

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 639/14

In the matter between:

SACCAWU

Applicant

And

ZAMANYAMBOSE GOODNESS

MTHETHWA

First Respondent

CCMA

Second Respondent

COMMISSIONER ALMEIRO DEYSEL

Third Respondent

Heard: 18 February 2016

Delivered: 19 February 2016

Summary: review. Application to review dismissed: Cross review dismissed

JUDGMENT

GUSH J

Introduction

- [1] The Applicant in this matter applies to review and set aside the award of the Third Respondent under case number KNDB 2724/12 and substitute the award with an order “that the termination of [the First Respondent’s] services was due to abscondment and that the First Respondent is not entitled to any relief”.
- [2] The Third Respondent at the conclusion of the arbitration handed down the following award:
- a. The [Applicant] is ordered to reinstate the [First Respondent] in its employ on the same terms and conditions of employment that governed her employment at the time of her dismissal.
 - b. The reinstatement referred to in paragraph (a) is to operate with retrospective effect from the date 6 months prior to the issuing of this award;
 - c. At the time of the issuing of this award the remuneration due to the Applicant as a consequence of the retrospective effect of the reinstatement amounts to R63,986.16 minus such amounts as the Respondent is in terms of the law applied to entitled to deduct;
 - d. The Applicant is to tender her services to the Respondent within 48 hours of being notified of this award.
- [3] The First Respondent, too, disgruntled with the award seeks to cross review that portion of the award dealt with in paragraph (b) thereof in which the Third Respondent limited the retrospective compensation for a period of (six) 6 months prior to the issuing of the award.

Background

- [4] As the background to the matter has been set out in detail by the Third Respondent I set out below a brief summary thereof.
- [5] The First Respondent was employed by the Applicant in March 2004 as an Organiser. For a considerable amount of time the Third Respondent had frequently been absent from work due to ill-health. She had been paid a **full** salary during her absence.
- [6] During June 2011 and in response to requests by the First Respondent's doctors, the Applicant agreed to redeploy the First Respondent, relieving her duties as an Organiser and placing her in the Pinetown offices to perform duties as an Administrator. It was felt that this was a less demanding job and that it would allow the First Respondent the opportunity to consult medical practitioners in respect of the ongoing illness.
- [7] The accommodation of the First Respondent by the Applicant and the First Respondent's frequent absence led to friction between the Applicant and the First Respondent.
- [8] On 10 November 2011 the First Respondent was advised by the Regional Secretary that the meeting was to be held regarding her ongoing duties and for the purposes of assessing the redeployment of the First Respondent to the Pinetown office.
- [9] It appears from the record that at about the same time the Third Respondent was hospitalised and was absent from work.
- [10] On 2 February 2011 the Applicant addressed and delivered a letter to the First Respondent headed "ABSCONTION FROM WORK" the letter advised the First Respondent:

- (a) According to our records you have not been at work since 14 November 2011, which itself is very serious misconduct, meaning you have absconded from duty since then.
- (b) As you may recall you were supposed to report to the Durban local office on Monday, 14 November 2011, which you have failed.
- (c) **In the light of the above you are given 7 days from date of receipt of this letter, failing which, the union will have no option but to terminate your service** (sic). (My emphasis)
- (d) Trusting your find above to be in order as well looking forward your co-operation in this regard.

[11] On 5 February 2012 the 1st respondent addressed the following letter to the applicant in response to its letter:

1. Your correspondence dated 1 February 2012 and received on 2 February 2012, by my son and its content is noted with caution.
2. However I would like to register my disappointment and torture I'm experiencing from you as regional office bearers.
3. Furthermore to that I would like to record the following:
 - 3.1 You as regional secretary wrote this unbecoming letter knowing exactly the answers to it.
 - 3.2 That after regional meeting at was held for me on 10 November 2012, where I was told that my sickness has become a nuisance, yet I explained that the person to give an explanation my assessment is the Dr, and the regional chair was adamant that she had no need to contact my doctor. The meeting went out of hand and when the deputy chair recommended to take over the meeting, regional chair of fusion court of the meeting. I was deeply hurt and frustrated at this meeting and that I had to go for consultation to Dr Singh same day.

3.3 I was then admitted by Dr Singh in a medical certificate facts to the regional office attached with ease of reference, which the receipt of same was confirmed, my condition worsen that I was further admitted by doctors (gynaecologist) on 24 November 2012, which you will also notified about and that admission led me to having an operation of which I'm still recovering from, medical certificate was also sent on receipt of same confirmed, also touched for ease of reference.

3.4 This act is inhuman and inconsiderate given the circumstances.

3.5 That there are amicable ways are dealing with an ill-health employee without discriminating harassing or being harsh to the person.

3.6 I can see you are paving a way to get rid of me and in that you want to make sure I do not even get paid by the Department of Labour ensure letter states clearly that you will terminate by services on abscontion yet you know that this is not true.

3.7 In the light of the above argue this maltreatment is a constructive dismissal.

[12] The Applicant's Regional Secretary after having received this letter wrote to the First Respondent's doctor on 16 February 2012 seeking clarity on the First Respondent's "situation" requesting an urgent response to enable the Applicant to "make a determination around a future with our organisation".

[13] The following day, 17 February 2012 the Applicant wrote a letter to the First Respondent, delivered on 21 February 2012 headed TERMINATION OF YOUR SERVICE WITH THE UNION. The letter read:

"Following our letter dated 1 February 2012 and your subsequent response dated 5 February 2012; this letter serves to advise you

that union has decided to terminate your service with effect from today. The decision was communicated years based on the fact that you have absconded from work since 26 November 2011 and we expected you to return back to work on Friday, 10 February 2012 in line with the 7 days it was given to you in our letter dated 1 February 2012, which failed to do resulting in the union having to take a decision to terminate your service.

To this end you are required to bring back all the union belonging such as office keys and any other union property that you might be in possession of and same has to reach this office by no later than Wednesday, 22 February 2012.”

- [14] The Third Respondent referred a dispute regarding her dismissal to the Second Respondent who in turn appointed the Third Respondent to arbitrate the dispute.
- [15] It is clear from the record, the Third Respondent's award and the relief sought in prayer one of the Applicant's notice of motion that at all times the Applicants have relied on the Respondent having absconded as the grounds for her dismissal.
- [16] It is common cause that the Applicants did not conduct a disciplinary enquiry or any investigation as envisaged by section 10 of Schedule 8 of the Labour Relations Act¹ (the “Act”) or follow the guidelines in the cases of dismissal arising from ill-health as envisaged by section 11 of Schedule 8 of the Act.
- [17] The Applicant's grounds of review suggest that the award of the Third Respondent is reviewable in that whilst at all times it relied on the First Respondent having absconded the Third Respondent should have concluded that it was clear that the misconduct amounted to absenteeism and for that reason the Third Respondent should have found the dismissal to be fair.

¹ Act 66 of 1995.

- [18] In this regard the applicant relied in the matter of *SABC v CCMA and others*² and in particular paragraphs 12 to 14. The Applicant concedes that the dismissal was procedurally unfair in that an enquiry should have been held into the First Respondent's absenteeism.
- [19] Although it was argued that the exchange of correspondence between the Applicant and the First Respondent should be interpreted to demonstrate an unequivocal intention on the part of the First Respondent not to return to work (abscond) this argument clearly cannot be sustained on a simple reading of the letters.
- [20] A further ground of review relates to the conclusion reached by the Third Respondent that a dismissal was not an appropriate sanction and that the conduct of the First Respondent did not amount to misconduct. In this regard there is no evidence to justify a dismissal for absenteeism save for a suggestion by the Applicants witness that the 'misconduct' was serious. Serious misconduct does not automatically result in a dismissal.
- [21] In his award the Third Respondent analyses in detail the meaning of abscondment and what needed to be established in order to sustain a fair dismissal for absconding. The Third Respondent concludes that the probabilities were overwhelming at the Applicant did intend to return to work and that it had not been established that the First Respondent had absconded. The Third Respondent concludes that it is probable that the First Respondent was dismissed for being absent without leave and for not submitting medical certificates. Based on the judgement in the *SABC* case the Third Respondent concludes that the Applicant should have conducted a disciplinary enquiry but did not.
- [22] It is so that the Third Respondent concludes that the First Respondent's explanation was satisfactory and had not been proved on a balance of probabilities that the First Respondent's absence did not constitute misconduct

² [2002] 8 BLLR 693 (LAC)

he continues to find that “the sanction of dismissal was in any event unfair as any misconduct that might have been committed was not so serious as to warrant the sanction of dismissal.”

[23] The Applicant suggested that while it might be so that the dismissal was procedurally unfair it was not substantively unfair as, based on the *SABC* case³ the facts clearly demonstrated that the First Respondent “had earned her dismissal”. Apart from some evidence that the Applicant regarded the misconduct is serious there was no evidence to justify a conclusion that the respondent had “earned her dismissal” or that dismissal was justified.

[24] At all times during the arbitration (and in the Applicants pleadings) the Applicant has relied on the First Respondent having absconded. In particular in the prayer the Applicant asks specifically for an order “that the termination of services was due to abscondment”. In paragraph 18 of the Applicants supplementary affidavit the Applicant pleads the following:

“It is the applicants respectful submission that a reasonable Commissioner applied his or her mind to the evidence before the Third Respondent would have concluded that, as a matter of law, the First Respondent’s failure to attend a services to the applicant in circumstances in which it was no medical reason for her not to constitute a repudiation of the First Respondent’s contract of employment with the applicant in consequence of which the applicant was entitled, and its own election, except the First Respondent repudiation the contract and to cancel the contract which it did.”

[25] Applying the test on review as set out in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁴ *Herholdt v Nedbank Limited*⁵ and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁶ matters I

³ *Supra*

⁴ (2007) 28 ILJ 2405 (CC)

⁵ (2013) ILJ 34 2795 (SCA)

⁶ [2014] 1 BLLR 20 (LAC).

am not persuaded that the award of the Third Respondent is reviewable. The Third Respondent clearly understood the nature of the enquiry and the material placed before him and reached a conclusion that is clearly one that a reasonable arbitrator would reach.

- [26] Turning to the cross review the First Respondent sought to persuade the court that the exercise by the Third Respondent of his discretion regarding the extent to which back pay should be awarded committed a reviewable irregularity. The First Respondent relied on comments made by the Third Respondent relating to the delay in the matter being arbitrated and some speculation as to whether the First Respondent should or should not have been paid for the time she was absent.
- [27] The Third Respondent however records that he did take into account the background to the matter and the Applicant's contribution "to the situation that developed by not providing the respondent with detailed medical reports explaining what was going on and explaining for how long she would be away from work"
- [28] A careful reading of the Third Respondent's award suggests that, the Third Respondent not only understood the evidence adduced but clearly in determining appropriate compensation properly exercised his mind in limiting the compensation as he did.
- [29] I am not satisfied that, that part of the award that the First Respondent seeks to have set aside is reviewable.
- [30] As far as costs are concerned I am mindful of the fact that the Applicant and the First Respondent in accordance with the award of the Third Respondent will recommence their employment relationship. Neither the Applicant in the main review nor the First Respondent in the cross review have succeeded. I am therefore satisfied that it is not appropriate in the interests of fairness or lawful to make a costs order.

[31] In the circumstances and for the reasons above I make the following order:

- 31.1 the Applicant's application to review the award of the Third Respondent's is dismissed ;
- 31.2 the First Respondent's application to review portion of the Third Respondent's award is dismissed;
- 31.3 there is no order as to costs.

D H Gush

Judge of the Labour Court of South Africa
Johannesburg

APPEARANCES:

FOR THE APPLICANT: B Mgaga Garlicke and Bousefield

FOR THE RESPONDENT: K Allen instructed by Japhta Inc