



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 348/11

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION obo FUMBA & OTHERS

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

MANGISI MRWEBI N.O

Second Respondent

GREYSTONE CARGO SYSTEMS (PTY) LTD

Third Respondent

Heard: 21 May 2014

Delivered: 5 June 2015

Summary: An arbitration award of a commissioner who determined the fairness of a dismissal without taking into account that it was a dismissal for participation in an unprotected strike is susceptible to review if the omission resulted in the commissioner taking an unreasonable decision.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent (“the Commissioner”) in which he found the individual applicants “substantively and procedurally dismissed”. It is clear from the reading of the award that the Commissioner meant that the dismissal was substantively and procedurally fair. The application is opposed by the third respondent.

Factual background

- [2] The individual applicants were employees of the respondent, a labour broker, and performed their duties at the East London Harbour. Their main duty was to load and offload ships. On 11 November 2010, 32 employees including the individual applicants were at the East London harbour (“the harbour”). Eighteen did not have the necessary authority and were not wearing protective clothing while 14 were authorised to be there as they were scheduled to perform their duties. They demanded to speak to the Human Resources Director (“the director”) notwithstanding that a meeting had been arranged for them to meet the Director in connection with their grievances on 28 and 29 November 2010. The employees who were at the harbour without authority were ordered to leave. They left and after an exchange of correspondence between the applicant trade union and the third respondent, the individual applicants returned to work on 23 November 2011. They were subjected to a disciplinary enquiry and dismissed for being absent from work without leave (“AWOL”) and for breaching safety and security by having access to the East London Harbour Port without the necessary authority and protective clothing (“PPE”).

The award

- [3] The Commissioner recorded that ten of the original individual applicants had withdrawn the dispute against the third respondent. He further dismissed the cases of individual applicants who were not in attendance on the first day of the arbitration proceedings. He accepted the third respondent's version that the individual applicants were not dismissed on 11 November 2010 but sent to the offices of the applicant trade union in an attempt to defuse the tension which prevailed at the workplace. On 15 November 2010, the third respondent addressed a letter to SATAWU explaining that the individual applicants were not dismissed. He rejected the applicant's version that the individual applicants were dismissed on 15 November 2010. He further rejected their evidence that when they reported for duty on 15 November 2010 they were turned away and told that they had been dismissed as he found their evidence unreliable. He found that the applicants' version was not supported by evidence, their witnesses contradicted themselves, were evasive and could not remember dates which the Commissioner considered vital in determining whether they had committed the misconduct which led to their dismissal. They were unable to explain SATAWU's failure to reply promptly to the third respondent's letter of 15 November 2010. He concluded that the individual applicants were AWOL as they returned to the workplace on or after 23 November 2010. The dismissal of the individual applicants was found procedurally fair on the basis that they had themselves to blame for not seizing the opportunity to present their version before the chairperson of the disciplinary enquiry. The third respondent held their disciplinary hearings the best way it could in the circumstances. He concluded that the individual applicants' dismissal was both substantively and procedurally fair.

Grounds for review

- [4] The applicant sought to rely on a number of reasons to have the arbitration award reviewed and set aside. However, when the matter was argued, the applicant relied only on two grounds. Firstly, the Commissioner's ruling dismissing the referrals of the individual applicants who were not in attendance on the first day of the arbitration hearing had no basis. Secondly,

the Commissioner not only misconceived the nature of the dispute before him but failed to deal with the real dispute, which was an unprotected strike. The third respondent submitted that the ruling dismissing the referrals of the applicants who were absent from the arbitration does not form part of the matter at hand. It suggested that the applicant should apply for its rescission. The third respondent's approach is not supported by the award as in paragraph three thereof, the Commissioner stated that he made the dismissal ruling. The circumstances in which the dismissal ruling was made fall outside the purview of section 144 of the Labour Relations Act 66 of 1995 ("the LRA") in that the ruling was not made in the absence of the applicant, no ambiguity, obvious error or mistake common to the parties was pointed out by the third respondent. Section 200 of the LRA is clear, it grants trade unions the right to act on behalf of its members in any dispute to which its members are a party. The Commissioner's dismissal ruling denied SATAWU the right to assert the authority it is granted by legislation to represent its members. It is also unreasonable in that its basis is invalid.

- [5] The applicant submitted that the Commissioner had an obligation to lend a helping hand to both parties as they were not legally represented. He failed to appreciate that the real dispute before him was a dismissal for participating in an unprotected strike, when in the opening statement the third respondent intimated that there was a demand followed by refusal to work until the demand was met. As a result of the omission the Commissioner failed to apply the relevant legal principles and reached an unreasonable decision. The third respondent denied that the award was unreasonable and argued that the Commissioner's function was to determine the merits of the arbitration on the evidence before him. He could not be expected to consider evidence which was not placed before him. It denied that the applicant tendered evidence to the effect that the individual applicants were on strike. There was no evidence that the applicant made a demand. The evidence before the Commissioner was that the individual applicants were told to attend to work on 15 November 2011 but they failed.

- [6] In *Herholdt v Nedbank Ltd*¹ it was held that a decision-maker commits a gross irregularity within the meaning of section 145 (2) (a) (ii) of the LRA when he or she has undertaken the wrong enquiry or has undertaken the enquiry in the wrong manner. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*² it was held that by approaching a dismissal for misconduct as one of poor work performance, the Commissioner committed a gross irregularity in the conduct of the proceedings. The conclusion arrived at was influenced by the wrong categorisation of the case against the third respondent. For the award to be reviewed and set aside the incorrect categorisation must lead the arbitrator to arrive at a decision which no reasonable decision-maker could reach on facts before the arbitrator.
- [7] The Commissioner had to base his decision on the facts before him. Pistorius testified that on 11 November 2010, the applicants made a demand to speak to the HR Director. He phoned the HR Director and conveyed their demand but it was not met as the HR Director insisted that he would meet them on 28 or 29 November as he had told them at an earlier date. When their demand was not met, the applicants withdrew their labour by downing their tools. A strike is defined in section 213 of the LRA as ‘...the partial or complete concerted refusal to work, or the retardation of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘**work**’ in this definition includes overtime work, whether it is voluntary or compulsory’. The Commissioner was required to identify the dispute he had to arbitrate based on the facts before him. Facts that are common cause place the applicants’ conduct within the definition of an unprotected strike action in that it failed to comply with the provisions of section 64 of the LRA. Pistorius knew that the applicants had grievances which were brought to the attention of management which led to the promise that the Director would meet with them on 28 or 29 November. As Pistorius was not privy to the discussions he was in no position to disclose the content

¹ [2013] 11 BLLR 1074 (SCA)

² [2014] 1 BLLR 20 (LAC)

thereof. It was therefore not for him to state that the applicants made no demands. The union informed Pistorius that the applicants were on strike as it was aware of the demands which had been made. It was not for Pistorius to decide whether the applicants were on strike or not. The test to determine whether the applicants were on strike is objective. It is whether their conduct falls within the meaning of "strike" as defined in the LRA. The concession by Pistorius that the applicants downed their tools when their demand for a meeting with the direct was not met is sufficient to place the applicant's conduct in the purview of strike action. Had the Commissioner identified the dispute before him correctly, he would, in determining the fairness of the applicants' dismissal, have enquired into whether the third respondent had complied with provisions of item 6 of schedule 8 of the LRA which lays down the procedure to be followed by an employer faced with an unprotected strike. The procedure required the third respondent to have done the following:

'Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them'.

None of the required action was taken by the third respondent. Its version is that the applicants were referred to the union office in order to defuse tension.

- [8] In *Herholdt (supra)* it was held that when the Commissioner has misconstrued the nature of the dispute before him or her or has undertaken the incorrect enquiry the resultant award becomes reviewable. This principle was relied on in *Gold Fields (supra)* when the court reviewed and set aside an arbitration award on the grounds that the Commissioner had undertaken the incorrect enquiry by treating the unfair dismissal dispute before him as a dismissal for poor work performance when it was a dismissal for misconduct. The Commissioner misconstrued the nature of the dispute before him and

undertook an incorrect enquiry. His error led him to reach an unreasonable decision.

[9] In the premises, the following order is made:

9.1 The arbitration award issued by the second respondent on 13 June 2011 is reviewed and set aside.

9.2 The matter is remitted to the first respondent to be arbitrated *de novo* by a Commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Niehouse of Niehouse Attorneys

For the Third Respondent: Mr Van Rensburg of Van Rensburg Attorneys

LABOUR COURT