 November 2015

Order: 05 November 2015

Judgment: 10 November 2015

**Summary: Review application. Arbitration award reviewed and set aside.
Matter remitted to the CCMA for a *de novo* determination.**

JUDGMENT

Introduction

- [1] The Applicant, Glencore Operations South Africa (Pty) Ltd (Mototolo), seeks an order reviewing and setting aside the award of the Third Respondent date 9 October 2014 issued under CCMA case number LP6018-13 in which the third Respondent (“the commissioner”) found that the dismissal of Mr Piet Baloyi (“the employee”) is unfair and ordered his re-employment with effect from 1 April 2014. The application is unopposed.

Relevant Evidence

- [2] The evidence before the commissioner is that the employee was dismissed from employment in the following circumstance:

2.1 On 11 July 2014 he did not report for work and did not inform the Applicant of his absence and the reasons therefore within 24 hours as required by the Applicant’s sick leave policy. The employee did not return to work until 28 July 2014.

2.2 On 14 July 2014, the Applicant’s Ms Janet Mondi (“Ms Mondi”) telephonically enquired from the employee’s wife about his absence from work. Mrs Baloyi informed Ms Mondi that the employee was ill. Ms Mondi requested that Mrs Baloyi telefax the employee’s medical certificate to her. The medical certificate was not telefaxed as requested by Ms Mondi.

2.3 On 21 July 2014 the Applicant’s Ms Busisiwe Mawela (“Ms Mawela”) spoke with the employee on the phone and instructed him to report for work within 24 hours. Ms Mawela testified that the employee told her that he was ill but agreed that he would report for work. Ms Mawela also asked the employee to telefax his medical certificate. On the same day, the Applicant sent a letter to the employee in which it instructed him to report for work within 3 days of the date of the letter, failing which his employment would be terminated. The

letter also reminds the employee “that the company policy with regard to desertion is that after five (5) days of absence without permission, you will be dismissed in absentia”. The employee did not report for work and did not submit a medical certificate. He was accordingly deemed to have deserted and was dismissed from employment as a result in accordance with the Applicant’s “desertion policy”.

2.4 The employee reported at the Applicant for work on 28 July 2014 whereupon he was informed that he had been dismissed from employment. He lodged an appeal against his dismissal and in the appeal, he informed the Applicant that he did not report for work on 14 July 2014 because he was arrested on 13 July 2014 and remained in police custody until 21 July 2014. He also alleged that he was ill upon his release from custody and as a result did not report for work as instructed by Ms Mawela. He also stated that he did not report for work within the 3 day period as instructed in the Applicant’s letter of 21 July 2014 because he received the letter on 23 July 2014 and on his calculation the three days had already expired and he considered himself as dismissed in accordance with the letter. The employee’s appeal against dismissal was unsuccessful - the minute of the appeal hearing records the charge as “dismissal in absentia (Desertion)”.

Grounds for Review

- [3] The applicant seeks the review and setting aside of the award on the grounds that the commissioner:
- (i) misconstrued the issues before him by dealing with irrelevant issues, in particular, whether the employee breached the Applicant’s sick leave policy, as opposed to determining the fairness of the employee’s dismissal on the basis that he had deserted.
 - (ii) committed misconduct and/or a gross irregularity in that he failed to consider relevant material evidence, and considered the evidence

before him in a manner that amounts to a failure to apply his mind;

(iii) applied the law incorrectly when considering whether dismissal was an appropriate sanction.

[4] With respect to the first-mentioned ground for review, the Applicant contends that the commissioner failed to consider the question he was required to answer, namely, whether the employee committed the misconduct of desertion; and if so, whether dismissal is an appropriate sanction.

Is the award liable to be set aside?

[5] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*¹, the court succinctly restated the test for review in the following terms

“... A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable.”

[6] Applying the review test as set out above, the following can be said of the decision of the commissioner –

6.1 It is apparent *ex facie* the award that the commissioner construed that the question he was required to determine was whether the employee committed the misconduct of failure to report his absence from work due to illness within 24 hours of such absence as required by the Applicant's sick leave policy.

6.2 Having determined that the employee was guilty of the misconduct of failure to report his illness in accordance with the sick leave policy, the commissioner found that the sanction of dismissal was unfair in the circumstances.

[7] Whilst the record is not of the greatest clarity with respect to the reasons

¹ [2014] 1 BLLR 20 (LAC) at para 16.

for dismissal, which confusion is in my view created by the following evidence - (i) that the employee was instructed to report to work on 22 July 2014 and to submit a medical certificate; (ii) the employee provided to the Appellant an explanation for his absence from work, namely that he was ill in the period after he received the letter instructing him to return to work and for his failure to submit a medical certificate; and (iii) the record of appeal, which states the charge as “dismissal in absentia (Desertion)”.

- [8] Notwithstanding, it is however clear that the real dispute that the commissioner was required to decide is whether the dismissal of the employee on the ground of desertion was fair. The commissioner misdirected himself as to the question he was required to consider and as a result did not consider whether dismissal for the reasons stated by the Applicant was fair. This is what he was required to do. As a result of the commissioner’s misdirection, the commissioner’s decision is inevitably and unavoidably not reasonable and stands to be set aside on this ground – see *MEC for Education, Gauteng v Mgijima*.²
- [9] In the light of this conclusion I have reached, I do not consider it necessary to deal with the other grounds for review relied upon by the Applicant.
- [10] As primary relief, the Applicant seeks the substitution of the award of the commissioner with an order that the dismissal of Baloyi is substantively fair. In the alternative, the Applicant seeks an order remitting the matter to the CCMA for a determination by a commissioner other than the Third Respondent.
- [11] In considering whether to substitute the decision of the commissioner as prayed for by the applicant, I must consider whether there are any special circumstances that dictate substitute instead of a remittal. In particular, I must consider whether: (i) the outcome is a forgone

² [2011] 3 BLLR 253 (LC).

conclusion and that it would be a waste of time to remit the matter to the CCMA; (ii) further delay will cause unjustifiable prejudice to the parties; (iii) the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit on the same jurisdiction; and (iv) whether this Court is in as good a position as the CCMA to decide the matter – see *Rustenburg Platinum Mines Ltd v CCMA and others*³. I am unable to find that all these factors are present in this case. In the event, it is my view that a substitution as prayed for by the applicant is not appropriate in the circumstances.

Order

[12] In the result, the application succeeds. Accordingly, I make the following order:

12.1 The award of the First Respondent is set aside.

12.2 The matter is remitted to the First Respondent for determination afresh by a commissioner other than the Third Respondent.

S.Baloyi

Acting Judge of the Labour Court of South Africa

³ (2007) 28 ILJ 417 (LC) at para 12.

Appearances:

For the Applicant: Mr. D Masher of Edward Nathan Sonnenbergs
Incorporated

For the First Respondent: No appearance

Labour Court