



**THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG**

Not Reportable

Case Number: JR 991/15

In the matter between:

CIVILCON (PTY) LTD

Applicant

And

FRANK NAIDOO N.O

First Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

MALEFANE JACOB MOKATI

Third Respondent

Date order: 24 May 2016

Date of reasons: 6 February 2017

REASONS FOR THE JUDGMENT

MOLAHLEHI J

- [1] On 24 May 2016, this Court made the order in terms of which the arbitration award issued by the first respondent ('the Commissioner') was reviewed, set aside and substituted with the order to the effect that the dismissal of the third

respondent was substantively fair. The reasons for the order are set out in this judgment.

The background facts

[2] After his dismissal, the employee referred the dispute concerning the alleged unfair dismissal to the CCMA. The matter was, subsequent to the failure of the conciliation, referred to arbitration the outcome of which was that the dismissal was unfair.

[3] The employee who at the time of his dismissal was a general worker was dismissed arising from the following charges:

“The refusal to follow instruction given by:

- Precast Manager
- Safety Officer
- Safety Representative
- Continuous refusal to wear appropriate PPE (hardhat)
- Absence without permission and without proper communication.

Charges as result of the above:

- 1) Failure to follow reasonable and lawful instructions.
- 2) Gross insubordination.”

The grounds of review

[4] The applicant contended that the Commissioner failed to deal with the issue which was properly before him. The key issue which the Commissioner had to deal with concerned the failure by the employee to wear the hard-hat at the construction site.

[5] The other complaint of the applicant is that the Commissioner accepted a version of the employee which was non-existent. The employee did not have a version because he closed his case without leading any evidence.

- [6] The applicant further contends that the decision reached by the Commissioner is unreasonable because there is no rational connection between the undisputed evidence properly placed before him and the decision he reached.

The arbitration award

- [7] The Commissioner accepted that the dismissal of the employee was procedurally fair. As concerning substantive fairness, he found that it was common cause that the employee had breached the rule which he was aware of. He, however, found the dismissal to have been unfair.
- [8] The Commissioner then noted that the version of the employee was that he was not dismissed for refusing to wear the hard-hat but for reporting the assault on him. He also rejected the version of the applicant as, according to him, the employee was given three weeks leave.
- [9] In dealing with the aggravating factors the Commissioner found that in dismissing the employee for the previous written warnings which had been given to him amounted to double jeopardy and was accordingly unfair.

Evaluation

- [10] The test to apply in considering whether to review a decision of a Commissioner is the reasonable decision maker test enunciated in *Sidumo v Rustenburg Platinum Mines*.¹ In determining whether or not the dismissal was fair the Commissioner has to take into account the totality of the circumstances of the case. This entails a Commissioner taking into account the importance of the rule which the employee is accused of contravening, including the reason why the employer dismissed the employee.²

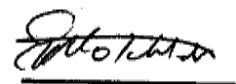
¹ 2008 (2) SA 24 (CC).

² *Sidumo* Paragraph 64 and 68

- [11] The other factors which the Commissioner has to consider relate to the loss suffered as a result of the conduct of the employee and whether further training and instruction could avoid a repeat of the misconduct.
- [12] It is apparent that the employee in the present matter refused to obey the instruction relating to compliance with a safety rule. The rule concerned everybody's safety including himself. He, in my view, provided no satisfactory explanation as to why he would not comply with the rule. He continued to disobey the rule despite two warnings given against him. It has also not been disputed that the failure to comply with the safety rule carried with it considerable risk related to the possibility of hard objects hitting the employee on the head. This exposed the applicant to the risk of failing to comply with the safety regulations.
- [13] In light of the above discussion, I am of the view that the decision reached by the Commissioner that the dismissal of the employee was substantively unfair does not comply with the reasonable decision maker test. Accordingly, the applicant has made out the case for the review of the Commissioner's arbitration award. I do not, however, believe that costs should in the circumstances of this case be allowed to follow the results.

Order

- [14] In the premises the following order is made:
1. The arbitration award made under case number GATW 3484-15 dated 14 April 2015 is reviewed and set aside.
 2. The arbitration award is substituted with an order to the effect that the dismissal of the third respondent was fair.
 3. There is no order as to costs.



E. Molahlehi
JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: Snyman Attorneys

For the Respondent: No appearance

LABOUR COURT