

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1701/2017

DATE: 2017-03-22

In the matter between

GENET MINERAL PROCESSING (PTY) LTD

Applicant

and

CCMA

First applicant

10 MOKABANE N.O.

Second applicant

ESWUSA obo MAGAGULA

Third respondent

J U D G M E N T

STEENKAMP, J:¹

This is an application by Genet Mineral Processing (Pty) Ltd to have an arbitration award by Commissioner Comfort Mokabane of the CCMA reviewed and set aside. It stems from the dismissal of the third
20 respondent, Mr Sipho Given Magagul,a who is represented by his trade union, ESWUSA. The employee was called to a disciplinary hearing on the 13th of May 2015 on the following allegation of misconduct:

“It is alleged that you are guilty of gross negligence alternatively gross insubordination in that you blocked the plant by adding magnetite thereby reducing clarified water.”

¹ NOTE: This is the transcript of an *ex tempore* judgment that I handed down in open court on 22 March 2017. It was only sent to me for my signature on 1 June 2017, more than two months later.

In shorthand, it was alleged that the employee had caused a blockage that had the potential to cause significant loss to the employer, which is a mining operation. The incidents that led to the complaint against the employee were set out by the complainant, Mr Gustav Smuts. Mr Smuts explained in a statement that the employee

“...was accused of blocking the plant by failure to check the water in plant and water levels and kept feeding Magnetite to the plant when there was no water. Thereby [*sic*] wasting a whole batch over a couple of days.

10 This happened on the 18th April 2015 and 27th April 2015.”

There is no transcript or other details of the disciplinary hearing other than the finding by the Chairperson on the 20th of May where he, that is Mr Harry van der Westhuizen, records that the employee is dismissed for

“Gross negligence in that you [something] the plant at Doornrug by failing to check the water levels (water in plant) on the 18th April 2015 and 27 April 2015.”

It is clear therefore that the misconduct for which the employee was dismissed was that he was grossly negligent by causing a blockage on
20 the 18th and 27th of April 2015.

At the arbitration the representative for the employee, Mr Sefiti, started off in his opening address by pointing out that on those dates there was no loss of production. The representative for the employer, Mr Welman, made no contrary comment in his opening address and it is only when the employer’s main witness, Mr Smuts, started testifying that

he said that there was in fact a mistake in both his statement and in the findings of the disciplinary chairperson and that the employee should have been disciplined for misconduct complained of on the 11th and the 26th of April. The chairperson did not testify to explain why the misconduct on which the employee was dismissed specifically related, instead, to the 18th and the 27th of April.

At arbitration the Commissioner, having heard the evidence of Smuts and of the employee, found that the employee did not commit the misconduct complained of. He noted that the employee was charged
10 and dismissed for gross negligence and that “the above charge stems from the incidents that occurred on the 18th and 27th April 2015.”

He noted that it was common cause that the employee was on duty on those days and that the crew under his supervision reached the production targets on those days. He therefore found that the employee did not commit the misconduct for which he was dismissed.

Mr *Grundlingh*, for the employer, argues that arbitration is a hearing *de novo* and that at the arbitration stage it was clear that the misconduct that was complained of actually happened on the 11th and the 26th of April. The difficulty with that assertion is that that was not
20 the basis for the employee’s dismissal. From the portions that I have quoted the Commissioner was quite correct in saying that the misconduct for which the employee was dismissed was gross negligence on the 18th and 27th of April.

For his argument Mr *Grundlingh* relied upon *Fidelity Cash Management Services v CCMA* [2008] 3 BLLR 197 (LAC) where the

Labour Appeal Court held that it is a principle of labour law in our country that the fairness or otherwise of the dismissal of an employee be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. That is of course trite law and quite correct. The reasons for dismissal which the employer gave in this case, could not be clearer. The chairperson says in so many words that it is based on misconduct on the 18th of April 2015 and the 27th April 2015. I agree with Mr *Grundlingh* that an employer may not seek to justify a dismissal based on gross dishonesty in arbitration whilst the
10 employee was charged with and found guilty of gross negligence at the disciplinary hearing. In this case, the employee was dismissed on the basis of gross negligence on the 18th and 27th of April 2015. That is the reason for dismissal given by the employer. The arbitrator found that the employee did not commit any misconduct on those days. In fact, Mr *Grundlingh* accepted that it was common cause that there was no misconduct on those days.

Even if the employer made a mistake by presenting the employee with the wrong allegations of misconduct, that is a mistake with which it has to live. The arbitrator's finding that the employee did
20 not commit misconduct on those days is a reasonable one, using the test in *Sidumo*.

Given my conclusion in that regard, I need not strictly speaking deal with the evidence of Smuts, other than to say that the arbitrator's reasoning that, even if he were to consider the evidence of Smuts relating to the 11th and the 26th of April, he was not persuaded by that

evidence because Smuts was not on duty and not in a position to give direct testimony and to testify what transpired at the plant. He could not find on the balance of probabilities that the employee committed the misconduct complained of on those days either.

As I say, I need not strictly speaking consider that; my comments therefore are *obiter*, but it does seem to me that, even if this court may have found otherwise, given the inferences that could have been drawn from Smuts's evidence, the conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have
10 come to the same conclusion. It may have been open to appeal but not to review.

Lastly, Mr *Grundlingh* and his predecessor, Mr *Venter*, argued that the employee should in any event not have been reinstated; but the authority that Mr *Grundlingh* relied on, that of the recent Constitutional Court case of *SARS v CCMA and Kruger* [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC), is clearly distinguishable. In that case, Kruger did commit misconduct. He accepted as much. It is in those circumstances that the Constitutional Court criticised the arbitrator for not having considered the correct or the
20 appropriate remedy.

In this case the arbitrator found that the employee committed no misconduct. In those circumstances the default position is that outlined in section 193(1) of the LRA, that is reinstatement. The arbitrator's decision to rule that the employee should be reinstated given that he had committed no misconduct is not an unreasonable one.

Lastly, with regard to costs, I take into account that there is an ongoing relationship between the union and the employer as well as the employee and the employer. In law and fairness I did not think that a cost award is appropriate.

The application for review is dismissed.

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STEENKAMP J

APPEARANCES

APPLICANT: R Grundlingh

Instructed by: Joubert attorneys.

THIRD RESPONDENT: Goldberg attorneys.