



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2499/16

In the matter between:

ADWILL PLASTICS (PTY) LTD

Applicant

and

ISAAC TEKE MOTHIBE N.O

First Respondent

THE COMMISSION FOR MEDIATION,

CONCILIATION ARBITRATION

Second Respondent

NUMSA OBO MOTOMA AND 1 OTHER

Third Respondent

Heard: 16 October 2018

Delivered: 09 November 2018

Summary: Review application – appropriateness of the sanction – progressive discipline must be followed to its logical conclusion.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] In this application, the applicant, Adwill Plastics (Pty) Ltd (Adwill) seeks an order reviewing and setting aside the arbitration award issued by the first respondent (commissioner) under case number GATW8947-16, dated 19 October 2016. The third respondent, National Union of Metalworkers of South Africa (NUMSA), is defending the award. The commissioner found that the dismissal of NUMSA's members, Messrs Koos Motoma (Mr Motoma) and Phineas Namane (Mr Namane) (respondent employees) was substantively unfair and reinstated them without back pay and subject to a written warning.
- [2] The applicant's main impugn is that the commissioner failed to apply his mind to the facts that were before him and as such, rendered an unreasonable award.

Background

- [3] The facts in this matter are, to a great extent, common cause. The respondent employees were employed by Adwill as general workers. On 8 May 2016, while Mr Motoma was operating his machine, he was asked to assist with another machine that was running rejects. He had to adjust the machine using an allen key and forgot to take it back to the toolbox. Mr Namane, unaware of the allen key, placed a pack of bottles on top of the machine. The allen key fell into the machine and it immediately stopped working. The respondent employees tried to fix it but failed and reported the incident. Adwill spent R26 000 to fix the damaged machine.
- [4] The respondent employees were charged and dismissed for gross negligence. The crux issue that was before the commissioner was the appropriateness of the sanction. Adwill was adamant that dismissal was an appropriate sanction. It asserts that the damaged machine was worth R1.2 million and has only two of them. Previously, there was an incident where a knife fell into the machine and Adwill suffered loss of about R180 000.00 in

production. All the employees were verbally warned of the danger of leaving foreign objects on the machine.

- [5] On the other hand, the respondent employees pleaded for a more lenient sanction. Mr Motoma testified that he was aware of the general warning to all employees. However, on the day in question he was working under pressure; hence the mistake of leaving the allen key on the machine. Mr Namane testified that he was not yet employed when the first incident happened. He was not made aware of the allen key as it was a hectic day.

Review test

- [6] The essence of the review test is tersely stated in *Head of the Department of Education v Mofokeng*¹ and pertinently that:

‘Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order.’

Evaluation

- [7] Adwill submitted that the commissioner failed to attach the necessary weight to the evidence that the respondent employees had been previously warned about the danger of leaving foreign objects on the machine. However, Mr Posthuma, Adwill’s attorney, prudently conceded that previously all the

¹ [2015] 1 BLLR 50 (LAC) at paras 33; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14.

employees were verbally warned, despite the fact that the loss suffered was greater, and that, in a sense, initiated a progressive disciplinary process.

[8] Therefore, it was discordant of Adwill to jump to the sanction of dismissal without affording the respondent employees the benefit of a written warning. In my view, once the employer chooses a path of progressive discipline, it must be followed to its logical conclusion; unless there are circumstances justifying immediate dismissal, none of which exist in this instance.

[9] The respondent employees were remorseful and clearly exhibited attributes of employees who are capable of rehabilitation. The commissioner accepted that the respondent employees were guilty of negligence but given the circumstances, the sanction of dismissal was too harsh. As such, their reinstatement was not retrospective and was subject to a written warning.

Conclusion

[10] In all the circumstances, I am convinced that the award is reasonable and therefore unassailable. The parties did not pursue costs.

[11] In the premises, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr AJ Posthuma from Snyman Attorneys

For the respondent: Mr V Shezi, NUMSA's Regional Legal Officer

LABOUR COURT