



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
CASE No: JR 1671/16

In the matter between:

**KELLOGG COMPANY SOUTH AFRICA
PROPRIETARY LIMITED**

Applicant

and

**FOOD AND ALLIED WORKERS UNION
obo LUCKY KHUMALO**

First Respondent

COMMISSIONER LUCKY DERRICK MAHLANGU N.O

Second Respondent

**COMMISSION FOR CONCILATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 06 June 2017

Delivered: 06 July 2017

Summary: Review application – test for review restated – review application dismissed.

REASONS FOR THE ORDER

MABASO AJ

[These are the reasons for the order issued by this court on 06 June 2017.]

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, under the third respondent's case number GAEK 1584/16; and to substitute it with an order that the dismissal of the employee was substantively fair; alternatively, to refer the dismissal dispute back to the third respondent for the determination *de novo* before a different Commissioner. None of the respondents delivered opposing papers herein.
- [2] The applicant is Kellogg Company South Africa Proprietary Limited ("the applicant"), the first respondent is Food and Allied Workers Union (the Union), a registered trade union which is cited in these proceedings in terms of section 200 of the Labour Relations Act,¹ acting on behalf of the Lucky Khumalo ("the employee"), the second respondent is Commissioner Lucky Derrick Mahlangu ("the Commissioner") and the third respondent is the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

Relevant Background

- [3] The employee worked for the applicant from 21 December 2004 until on 18 January 2016. He was dismissed after pleading guilty to a charge of misconduct, the rule breached reads as follows:

"Any unsafe act where the employee demonstrates a reckless disregard for themselves or their co-workers Safety – Ex.: Any act or

¹ 66 of 1995, as amended. (the Act)

action that recklessly or intentionally puts another employee in danger of physical injury”.

Despite, the guilty plea the applicant proceeded to dismiss him. The charge emanated from a horseplay performed by the employee to one Ms Grace Sekiti (Ms Sekiti), an employee employed by a temporal employment services provider.

- [4] Following the dismissal, he declared an unfair dismissal dispute to the CCMA, which appointed the Commissioner to arbitrate it after the unsuccessful conciliation. Before the Commissioner, the employee did not challenge the guilty finding. However, he was of the view that the sanction which was meted out against him was too harsh.² This was stated by the employee's representative during opening statement. The Commissioner was only required to decide on the appropriateness of the sanction.³ After hearing the evidence by both parties, as stated below, he made an order that the dismissal of the employee was procedurally fair but substantively unfair, as according to him, the sanction of dismissal was too harsh.
- [5] The Commissioner ordered the employer to reinstate the employee to the same position that he held at the time of the dismissal, on the same terms and conditions that existed prior to the dismissal. There were further two conditions to this order of reinstatement, namely that the employee should not be entitled to back pay and must also be given a final written warning. The reinstatement was to take place on 1 August 2016.

Grounds of review

- [6] Aggrieved by this outcome, the employer launched this review application. The grounds thereof have been summarised below.

² Records: page 80, line 22-23.

³ Paginated index: page 27.

- 6.1 That the Commissioner committed gross irregularity in that he misconceived the nature of the enquiry before him, by asking himself the question as to “*whether dismissal sanction was too harsh*”⁴;
- 6.2 that he “*committed misconduct in relation to his duties as an arbitrator*” in that he misconstrued the evidence and that the finding was not supported by evidence that was properly presented before him, for example, when he concluded that the employee suffered financial loss since his dismissal, therefore, according to the employer this is a sign of misconstruing the evidence and relying on the factors that were “*not relevant at the time that the sanction of dismissal was imposed*”;⁵ and
- 6.3 that the arbitrator should have confirmed the dismissal as the evidence presented justified the dismissal.⁶

The evidence before the arbitrator

- [7] In summary, during opening statements, the employee indicated that he was challenging the fairness of a dismissal, as he and Ms Sekiti were involved in the horseplay. The required outcome was one of reinstatement. The first witness for the employer was Sipho Malombo (Mr Malombo), who testified that he was the initiator of the disciplinary hearing. He explained that the reason for the employee to be called before a disciplinary hearing, instead of counselling, was that he had attended training where he was skilled on safety, and steps to be taken to avert a previous similar incident of safety violation.
- [8] The second witness for the employer was Ms Sekiti who stated that: on 20 August 2015 she was on her way from the plant to the canteen, before reaching the canteen she met the employee who was walking from the opposite direction. When she walked past the employee, the latter suddenly turned and grabbed her from behind and moved her around, she asked the

⁴ Paginated index: pages 15 ,16 and 19.

⁵ Paginated index: page17

⁶ Paginated index: page 17.

employee to stop what he was doing but the employee did not immediately heed to this call. She became light-headed. She regained her consciousness when she was in the clinic and *“did not know what happened when [she] stood up from the ground, [she] fell”*. During cross examination, this witness confirmed that she was not angry with the employee, and that both the employee and her would sometime play with each other.

- [9] The applicant did not dispute what happened, he added that he acted the way he did because he was happy to see his colleague, Ms Sekiti, who had not been at work for two days due to *“having a problem of a headache”*. In mitigation, it was confirmed that he worked for the employer for the period of 10 years and 6 months , and had no intention to harm her.
- [10] In the circumstances, the arbitrator found that the dismissal of the employee was substantively unfair, as the dismissal was too harsh.

Principles and Application thereof

- [11] For a Court to review and set aside an arbitration award, an applicant has to show that a Commissioner committed reviewable irregularity. Where he alleges an error of fact or law he has to show that such error prevented a fair trial of issues. A wrong conclusion on law or facts, by an arbitrator, does not necessarily always lead to a conclusion that there has not been a fair trial of issues. The reviewing Court has to look at *“all the material”* properly placed before such Commissioner.⁷
- [12] In 1906, the then Eastern District Court was called upon to decide on an error of law and its consequences, in the matter of *Rex v Sidumo and others*⁸ held that:

“now this is clearly in any irregularity and may cause the setting aside of the conviction and sentence... However, provides a very sensible principle to the

⁷ Herholdt v Nedbank Ltd (COSATU as amicus curiae) [2013] 11 BLLR 1074 (SCA), at para 25.

⁸ (1906) 20 EDC 39.

*effect that, where the court is satisfied no substantial wrong was done to the prisoners by the irregularity, the conviction shall not be set aside.*⁹

- [13] In respect of duties of Commissioners, once it has been found that an employee, claiming unfair dismissal, has committed misconduct that he was dismissed for, Commissioners are duty-bound to decide the appropriateness of the sanction thereof. Where a Commissioner fails to decide on this, whereby he had been called to decide, no doubt such a Commissioner would have committed an error of law which would have prevented such an employee to have a fair trial of issues. The Constitutional Court in the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & Others*¹⁰ held as follows:

“In the respect of the absence of dishonesty, the Labour Appeal Court found that the Commissioner’s statement in this regard “baffling”. In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant fact in relation to the misconduct. However, the Commissioner was wrong to conclude that relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.”

*“The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal.”*¹¹ (Own emphasis)

- [14] In the matter of *Royal Canin*¹² this Court, among other things, confirmed the test that Commissioners are required to observe in deciding dismissal

⁹ Id at 40. See also *Metrotoy (Pty) t/a John Graig v Ntsumale NO and others* [2010] ZALC 251(17 November 2010), at para 31: A mistake of fact or law could also constitute an irregularity. It is however not every mistake that would lead to the conclusion that the complaining party has been denied a fair hearing and accordingly justifying interference by the court. **For a mistake of fact or law to constitute gross irregularity, it has to be shown that the mistake is so material as to amount to the denial of a fair hearing or failure to deal with the issues raised by the dispute.**(Own emphasis).

¹⁰ [2007] 12 BLLR 1097 (CC).

¹¹ Id at paras 116. See also para 117.

¹² *Royal Canin SA (Pty) Ltd v Mbileni NO & others* [2010] JOL 26100 (LC).

matters. It held that *“it was a duty of the [Commissioner] to determine whether punishment imposed by the [employer] is harsh or not”*. I, therefore, conclude that the Commissioner understood what he was required to decide, when he held that the test is one of determining the harshness of sanction, taking into account the principle above.

[15] In applying this principle, in this matter, the fact that the employee admitted that he was guilty, a reasonable decision maker was correct in taking into account that the employee had no intention to cause the harm to Ms Sekiti, and the Commissioner’s approach in this regard was in line with the principle of *“... approaching the dismissal dispute impartially, the Commissioner will take into account the totality of the circumstances,... She must take into account the basis of the employee’s challenge to the dismissal. His or her long service record and other related mitigating and aggravating factors”*,¹³ presented before him.

[16] If my conclusion is wrong, and the *Royal Canin* judgment was wrongly decided, I still believe that the Commissioner did decide what he was required to decide, and this is also confirmed by the applicant in its affidavit as it states that— *“it is clear from the contents of paragraph 19 of the award that the Commissioner made the critical finding regarding the appropriateness of the sanction that was imposed by the applicant”* – the applicant in paragraph 33.3 of the affidavit confirms that the Commissioner did make a finding in respect of the appropriateness of the sanction that was imposed on the employee, and further stated that the Commissioner decided that the trust relationship between the applicant and the employee has not broken down. Therefore, the Commissioner did apply her mind to the issues before her.

[17] The applicant is also challenging the Commissioner’s finding that the conduct did not break the trust relationship and it can be corrected. One has to look at the totality of evidence that was presented before the Commissioner, to determine as to whether the dismissal was an appropriate sanction or not. As

¹³ *Sidumo supra*, at para 78.

I have stated above, in paragraphs 13 and 15 , the test is not only about the trust relationship as there are other factors that have to be looked at. For example, the manner in which this misconduct took place, and what could justify corrective measures as compared to dismissal, in favour of the employee. The employee worked for employer for the period of more than 10 years, the offence was not intentional. The employee was happy to see his colleague who had been off sick due to “having a problem of a headache”.

[18] The Commissioner, based on the circumstances and facts of this matter, in making an order that the reinstatement should not be with back-pay, as the employee had suffered a financial loss since the dismissal, alone cannot be a ground that one can conclude that the award is one that a reasonable decision maker could not have made.

[19] It is my view that the Commissioner did apply his mind to all the evidence that was properly presented before him. Therefore, I opine that the Commissioner’s conclusion is in line with what the Constitutional Court, inter alia, said in *Sidumo supra*, in that— “in deciding how commissioners should approach the task of determining the fairness of the of dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been giving the effect by the LRA” .Under the circumstances, I conclude that the review application should fail as the records justified the outcome of the Commissioner, meaning the arbitration award is one that a reasonable decision-maker could have made. .

Order

[20] In the circumstances, I make the following order:

- 1 The review application is dismissed.
- 2 No order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: F Maleen

Instructed by: Edward Nathan Sonnenbergs Inc.

For the Respondent: No appearance

Instructed by:

LABOUR COURT