



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 759/12

In the matter between:

DAVID MPHAHLELE

Applicant

and

CORESLAB

Respondent

10 **Heard: 02 March 2017**

Delivered: 02 March 2017

Edited: 12 April 2017

EX TEMPORE JUDGMENT

MOSHOANA AJ

This is an application brought in terms of section 145 of the Labour Relations Act. The applicant before me contends that the award issued by the commissioner, the second respondent before me, is not one that a reasonable commissioner would have issued in relation to the

appropriate sanction that was to be imposed by the employer. On the other hand, the third respondent, being the union on behalf of Mr David Mphahlele, had lodged a counter-review; the basis thereof being that the award issued by the second respondent is not one that a reasonable commissioner would issue in relation to the guilt on the part of Mr Mphahlele.

The brief facts around this case are as follows: Mr Mphahlele commenced employment on the 18th of June 2008 in a position that was mentioned as a 'shutter hand'. The employee, on the 16th of
10 August 2011, was given some instruction to dig a trench and thereafter clean it. It is common cause that Mr Mphahlele refused to carry out those instructions. At the disciplinary enquiry he was found guilty and dismissed. He was aggrieved by the dismissal and approached the first respondent; and the first respondent appointed the second respondent to resolve the dispute.

In relation to the counter-review, Mr Makinta, appearing for the third respondent, argued that the commissioner was unreasonable in coming to the conclusion that Mr Mphahlele was obliged, as it were, to follow the instruction, because according to the material that was
20 presented before her, in particular page 156 of the paginated papers, which reads as follows:

"David Mphahlele has been elected to be the person responsible for cleaning and maintaining the ablutions, locker rooms and the workshops. David will be responsible for cleaning and maintaining the area around the lockers and

toilets as well. From today David will be reporting to Mr Tommy Yvette. Please assist David in keeping the lockers and toilets clean and tidy. David must report any problems to Mr Tommy immediately. David must also report people that do not give their cooperation and do not keep the toilets and lockers clean and tidy. We wish David good luck with his new position. It bears the signature of management and the signature of Mr Mphahlele.”

The document is not dated. However, it was pointed out to me in
 10 argument that it was actually issued on the 23rd of October 2010.

Now, on the basis of this document, page 156 and other places that I would deal with later in this judgment, an argument developed that the instruction does not fall within the document at page 156, which I have just quoted; and therefore, Mr Mphahlele was justified, as it were, to ignore the instruction. Now, the law regarding insubordination is very clear. An employee must not refuse to carry out a lawful and a reasonable instruction.

The commissioner came to the conclusion with the evidence that was before him, in particular the evidence of Mr Tommy Yvette
 20 who, as his testimony is recorded under paragraph 4.1.3, which reads as follows:

“He testified that the applicant was employed as a ‘shutter hand’ building scaffolding. However, due to the number of incidents/accidents, he was transferred to the workshop maintenance section. His job comprised of cleaning workshop,

ablution facilities, planting trees and digging holes. All this was discussed verbally with the Production Manager. The memorandum was placed on the notice board. He was doing gardening and other jobs until he was dismissed.”

Now, on the balance of probabilities, the second respondent came to the conclusion that the instruction that was provided or requested by the two managers fell within the responsibilities of Mr Mphahlele.

I am now being asked to interfere with that finding, because as it is argued, the finding is unreasonable. As the authorities have
 10 pointed out, as the review court, I always have to remind myself whether there are any justifiable basis upon which I can conclude that the finding made by a commissioner is unreasonable. If a finding falls within the bounds of reasonableness, then I cannot interfere. I do not understand how a person who is employed, as the evidence point out, as a general worker would not be required to perform the functions that were instructed by the two managers. There was, it appears to me, a contention that the instruction was unreasonable and unlawful. To that extent, the commissioner at paragraph 5.10 said the following:

“The applicant party failed to prove that the instruction was
 20 unreasonable and unlawful.”

The submission of Mr Makinta was that the onus lied on the employer to prove the lawfulness and the reasonableness of the instruction. He, however, refused to concede that if the employee makes an allegation, the employee bears the evidentiary burden to prove that allegation of fact. The law is very clear. A party who makes

an allegation of fact would have the duty to provide evidence in support of that fact; and that is called evidentiary burden, which is different from onus. Onus never shifts; and in terms of section 192 of the Labour Relations Act, it stays with the employer to justify the fairness of the dismissal. Accordingly, it is my view that the finding stated by the commissioner that the applicant failed to prove that the instruction was unreasonable and unlawful is perfectly in line with the law insofar as evidentiary burden is concerned.

So, returning to the issue of the counter-review; it is my
10 conclusion that the counter-review has no basis and should fail. Now I am turning to the issue of the main review. As I have pointed out earlier, the basis of the main review is simply the issue of interfering with the sanction of the employer. It is trite law that the duty to determine the appropriate sanction in an arbitration process is that of a commissioner or an arbitrator. And the arbitrator therein would be applying his or her own sense of fairness.

Now, the Constitutional Court in the *Sidumo* matter has made it very clear that the commissioner is not imposing the sanction afresh. The commissioner has to determine whether the sanction of dismissal
20 as imposed by the employer is fair. And it is at that stage that the commissioner will then have to apply his or her own mind in terms of fairness. However, since the arbitrator is not starting from the clean slate, the arbitrator should, amongst others, take into account the reasons as provided by the employer why it imposed the sanction of dismissal.

Now, in the matter before me and the award that is presented by the second respondent in dealing with the issue of the sanction, she stated the following:

“Was dismissal an appropriate sanction under the circumstances? Having considered the age and the literacy level of the applicant, it is my conclusion that the respondent could have dealt with the matter differently. Chances of him finding employment elsewhere are non-existent in the current economic condition. It is my finding, therefore, that the applicant... that the dismissal of the applicant was procedurally fair, but substantively unfair, particularly with regard to the sanction meted out.”

As pointed out earlier, *ex facie* the award, the commissioner took into account, it seems, only three considerations:

1. The age.
2. The literacy level; and
3. The chances of finding employment in the economic conditions.

During this time the Constitutional Court had already stated and paragraph 78 of the judgment in *Sidumo* states very clearly that the commissioner does not start on a blank page and determines what is fair. It is not his task or her task to determine whether a dismissal as a sanction ought to be imposed or not. That duty is the duty of the employer without necessarily deferring to the employer. He has or she has to apply value judgment and look at the reasons that the employer provide to justify the dismissal. Paragraph 78 stated very clearly in the

Sidumo judgment that there are several factors, although not a close list, but those are:

- The importance of the role breached
- The reason of the employer imposing the sanction
- The basis of the employee's challenge; and
- The harm caused by the employee's conduct; and
- Whether additional training would be required
- Most importantly: The record of service.

Now, in this matter there is common cause evidence that the
 10 employee, Mr Mphahlele, was at the time sitting with a final written warning for a similar misconduct. Clearly from the award that I have already pointed out and quoted, there is no indication that the commissioner even considered that fact. So, the commissioner then decided to actually take the functions of the employer, contrary to what *Sidumo* has said, instead of assessing what the employer has done, applying his own sense of fairness.

In the result, I make the following order:

ORDER

- 20 1. The award issued by the second respondent is reviewed and set aside and is replaced with an order that the dismissal was fair.
2. The counter-review application is dismissed.
3. The costs should be paid by the third respondent.

G Moshoana

Acting Judge of the Labour Court

Appearances:

Counsel for Applicant: (No annotations)

Counsel for Respondent: Adv Makinta