

SOUTH AFRICA / JUDGMENT

NUMSA and Another v CCMA and Others (PR46/18) [2020] ZALCPE 8 (7 February 2020) [2020] ZALCPE 8

COURT

Labour Court Port Elizabeth

BEFORE

G N Moshwana

CASE / FILE NUMBER

PR46/18

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THE

LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

case

no: PR

46/18

In

the matter between:

NUMSA AND DILLO
DITCHABA Applicants
and
CCMA First
Respondent
THEODOROUS
POTGIETER N. O
Second Respondent
CONTINENTAL
TYRE SA (PTY) LTD Third
Respondent

Heard:

05 February 2020

Delivered:

07 February 2020

Summary: An opposed review application – award falls within the bounds of reasonableness. Held (1): The application is dismissed. Held (2): No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application seeking to review and set aside an award issued by the second respondent under the auspices of the first respondent. The application is duly opposed by the third respondent.

Background

facts

- [2] Mr Dillo Ditchaba (Ditchaba) was employed by the third respondent as a machine operator. Ditchaba was charged with misconduct labelled “Operator produced four scrap rolls”. It became common cause that around December 2015, Ditchaba produced four scrap rolls. It also became common cause that Ditchaba reflected the width of the ply or template produced to be 580mm in respect of all the plies produced. The truth being that the plies were 570mm, 572mm and 573mm respectively.
- [3] It is apparent that Ditchaba pleaded guilty to the production of the four scrap rolls. The chairperson of the internal enquiry issued a sanction of dismissal and supported it with the fact that the production of the scrap rolls was deliberate as Ditchaba did not do his checks and was dishonest in his testimony. He found that Ditchaba carried out his actions with intent and deliberately placed the company at risk.
- [4] Aggrieved by the decision of the internal chairperson, Ditchaba lodged an internal appeal. His grounds of appeal were: (a) sanction too harsh for first offence; (b) evidence of faulty machine not taken into account and (c) he had a good behavioural record. The appeal was considered by the Quality Manager, Mr Lance Williams. On the harshness of the sanction he stated the following: “In the light of the fact that there was dishonesty involved in the form of falsified measurements, which could be seen as fraudulent, I believe dismissal an appropriate sanction for a first offence.”
- [5] Ditchaba was aggrieved and referred a dispute alleging unfair dismissal. It is apparent that a favourable arbitration award was issued on 27 June

2016. The award was reviewed and set aside by this Court under case number PR138/16. The order[1] of my sister Prinsloo J remitted the dispute back to the CCMA. At arbitration, the issue under attack was that Ditchaba having been charged for producing scrap, he was dismissed for deliberately producing scrap. After hearing testimony on the challenge, the second respondent on 9 February 2018, rendered an award. Aggrieved by the award, Ditchaba launched the present application. The application is opposed by the third respondent. The application was launched out of the prescribed time period. Condonation was sought for that and other procedural lapses. Such was not opposed. As such condonation was granted without further ado, when this application was heard.

Grounds of Review

[6] At a very general level, the applicant contended that the arbitrator committed a gross irregularity and acted as an unreasonable decision maker in arriving at a decision that no other reasonable decision maker would have arrived at. Further, it was contended that the arbitrator ignored certain evidence and misconstrued evidence of certain witnesses. No further grounds were added in the supplementary affidavit.

Evaluation

[7] To a large degree, the gripe of Ditchaba was that the sanction imposed by the third respondent is unfair. However, the substantive issue was recorded as being that Ditchaba was charged for a particular offence and dismissed for a different offence. This, in my view, is effectively a procedural challenge as opposed to a substantive challenge. The principle in *Fidelity Cash Management Service v CCMA and others*[2] is simply that an employer is not permitted to justify the fairness of a dismissal using a reason different from the one it used to dismiss. Thus, the principle does not find application in this matter. Ditchaba was dismissed for deliberately producing scrap. The third respondent once challenged to demonstrate the fairness of the dismissal, it used the same reason it used to dismiss Ditchaba. The procedural fairness was not at issue at arbitration. To demonstrate that the gripe of Ditchaba was the harshness of the sanction, at his internal appeal he raised it as a basis. Therefore, Ditchaba was well aware, even at that time, that he was dismissed for deliberate – which, in my view, only goes to the state of mind as opposed to being a charge – production of scrap. Fact that he produced scrap was beyond dispute.

[8] Therefore, the only consideration in this matter is whether the sanction of the third respondent was fair or not. When it comes to sanction, a commissioner cannot defer to the sanction imposed by the employer, he or she must decide whether the sanction as imposed by the employer is fair considering all the circumstances. He or she is not at large to interfere with the sanction of the employer. In casu, the second respondent in correctly upholding the sanction of the employer, was convinced that the misconduct was of a serious nature and that Ditchaba did not show any remorse. Besides, as Mr Williams found at the internal appeal, the misconduct is coloured with misrepresentation and dishonesty. There was no explanation as to why wrong measurements were provided. The only inference to be

drawn is that Ditchaba was indeed attempting to hide the fact that he produced scrap rolls.

[9] For all the above reasons, the application must fail.

[10] In the results I make the following order:

Order

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

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate F Le Roux

Instructed by: Gray

Moodliar Attorneys, Port Elizabeth.

For the third Respondent: Advocate M Grobblers

Instructed by: Van

Zyl's Inc, Port Elizabeth.

[1] An ex tempore judgment was handed down by my sister, thus this Court was unable to observe what the reasons of the order reviewing and set aside the favourable award was. The judgment was not transcribed.

[2]

[2008] 3 BLLR 197 (LAC)

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