



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: **JR1285/16**

In the matter between:

PRIMARY ASSET ADMINISTRATIVE SERVICES

Applicant

And

MMASECHABA MOLOI

1st Respondent

THEMBA MICHEAEL CEDA

2nd Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION HELD AT JOHANNESBURG**

3rd Respondent

HEARD: 17 January 2017

DELIVERED: 20 January 2017

JUDGMENT

PRETORIUS, AJ

Introduction

- [1] This is an unopposed application in terms of which the Applicant seeks an order that the arbitration award made by the second respondent dated 23 May 2016 be remitted to the third respondent for arbitration *de novo*, before a commissioner, other than the second respondent. Alternatively, reviewing and setting aside the arbitration award dated 23 May 2016 issued by the second respondent and substituting same with an order that the dismissal of the first respondent was substantively fair.

Background

- [2] The first respondent had been employed by the applicant as a claims technician for approximately one (1) year until she was dismissed for negligence on 29 February 2016. At the time of her dismissal, the first respondent earned a salary of R17 400.00 (seventeen thousand four hundred Rand) per month.
- [3] The first respondent was dismissed following a disciplinary enquiry wherein she was charged and found guilty of negligence, and thereafter a sanction of dismissal was imposed. The first respondent challenged the substantive fairness of her dismissal at the arbitration. The second respondent found that the dismissal was substantively unfair.
- [4] Central to this conclusion was the issue as raised by the first respondent that she was singled out and other employees in the identical situation as her, were all guilty of the same offence. The first respondent alleged that although other employees were guilty of failing to meet the required protocols within the prescribed time period of 48 hours, no disciplinary action was taken against them.
- [5] With regard to the issue of consistency having been raised by the first respondent, it was the applicant's case that such contention was untenable given that the supervisor (Albert Nicolson) of two of the other employees

who had made themselves guilty of the same infraction had been dismissed for failing to take disciplinary action against such employees who failed to meet the protocols and failed to provide valid and sufficient reasons for not doing so.

- [6] The second respondent did not accept the explanation provided by the Applicant and, in a nutshell, concluded that in particular in relation to the employees, Jerode and Kaveshnee, who reported to a different supervisor than the applicant (Albert Nicolson), it was clear that they had committed the same infractions as the first respondent and yet nothing happened to them.
- [7] As such, the second respondent concluded that the dismissal of the first respondent was substantively unfair. As a consequence, the second respondent ordered the applicant to retrospectively reinstate the first respondent on the same terms and conditions that prevailed prior to her dismissal. A significant further factor to be considered in this matter relates to the fact that it was common cause that the first respondent had a valid and extant final written warning for a similar offence.

Review grounds

- [8] The applicant relies in its founding affidavit on seven grounds for review which it amplified also in its supplementary affidavit. I do not intend repeating such grounds of review here, but will deal with them in the analysis hereunder.

Applicable legal position

- [9] I do not deem it necessary to extensively address the relevant test to be applied in proceedings such as this. The test laid down in the Constitutional Court in *Sidumo v Rustenburg Platinum Mines* 2008 (2) BCLR 158 (CC),

namely that an arbitration award will be reviewable if it is one that a reasonable decision-maker could not reach, is well established.

- [10] The Labour Appeal Court confirmed in *Fidelity Cash Management Services v CCMA* (2008) 29 ILJ 964 (LAC) that there can be no doubt under Sidumo that

“... the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely that could have relied which are enough to sustain the decision.”

- [11] Ultimately, whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable, must be determined objectively with due regard to all the evidence that was before the commissioner, and what the issues were that were before him or her.

- [12] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC) restated the applicable test as follows:

“In short: 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 that is reasonable.”

Analysis

- [13] The applicant specialises in providing insurance services to its clients and the first respondent worked within the section where such insurance claims were processed, and this had to occur within 48 hours of receipt of such claim. All employees in the same position as the first respondent were expected to meet the 48 hour deadline. In the event that an employee failed to meet the standard, disciplinary action would normally be taken where, on a first infraction an employee would be given a final written warning, whereafter should a further infraction follow such employee would face dismissal.
- [14] After the applicant had been dismissed, disciplinary action was taken against Albert Nicolson, the supervisor of Jerode and Kaveshnee, for failing to take disciplinary steps against them as they had breached the 48 hour protocol and they reported to him. He was eventually dismissed for this failure.
- [15] It is clearly apparent that the second respondent did not accept that the disciplining of the supervisor of Jerode and Kaveshnee equated to the discipline meted out to the first respondent, thus rendering the applicant's approach to discipline inconsistent and consequently unfair.
- [16] I agree with the second respondent that the imposition of disciplinary action against the supervisor of Jerode and Kaveshnee which lead to his dismissal is not comparable to the discipline meted out to the first respondent. The fact that Jerode and Kaveshnee was not disciplined at all, notwithstanding their supervisor having been dismissed, renders the conduct of the first respondent in the exercise of discipline inconsistent insofar as it relates to the first respondent, Jerode and Kaveshnee. At the very least, they should have received final written warnings if the applicant wanted to be consistent. The applicant clearly did not compare apples with apples by its attempt to justify the dismissal of the first respondent by comparing her situation with that of the supervisor of Jerode and Kaveshnee who had been dismissed.

See in this regard *SRV Mills Services (Pty) Ltd v CCMA* (2004) 25 ILJ 135 (LC).

- [17] What is curiously absent from the second respondent's judgement is the complete failure to refer at all to the fact that the first respondent had a valid and extant final written warning for the same offense which occurred approximately a month earlier.
- [18] To complicate matters further, there was no evidence before the second respondent whatsoever as to whether Jerode and Kaveshnee had previously been disciplined, or that they had extant final written warnings applicable to them. This matter is not covered at all in the evidence and one cannot speculate in this regard.
- [19] I will now deal with the various grounds of review as relied on in the founding and supplementary affidavits of the applicant.
- [20] With reference to the first review ground, the applicant makes much of the trust relationship having been destroyed between the first respondent and the applicant. However, on consideration of the evidence presented, it is clear that no evidence in relation to the trust relationship had been led during the arbitration. Submissions that the trust relationship has been destroyed will not suffice. See: *Edcon v Pillemer NO* (2009) 30 ILJ 2642 (SCA). I will return to this aspect hereunder.
- [21] With reference to the second review ground, I disagree that the first respondent was dismissed for the exact same offence as a senior employee (Nicolson) in the employ of the applicant for the reasons referred to above.
- [22] I am not persuaded that the second respondent acted with bias in favour of the first respondent which materially affected the outcome of the award (the third review ground). The references relied upon by the applicant is

indicative of the second respondent's rejection of the consistency argument as raised by the applicant before the second respondent.

- [23] The applicant's contention that the second respondent's misquoting of who represented the first respondent, constitutes a gross irregularity in the conduct of the proceedings (the fourth review ground). I am of the view that this mistaken reference by the second respondent must be seen for what it is, and does not in itself constitute an irregularity which would render the award unreasonable.
- [24] I agree that the position in regard to Tamerine was justified by the applicant during the arbitration proceedings (the fifth review ground). I do not believe that the inconsistency as found by the second respondent focused on the circumstances of Tamerine. The glaring inconsistency relates to the failure by the applicant to have disciplined Jerode and Kaveshnee, where they have committed the exact same infraction as the first respondent.
- [25] With reference to the sixth review ground, I agree with the applicant that the second respondent's failure to consider that at the time of the first respondent's dismissal she was on a final written warning for negligence is problematic. I disagree however that there is any evidence to suggest that Jerode and Kaveshnee did not have final written warnings applicable to them.
- [26] Lastly, and with reference to the seventh review ground, I disagree that the second respondent must the crux of the applicant's case in his rejection of the applicant's attempt at establishing that it had treated the first respondent consistently. As no disciplinary action was taken against Jerode and Kaveshnee, the discipline meted out to the first respondent was inconsistent and renders same substantively unfair.
- [27] However, the second respondent's complete failure to deal with the fact that the first respondent was subject to an extant final written warning, renders

his award unreasonable, particularly in regard to the relief granted, being retrospective reinstatement.

- [28] In cases of employees being subject to a final written warning, I agree with the judgement in *Transnet Freight Rail v Transnet Bargaining Council* (2011) 32 ILJ 1766 (LC) at par 38 where it is stated that employees already on a final written warning leaves the employer with little choice but to dismiss them. In this judgement (at paragraph 42) the Labour Court further concluded that the presence of a final valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature, and that the principles of progressive discipline required such a re-offending employee usually to be considered irredeemable.
- [29] By virtue of the foregoing, I have considered referring this dispute back to the third respondent for rehearing, but have concluded that I am in as good a position to deal with this dispute on the record, and that no good purpose would be served in a remitting the matter.

Conclusion

- [30] I therefore conclude that given the inconsistent treatment of the first respondent renders her dismissal substantively unfair. However, given that at the time of her dismissal she was subject to a valid final written warning, the award of retrospective reinstatement is inappropriate and not one that a reasonable decision maker could reach. I therefore consider an appropriate award to be compensatory in nature, and conclude that it would be fair and equitable to award compensation in the amount equal to 4 months' remuneration. I have reached this conclusion, having regard particularly to the first respondent's relatively short length of service.

Order

In the premises, I make the following order:-

1. The second respondent's award is reviewed and set aside and replaced with the following order:
 - 1.1 The dismissal of the first respondent was substantively unfair;
 - 1.2 The retrospective reinstatement of the employee is reviewed and set aside and substituted with an order that the applicant pay compensation to the first respondent in an amount equal to four months remuneration, being R 69 600.00 (sixty nine thousand six hundred rand), together with interest thereon at the prescribed rate from 29 February 2016 to date of payment;
 - 1.3 The said sum is to be paid to the first respondent within ten (10) days of the date of this judgment;
 - 1.4 There is no order is made as to costs.

Pretorius AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr C McAdam

Instructed by: Lee and McAdam Attorneys