

SOUTH AFRICA / JUDGMENT

NUM obo Magagula v Commission For Conciliation Mediation and Arbitration and Others (JR554/18) [2024] ZALCJHB 333 (23 May 2024)

[2024] ZALCJHB 333**COURT**

Labour Court Johannesburg

BEFORE

Mokose AJ

CASE / FILE NUMBER

JR554/18

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Source record**FLYNOTES:****LABOUR**

– Dismissal – Dishonesty –

Dump

truck overturned – Safety related transgression –

Dishonest conduct in submitting false statement regarding
incident– Statement contradicted by CCTV footage – Whether
discipline was applied consistently – Matters
aredistinguishable – Clear intent by applicant – Decision
that applicant's dismissal was substantively
fair fallswithin band of reasonableness – Award is unassailable –
Application dismissed.

IN

THE LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

CASE

NO: JR554/2018

In

the matter between: NUM
obo NEHEMIAH MAGAGULA
Applicant
And
COMMISSIONER
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
1st
Respondent
JACKY
RAMADIMALA N.O.
2nd
Respondent
GLENCORE
OPERATIONS SOUTH AFRICA (PTY) LTD
3rd
Respondent

Heard: 22 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 23 May 2024.

JUDGMENT

MOKOSE AJ

Introduction

- [1] Before this court is an opposed application in terms of Section 145 of the Labour Relations Act 66 of 1995 (“LRA”) to review and set aside an arbitration award issued by the Second Respondent under the auspices of the first respondent, in terms of which the Commissioner found that the applicant’s dismissal was both procedurally and substantively fair.
- [2] The crisp issue around which this matter turns is whether the applicant’s dismissal was substantively fair and whether the third respondent had consistently applied discipline with regards to misconduct involving dishonesty.

Brief

Facts

- [3] The applicant was employed as a supervisor by the third respondent until his dismissal on 27 October 2017. An incident occurred on 19 September 2017 which resulted in a misconduct where a dump truck had overturned on Glencore’s site. The applicant gave an oral statement

which was later confirmed in writing. The applicant averred that the dump truck had been overloaded and was accordingly unable to lift its bucket to off-load the material it was carrying. The applicant claimed that he had requested a front-end loader to scoop the material off the back of the dump truck so as to lighten its load. In so doing, the dump truck overturned.

- [4] It was through investigations that it subsequently ascertained that the front-end loader attempted to lift the dump truck's bucket, which was in contravention of the third respondent's safety standards. During the investigation, the applicant was asked to point out where the material that was allegedly scooped off the dump truck was placed. When he could not do so, it became clear that his statement was untrue. This statement was nevertheless confirmed in writing.
- [5] The third respondent reviewed the CCTV footage of the incident which revealed that the applicant had requested the front-end loader to assist the dump truck to offload its contents; was present throughout this attempt; and did not intervene when the front-end loader tried to lift the bucket onto the dump truck as opposed to scooping the load off the bucket of the dump truck.
- [6] The applicant was then charged as follows:

"Charge 1: Safety related transgression in that you instructed the Phadima FEL Operator to assist in unsafe executing of a task by lifting the bucket of the ADT with the intention to offload the M7 material that was stuck inside the bucket, resulting in the ADT cab to overturn.

Charge 2: Dishonest conduct in that you submitted a false statement regarding the incident that happened on 19.9.2017 where an ADT cab overturned."

- [7] The applicant was found guilty and given a final written warning in respect of charge 1 and was dismissed for charge 2. Aggrieved with the dismissal, the applicant referred the dispute to the CCMA where conciliation was unsuccessful. Having been referred for arbitration, it was found that only substantive fairness was in dispute. In particular, the commissioner was required to determine whether the third respondent had consistently applied discipline when compared to the disciplinary proceedings and sanction meted out to a Mr Moabelo who had been found guilty of the same offence of dishonesty but was not dismissed.
- [8] In proving that the applicant's dismissal was substantively fair, the third respondent called two witnesses to give evidence. They are Mr Zulu, the chairperson at Mr Moabelo's disciplinary hearing and Mr Nel, who chaired the applicant's disciplinary hearing.
- [9] It is noted that the Disciplinary Code provides for dismissal for the first offence of dishonesty. However, it further stipulates that it is merely a guideline, and that the merits of each case should be taken into consideration when apply a sanction.

- [10] Mr Zulu testified that Mr Moabelo had been charged with two charges of misconduct – the first being that of dishonesty in that he completed and signed off a work permit without ensuring compliance with fatal hazards protocols. This related to an incident where Mr Moabelo had marked on a safe work permit that there was scaffolding in place where it had not been erected. The ‘dishonesty’ referred to the fact that the work permit had been inaccurately completed.
- [11] The second charge was negligence in that he allowed a conveyor belt to operate without a nip guard.
- [12] Mr Moabelo was given a final written warning in respect of the first charge. Mr Zulu explained that the reason he had meted out this sanction was inter alia, because there were several mitigating factors. One such factor is that Mr Moabelo had admitted that he had completed the permit incorrectly but stated that it was due to a misunderstanding on his part. The third respondent did not furnish to the CCMA evidence that Mr Moabelo understood how to complete the form. Furthermore, there was no risk of an injury where the form had been incorrectly completed.
- [13] Mr Nel testified that the applicant had been dishonest in that he had made an oral and a subsequent written statement about the incident, both of which were contradicted by CCTV footage. He further testified that the driver of the dump truck had been lucky to survive when the vehicle overturned. Despite being made aware of the CCTV footage, the applicant maintained his version of the incident throughout the investigation and disciplinary hearing. He was of the view that an appropriate sanction in this matter was dismissal which was provided for in the Disciplinary Code for a first offence of dishonesty. He was further of the view that the applicant’s false account of the incident could have led to the wrong root cause being identified and incorrect measures being taken to prevent a similar incident which could have resulted in the re-occurrence of such an incident.
- [14] The commissioner found that the applicant’s case was distinguishable from that of Mr Moabelo and held that the applicant cannot expect to profit from what he regarded as an incorrect decision by the chairperson in Mr Moabelo’s disciplinary

enquiry. He concluded by saying that there was no evidence led by the applicant that the third respondent’s decision to dismiss him was capricious or induced by an improper motive, the applicant’s claim of inconsistent application of discipline could not be sustained. His dismissal was found to be procedurally and substantively fair.

Grounds of Review

- [15] The applicant relies on three grounds of review:
- (i) that the commissioner had committed an error in law in that he misconceived the nature of the enquiry before him and failed to perform his duties therein;

(ii) that the commissioner failed to consider the totality of the evidence in that he failed to consider the gravity of the misconduct, consistency, aggravating and mitigating factors and relevant circumstances in arriving at a conclusion that the applicant's dismissal was fair; and

(iii) that the commissioner agreed with the third respondent's version that there was no inconsistent application of discipline without providing

reasons.

Test on review

[16] Section 145(2) provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. The defect referred to in Section 145(1) is one where the commissioner has committed a misconduct in relation to his duties of a commissioner or arbitrator or he has committed a gross irregularity in the conduct of the arbitration proceedings or even where he has exceeded his powers.

[17] The test on review was espoused by the court in the matter of *Sidumo & Another v Rustenburg Platinum Mines Limited and Others*[1] where it was held as follows:

"In light of the Constitutional requirement (in Section 33(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the 'reasonableness standard' should now suffuse Section 145 of the LRA".

[18] It is clear that a commissioner is obliged to apply his or her mind to the issues in the case. [2]The review court is therefore required to determine whether the decision of the arbitrator is reasonable in light of the totality of the evidence that was before him together with the issues he was required to determine.

[19] The Labour Appeal Court ("LAC") in the matter of *Fidelity Cash Management Service v CCMA and Others*[3] considered what unreasonableness is and held as follows:

"[97] The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner is 'one that a reasonable decision maker could not reach' (para 110 of the Sidumo case). If it is an award or decision that a reasonable decision could not reach, then the decision or award of the CCMA is unreasonable, and, there, reviewable and could be set aside. If it is a decision that a reasonable decision make could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision make would not reach but one that a reasonable decision make could not reach...."

[20] In a more recent case of *Gold Fields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA and Others*[4] the court interpreted the test set out in the *Sidumo* case as follows:

“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.....In other words, in a case such as the present, where a gross irregularity is the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of proceedings, but extends to whether the decision that the arbitrator arrived at is one that falls in the band of decisions a reasonable decision maker could come to on the available material.”

[21] The court went on to say:[5]

“.....What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the

reasonableness test established in Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test.”

[22] The court then concluded that[6]-

“In short: A review must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.”

First Ground of Review

[23] The applicant contends that the commissioner committed an error in law in that he failed to conceive the nature of the enquiry that he was required to undertake. It is evident from the record that prior to the commencement of the arbitration, the parties concluded a pre-arbitration agreement which was read into the record. This minute confirmed inter alia, that there is only one issue in dispute, being that of inconsistent application of discipline with specific reference to Mr Moabelo's case. This minute was confirmed by both parties as being an accurate reflection of the pre-arbitration conference.

[24] Furthermore, in the award under 'issues to be decided' the commissioner stated the following:

“9. I was required to determine as to whether the respondent has consistently applied its rules of discipline in the circumstances of the applicant's case.

10. If not found so, I must determine an appropriate remedy in terms of the Labour Relations Act…”

[25] Furthermore, in recording his analysis, the commissioner stated in the award as follows:

“Applicant has averred that his dismissal is unfair because the respondent failed to apply its rules of discipline and sanction of dismissal consistently especially when comparing his case with that of Mr Moabelo.”

- [26] It is clear from the above mentioned, that the commissioner was well aware of the enquiry to be undertaken. It is evident from the record that the only basis upon which the applicant challenges his dismissal is whether discipline was applied consistently by the third respondent. The applicant does not allege in his papers what the correct enquiry should have been. Accordingly, I am of the view that the commissioner undertook the correct enquiry and that the award is unassailable in this regard.
- [27] It is trite that a dismissal must be substantively and procedurally fair. In determining substantive fairness, one must consider consistency in the application of discipline. It is not in dispute that the rule in question is that in terms of the third respondent's Disciplinary Code, the sanction for a first offence of making a false statement is dismissal. However, the applicant submits that this is qualified by clause 8.1.1 of the Disciplinary Code which reads as follows:
- "Disciplinary action and warnings for the transgressions listed below are merely a guideline as all disciplinary offences/cases and the merits of each case will always differ."*
- [28] Mr Moabelo and the applicant were both charged with dishonesty. Counsel for the applicant is of the view that the disciplinary policy and sanction was applied inconsistently in that Mr Moabelo was given a final written warning and his client a dismissal, which constitutes an unfair dismissal. Counsel for the applicant submits that their cases are distinguishable in that when Mr Moabelo was shown how he had completed the form, accepted that he had filled out the work permit, albeit incorrectly resulting in a dishonest statement being made. The applicant, on the other hand, submitted a false oral and written statement. Furthermore, he stood by this false statement throughout the disciplinary enquiry. When asked in cross-examination why he continued to lie when it had been proved that his statement was untrue, he conceded that he thought he would succeed in persisting with the lie.
- [29] I agree with counsel for the third respondent that the matters are distinguishable. I am of the view that there was no intent on the part of Mr Moabelo but was clearly there on the part of the applicant. Furthermore, the commissioner in the matter of Mr Moabelo found that there was no evidence presented by the company that Mr Moabelo had been trained to complete the forms, that being considered in mitigation of a lesser sanction.

Second Ground of Review

- [30] The applicant's second ground of review is that the commissioner failed to consider the totality of the circumstances in that he failed to consider the gravity of the misconduct, inconsistency, aggravating and mitigating factors and relevant circumstances in arriving at the conclusion that the applicant's dismissal was fair.
- [31] In the recent case of *Gold Fields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA and Others*[7] the court interpreted the test set out in the *Sidumo* case as follows:

“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.....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 proceedings, but extends to whether the decision that the arbitrator arrived at is one that falls in the band of decisions a reasonable decision maker could come to on the available material.”

[32] A failure to consider any fact will only amount to a reviewable irregularity where the arbitrator has arrived at an unreasonable

result. I note the extensive evidence that was led pertaining to the gravity of the misconduct, consistency, aggravating and mitigating

factors by the third applicant's witnesses. There is no indication in the award that these factors were not taken into consideration. I do not have a sense of what the applicant regards as evidence the commissioner should have taken into consideration and in what manner this evidence would have influenced the outcome of the arbitration. Accordingly, on a conspectus of the evidence that was

placed before the commissioner, I am of the view that the decision reached by the commissioner falls within the band of reasonableness.

Third ground of review

[33] The applicant further submits that the commissioner agreed with the third respondent's version that there was no inconsistent application of discipline without providing reasons.

[34] The reasons provided by the commissioner are, inter alia:

(i) the facts of Mr Moabelo's case were different to that of the applicant;

(ii) the gravity of each employee's misconduct, the circumstances, the impact and outcome of the respective acts of misconduct were different; and

(iii) that there was no evidence before him to conclude that the decision to dismiss the applicant was taken capriciously or induced by improper motives. The applicant can therefore not expect to benefit from what he refers to as the incorrect decision by the Chairperson of Mr Moabelo's disciplinary enquiry.

[35] I am satisfied that the commissioner did in fact provide reasons. This ground of review is misplaced.

Costs

[36] The general rule in litigation pertaining to an award of costs is that costs should follow the result. However, this does not find application in labour disputes due to the power imbalance between an employer and an employee. This court has a wide discretion in respect of the award of costs, considering fairness and the principles of law and further considering the power relationship between the employer and employee.[8] This principle

was confirmed in the matter of Zungu v Premier of KZN and Others^[9] where the Constitutional Court stressed that the court should seek a balance between unduly discouraging litigants from approaching the Labour Court to have their disputes dealt with and allowing those litigants to bring their matters to the court which should not have been brought in the first place. The court is obliged to strike a balance considering the requirements of fairness and the law.

[37] I have considered both the applicant and third respondent's submissions pertaining to costs. However, I am of the view that no order should be made as to costs.

[38] In conclusion, as stated above, it is clear that the award of the commissioner is unassailable. I am of the view that the commissioner's decision that the applicant's dismissal was substantively fair is one that falls within the band of reasonableness. Accordingly, the following order is granted:

Order

(i) The applicant's review application is dismissed.

(ii) No order as to costs.

[1]

[2007] 28 ILJ 2405 (CC)

[2] CUSA v Tao Ying Metal Industries [2008] 29 ILJ 2461 (CC) at para 134

[3]

[2008] 29 ILJ 964 at para 97

[4]

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at paragraph 14

[5] Gold Fields Mining (supra) at para 15

[6] Gold Fields Mining (supra) at para 16

[7]

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at paragraph 14

[8] Union for Police Security and Corrections Organisation v South African Custodial management (Pty) Ltd [2021] ZACC 41

[9] 2018 ZACC 1

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