



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JR1848/13

In the matter between

SASOL MINING (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

WILFRED NOKO NKGOENG N.O

Second Respondent

NUM on behalf of ELVIS SONGO

Third Respondent

Date Heard: 01 March 2016

Date Delivered: 01 March 2016

Date Edited: 19 May 2016

EX TEMPORE-JUDGMENT

CELE J:

- [1] The application before me is one that has been brought in terms of Section 145(2) of the Labour Relations Act to review and set aside the arbitration award dated 2 July 2013 issued by the second respondent in this matter. The commissioner found the dismissal of a member of the third respondent to have been substantively unfair and ordered the applicant to reinstate him. The third respondent did not oppose this application; the services of the Rule 7A(8) notice notwithstanding.
- [2] Mr Elvis Songo – initially represented in these proceedings by the third respondent; that is the union that he was a member of – commenced his employment with the applicant on 16 August 2006 as an operator. During the period 27 August 2012 up to 7 September 2012, Mr Songo was absent from work. On 27 August he went to a bus stop to meet his work colleague; a Mr Frank Maloka. He reported to Mr Maloka that he was unable to report for duty. Mr Maloka conveyed that message to Mr Songo's supervisor a Mr Joel Zunguza. There is a dispute relating to whether Mr Songo indicated when he would report back. There was a version that he had said he would be back on 29 August 2012. What is clear though is that he did not come back. Instead, during this period of absence he went back to Port Elizabeth, which is his home, where he had been when he arrived back on 27 August 2012. He seemed to have heard a story that his mother was sickly.
- [3] The applicant has a disciplinary code and procedure in terms of which

an employee, who absents him or herself for a period longer than four days without a valid reason, exposes him or herself to being dismissed by the respondent or by the employer, in fact. The applicant decided to charge Mr Songo with misconduct of being absent from work without leave for 10 days. At the time Mr Songo had a verbal warning of 5 June 2012 issued to him after he had been absent from work for two days. That warning was still valid, therefore, at the time. Mr Songo was then referred to a rehabilitation programme to mend his ways about absenteeism. The company was, at the time, very much concerned about the escalation of absenteeism by its employees. There were meetings held by supervisors with employees to try and urge them not to absent themselves without any prior authorisation.

- [4] At the internal disciplinary hearing held the reason given for his absent by Mr Songo was that he had no money to get transport to work. He also said that his mother in Port Elizabeth was not well. He was found guilty of absenteeism and was dismissed. He referred an unfair dismissal dispute for conciliation and for arbitration. At arbitration it remained common cause that Mr Songo was absent for the stated period of time of 10 days. He said again that he had no money to present himself and he had reported to the supervisor. He said that he had indicated to a previous supervisor that his mother had been sickly and he claimed that he had told the current supervisor as well.

- [5] The second respondent issued an award by finding that Mr Songo was

guilty of misconduct, but that a sanction of dismissal was unfair, rendering the dismissal substantively unfair. He ordered the applicant to reinstate Mr Songo with limited retrospectivity. The applicant initiated the present review proceedings, holding that the commissioner failed to apply his mind appropriately to the evidential material that was before him on the basis that in terms of the disciplinary code, an employer was entitled to dismiss once there was an absent of 10 or more days. And also the applicant contended that the commissioner contradicted himself in the award that he issued by firstly finding that the dismissal was substantively fair, and then turned around when it comes to the sanction to say the dismissal was substantively unfair.

[6] I must agree with the applicant that the phraseology in the award does tend to create some confusion in paragraph 26 of the award, which reads thus:

“[26] Given the above, it is safe to conclude that there were no compelling reasons or a situation and/or a situation beyond the control of the applicant. The applicant was in breach of the rule which was known to him or could reasonably be aware of the rule. If the applicant was not aware of the rule, he could not have asked his colleague to relate the message to the supervisor. It follows that the dismissal of the applicant by the respondent was substantively fair.”

That latter part of fair is the one that tended to create some confusion.

Paragraph 27 of the award then reads:

“[27] I am now turning to the appropriateness of the dismissal sanction. In my view, taking into account the evidence and circumstances of the matter in totality, the prejudice of not reinstating the applicant outweighs the prejudice if he is reinstated. The number of days absent was not too excessive, and also that the applicant conceded that he was mistaken by not following the correct channels. In view of the above, it is safe to conclude that the applicant has shown remorse of which weight in favour of reinstatement. It does follow that the dismissal sanction meted out by the respondent against the applicant was not appropriate.”

[28] However, since the applicant was to a certain extent the architect of his own misfortune, I am prepared to reinstate him not from the date of dismissal, which I believe would be just and equitable in the circumstances of the matter. According to the information on file, it appears this matter had been postponed on numerous occasions. The first postponement was due to unavailability of both parties on 28 November 2012. The second postponement was at the discretion of the commissioner due to the time constraint on 4 February 2013, followed by another request due to the absence of the employer's representative on 2 May 2012.

[29] Given the above, I make the following award.

[30] The dismissal of Mr Songo, the applicant, by Sasol

Mining, the respondent, was substantively unfair in regard to the dismissal sanction. The respondent is ordered to reinstate the applicant on same terms and conditions existing prior to the dismissal, effective from 1 July 2013. The applicant was to report on duty on the 14th of July 2013.”

- [7] The court has therefore to be guided by the review test. The question is whether or not the decision reached by the commissioner in this matter is one that a reasonable decision-maker could not reach in the circumstances. See in this respect *Sidumo and Another v Rustenburg Platinum Mines* (2007) 28 ILJ 2405 (CC). I also have to consider the applicability of this principle in various cases, but including *Gold Field Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC). This judgment does tend to explain the principles applicable in *Sidumo* when it comes to the review test. Particular reference is made to paragraph 13, going through to paragraph 21. Of particular importance; I will read paragraph 18 and I will then go to one of the paragraphs, which I will soon identify. Paragraph 18 reads: ‘In short...’ Sorry, it is paragraph 16.

“[16] In short: A court must ascertain whether the arbitrator considered the principle issue before him or her; evaluate the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.

.....

[18] In a review conducted under Section 145(2)(a)(c)(ii) of the LRA, the review court is not required to take into account every factor individually or consider how the arbitrator treated and dealt with each of those factors, and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularities sufficient to set aside the award. This piecemeal approach of dealing with arbitrator's award is improper as a review court must necessarily consider the totality of the evidence and then decide whether the decision made by the commissioner is one that a reasonable decision-maker could make."

[8] I have looked at the submissions of the applicant and I have considered the issue whether or not progressive discipline was also not called for in this matter. The exchange that I had with the representative of the applicant, Mr Hinds, was mainly about this issue. It would seem to me that progressive discipline may not have been considered by the commissioner. It could have been considered, but I do not see any harm done by the commissioner in that he did order reinstatement. I am of the view that there is a good prospect of other commissioners concluding that reinstatement was called for and also suggesting that progressive discipline was called for here.

[9] This is a situation where this employee had been absent for two days and was given a verbal warning. He then absented himself for 10

days, but during that period he did make an attempt to report. And it seems to be a case where his mother was unwell. He obviously was guilty of absenteeism, but he obviously acted stupidly in the way he went about conducting his affairs. Instead of going back home, he should have come back to report for duty earn money and possibly send it back home. This is a case of an employee who can still be rehabilitated. There is a programme that he had been put into.

[10] Clearly, therefore, I am of the view that it is a case where progressive discipline could be exercised. And I am therefore of the view that the decision reached by this commissioner cannot be described as a decision that no reasonable commissioner could have arrived at.

[11] I accordingly make the following order:

1. The application to review this arbitration award is dismissed.
2. No costs order is made.

Cele J

Judge of the Labour Court of South Africa

Appearances

Counsel for Applicant: Mr. A Hinds of Anthony Hinds Attorneys

Counsel for Respondent: Unopposed