



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1767/14

In the matter between:

SOUTH AFRICA MUNICIPAL WORKERS UNION

First Applicant

OBO

KEDIBONE CHAUKE

Second Applicant

and

MORETELE LOCAL MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

L DLAMINI N.O

Third Respondent

Heard: 24 October 2017

Delivered: 08 February 2018

Summary: Appropriateness of the sanction – the shop steward properly disciplined for the disruptive behaviour – a sanction of dismissal not appropriate.

JUDGMENT

NKUTHA-NKONTWANA. JIntroduction

- [1] The first applicant (SAMWU) seeks an order for the reviewing and setting aside of the award issued on 10 December 2015 by the third respondent (the arbitrator) under case number NW031401 acting under the auspices of the second respondent (the SALGBC). The basis of the challenge is that the award that found the dismissal of the second applicant (Ms Chauke) substantively fair was unreasonable. The first respondent (the Municipality) is defending the arbitration award.
- [2] The application is hinged on two main grounds of review. Firstly, that the arbitrator ignored the material evidence that was presented before him. Secondly, that the arbitrator failed to consider whether the sanction of dismissal was appropriate.

Background facts

- [3] Ms Chauke was employed by the Municipality as a Credit Controller. She was a SAMWU shop steward and a secretary of the shop steward committee. On 28 November 2012, a staff meeting was called by the Municipal Manager to be addressed by the Mayor. The Mayor was going to brief the employees in response to the rumours that had been circulated about the intention to suspend and dismiss the Municipal Manager.
- [4] Ms Chauke objected to the staff being addressed by the Mayor. It was the Municipality's evidence that even before the Mayor could address the meeting, Ms Chauke started singing an inciting song as she was leaving the room and was joined by some employees. She returned to the meeting with a letter purporting to be a strike notice for a strike intended to commence with immediate effect.
- [5] Ms Chauke was accused of four charges of misconduct for acting in a manner that was improper, disgraceful and disruptive during the staff meeting (i.e. insolence, disrespect, inciting an unprotected strike and

insubordination). She was found guilty as charged and dismissed on 12 February 2014.

- [6] Ms Chauke denied that she was singing when she left the meeting and that she did not tell other employees to follow her. She further denied that the strike notice she had authored was meant to incite an unprotected strike. However, it was used by SAMWU as a tactic to influence the Municipality's decision.

Review test

- [7] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,¹ the Labour Appeal Court (the LAC) as per Waglay JP contextualised the review test as postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² and stated that:

[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the

¹ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14.

² (2007) 28 ILJ 2405 (CC).

arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'

Evaluation

- [8] The arbitrator clearly accepted the version of the Municipality that Ms Chauke acted in a disruptive manner during the staff meeting and that she incited an unprotected strike. She was of the view that Ms Chauke, a seasoned shop steward, ought to have shown better leadership qualities by subordinating herself to the authority of the Municipal management and leadership.
- [9] Having perused the record of the arbitration proceedings, I am persuaded that the arbitrator applied her mind to the evidence that was before her on substantive issues. Therefore, the first ground of review has no merit.
- [10] However, the converse is true when it comes to the appropriateness of the sanction. The arbitrator held that there was no evidence of inconsistency and the misconduct was severe enough to justify the dismissal of Ms Chauke. However, she failed to apply her mind in relation to the issue of appropriateness of the sanction.
- [11] The parties were directed to file supplementary heads of argument solely to address the issue of appropriateness of the sanction. The applicants' submissions, in mitigation, can be summarised as follows:
- 11.1. The meeting that was disrupted did continue and its purpose was achieved. As such, as a matter of fact, it was interrupted.
 - 11.2. When Ms Chauke objected to the address by the Mayor, she was acting in good faith and erroneously relied on certain provisions of the Municipal Systems Act³. A possible training would have avoided the recurrence of the misconduct;

³ Act 32 of 2000.

11.3. Ms Chauke had a good relationship with her supervisor and she continued working until she was suspended; and

11.4. The arbitrator failed to have regard to Ms Chauke's length of service; and to apply progressive discipline.

[12] On the other hand, the Municipality contended, in aggravation, that:

12.1. Ms Chauke had a duty, as a shop steward, to maintain sound labour relations;

12.2. Ms Chauke's conduct had a potential to bring the Municipality's political and administrative structure into disrepute;

12.3. Ms Chauke's conduct included incitement of an unprotected strike which had a potential of causing job losses; and

12.4. Mr Kodisang, a member of SAMWU and Municipality's witness, testified that he was not aware of SAMWU's intentions to call a strike.

[13] In *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others*,⁴ the LAC reinvigorated the principle of progressive discipline. It is stated that:

[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour

⁴ [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC); (2015) 36 ILJ 2273 (LAC) at para 18.

practices, more particularly to a dismissal that is fair, is afforded to employees.' (Emphasis added).

- [14] In the present case, the arbitrator failed to have regard to *Sidumo*⁵ which enjoins arbitrators to consider the totality of circumstances when deciding whether dismissal was an appropriate sanction. She failed to appreciate that even though the meeting had been disrupted, it resumed without further disruptions. Tellingly, the threat of a strike was just a hollow and, in any event, SAMWU had associated itself with her conduct which was explained as a tactic normally used to influence the Municipality's decisions. It was Ms Chauke's undisputed evidence that she continued to enjoy a congenial relationship with her supervisor after the incident.
- [15] In my view, as inappropriate as it was, the conduct of Ms Chauke did not render the continued employment intolerable. This is a typical case where progressive discipline should have been preferred. The arbitrator's conduct in this regard constitutes a reviewable flaw.

Conclusion

- [16] In all the circumstances, I have no reason to interfere with the finding of the arbitrator to the effect that Ms Chauke was guilty as charged. On the contrary, the arbitrator certainly misconceived the true enquiry when it comes to the appropriateness of the sanction. The conclusion that the dismissal was justifiable is not sustainable on the facts of this case and as such does not fall in a band of reasonable decisions.
- [17] In the interest of justice and in line with the tenet of this Court to be hesitant to remit a dispute back because of the resultant delays, I deem it appropriate not to remit this matter back to the SALGBC. Having had the benefit of reading the record, pleadings and hearing oral argument; I am in a position to decide the matter to finality. For all the reasons alluded to above, I am persuaded that the dismissal of Ms Chauke was substantively unfair.

⁵ *Supra* n 2 at para 78.

The relief

- [18] Ms Chauke seeks retrospective reinstatement with full back pay. On the other hand, the Municipality argued that the delays in finalising the matter should be blamed on Ms Chauke. For that reason, in the event the Court finds the sanction of dismissal to be inappropriate, compensation should be awarded given the nature of the misconduct, or re-employment, or reinstatement with a limited back pay of not more than 12 months, so it was further argued.
- [19] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁶ the Constitutional Court reaffirmed reinstatement as 'the primary statutory remedy in unfair dismissal disputes...aimed at placing an employee in the position he or she would have been but for the unfair dismissal... by restoring the employment contract...The extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.'
- [20] Having considered the delays in finalising the matter, the fact that Ms Chauke is the culprit and that she has been out of employment for almost 4 years; I deem it just and equitable to both parties to order reinstatement with a backdated period of 12 months from the date of this judgment.
- [21] On the issue of costs, I am disinclined to award costs since SAMWU and the Municipality are involved in a persisting collective bargaining relationship.
- [22] In the premises, I make the following order:

⁶ [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

Order

1. The arbitration award under case number NW03140, dated 9 July 2014, is reviewed and set aside and replaced with the following order:

- 1.1 The dismissal of Ms Chauke is substantively unfair.

- 1.2 The Municipality is ordered to reinstate Ms Chauke with effect from 8 February 2017.

- 1.3 The order in paragraph 1.2 must be effected within a month from the date of this judgment.

2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate W Ndinisa

Instructed by: Maenetja Attorneys

For the respondent: Advocate J Molapo

Instructed by: Mosire Tsiane Attorneys

LABOUR COURT