



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable
Case No: JR 2198/15

In the matter between:

**SAMANCOR CHROME LTD (EASTERN
CHROME MINES)**

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER MOHLOMELELE MELLO

Second Respondent

NUM obo KUENA, MOSIUOA

Third Respondent

Decided: In Chambers

Delivered: 29 March 2018

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

NOWOSENETZ AJ

Introduction

- [1] This is an application for leave to appeal against the judgment in this case handed down on 30 November 2017. The applicant (employer) filed an application for leave to appeal on 23 January 2017 and an application for condonation for the late filing of the application for leave to appeal on 31 January 2018. The applications were not opposed.

Condonation

- [2] The application was filed outside the 15 day time limit prescribed by Rule 30 (2). The reasons provided were that judgment was handed down on 30 November 2017 but the Applicant's attorneys did not receive notification. It first came to their attention on 14 December 2017. The Applicant's attorneys shut down for year -end and early in 2017 the attorney attending to the case obtained instructions and briefed counsel. The application was filed on 31 January 2018. The reasons are sufficient and there is no indication of lack of diligence. The delay was excusable particularly having regard to the year-end closure of law firms. The application was not opposed. Condonation is granted.

Grounds of the application for leave to appeal

- [3] These were premised on the submission that the judgment incorrectly found that the arbitrator properly assessed the key dispute before him and disregarded evidence of serious or gross negligence by the employee. It was submitted that the crux of the charge against the employee was that he failed to discharge his fundamental duty to ensure compliance with safe mining practices in the areas under his supervision.
- [4] It was submitted that the negligence consisted of the Applicant failing to halt work and declare the panel unsafe on 17 March 2017. In the employers heads of argument in the review and in this application no reference was made to the transcript where this was explicitly formulated by the employer as being the substance of the charge. This should have been be stated in the charge and proven in the arbitration.

- [5] This brings into question the meaning of the charge. There is no indication whatsoever in the charge what the employee's failure of duty was. As stated in paragraph 4 of the Code of Good Practice: Dismissal in Schedule 8 of the Labour Relations Act¹ (LRA) the allegation must be in a form and language that an employee can reasonably understand. The charge is cryptic and vague in referring to unsatisfactory work performance which was discussed and highlighted to the employee. This is akin to a charge which says 'you know what you did wrong'. There was no evidence of any such discussion in the arbitration. Neither a reasonable arbitrator, nor the employee should not have to guess what the allegations were. The arbitrator's construction of the charge as considered in the judgment may be incorrect but it is not one which a reasonable decision maker could not have made. It was submitted that the arbitrator failed to consider the critical issue before him. This cannot be considered a failing on the part of the arbitrator, but rather on the part of the employer who did not present the critical issue properly.
- [6] To my mind the arbitrator investigated the charge as dealt with in the judgment and his interpretation of the charge was reasonable even if it was erroneous. This does however reach the threshold of review.
- [7] *In National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*² the Court held as follows:
- "In terms of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC), in deciding whether an award is reviewable the only question that needs to be asked is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply

¹ Act 66 of 1995 as amended.

² [2009] 8 BLLR 777 (LC); (2009) 30 ILJ 2771 (LC).

ensure that the commissioner's decision falls within those bounds. To succeed, the applicants must establish that the decision falls outside the bounds of what are reasonable."

[8] The employee denied allowing work to proceed on 17 March 2017 and he denied that he failed to report unsafe conditions. At best for the employer this issue was in dispute and the probabilities were reasonably found to not be capable of being established in the employer's favour. In my view this was a reasonable finding based on the poor quality of the employer's evidence before him. If this is the misconduct to be understood from the charge.

[9] In my view another court is unlikely to come to a different decision.

Order

[10] In the result, I make the following order.

1. The application for condonation for late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is dismissed.
3. No costs order is made.

L Nowosenetz

Acting Judge of the Labour Court of South Africa