

SOUTH AFRICA / JUDGMENT

San Contracting Services (Pty) Ltd v Kganyago and Others (JR2720/13) [2016] ZALCJHB 476 (27 May 2016) [2016] ZALCJHB 476

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR2720/13

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no JR 2720/13

In the matter between

SAN CONTRACTING SERVICES

(PTY) LTD

Applicant

and

FRANCIS MAAKE KGANYAGO

COMMISSION FOR CONCILIATION

MEDIATION AND

ARBITRATION

First Respondent

Second respondent

AMCU

obo LS MALUNGANI

Third

Respondent

Heard:

26 May 2016

Delivered:

27 May 2016

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator). In his award, the arbitrator found that the third respondent (the employee) had been unfairly dismissed. He did so on the basis that while the employee had committed the act of misconduct with which he had been charged (an assault on a co-employee) the sanction of dismissal was too harsh in the circumstances. That conclusion was reached, as will appear below, largely on the basis that the arbitrator considered that the employee had been provoked.
- [2] The basis for the review is narrow. The applicant submits that the arbitrator misdirected himself in concluding that provocation served as a mitigating factor, one that rendered the penalty of dismissal overly harsh. The applicant submits that the consequence of that misdirection is that the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the available evidence.
- [3] The factual background is contained in the award, and I do not intend to repeat it for present purposes. It is sufficient to state that after an altercation in the shift supervisor's office, the employee was dismissed for assaulting one Benedict, who in turn was given a final written warning for using vulgar language.
- [4] That part of the award that discloses the arbitrator's reasoning reads as follows:
- [30] By pleading that he was provoked by Benedict, the applicant is conceding that he had assaulted Benedict. With that statement, it cannot be said Benedict was the aggressor. Therefore, under the circumstances, I'm satisfied that the applicant has assaulted Benedict. It is therefore my finding that the respondent has a valid reason to dismiss the applicant. Assault of a fellow employee is regarded as a serious offence that can render the employment relationship in tolerable....
- [32] Now I must determine whether the sanction of dismissal imposed on the applicant was fair or not. As I have already pointed out in paragraph 29 above, that Benedict is younger than the applicant, for Benedict to call the applicant with his mother's private parts was a serious disrespect which could not be condoned. That in my view could have provoked the applicant to assault Benedict. In my view the provocation was so severe to the extent that it caused the applicant to lose his temper. Benedict was found guilty of having used vulgar language. The respondents should have considered the provocation of the applicant as a mitigating factor.
- [33] Therefore under the circumstances, the sanction imposed on the applicant induces a sense of shocking taking into consideration the words which Benedict has acted towards the applicant. In my view the sanction of dismissal was too harsh and stand to be interfered with. The applicant should have been issued with a final written warning.

[34] Assault of a fellow employee is a serious offence. The applicant has testified that he was having a good working relationship with Benedict and was not challenged. This assault was a once off incident. Therefore in my view they can still work together in

harmony and the employment relationship has not been rendered intolerable. In my view a final written warning is the appropriate

sanction under the circumstances.

[5] The arbitrator went on, as I have indicated, to find that the sanction of dismissal was harsh. He ordered the respondent to reinstate the applicant to his original position on the same terms and conditions, but without back pay. Further, he directed that the applicant be issued with a final written warning valid for a period of 12 months.

[6] The legal principles to be applied all well-established. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC), the Constitutional Court confirmed that when arbitrators consider the fairness of dismissal as a sanction, they must exercise a value judgement within the framework established by the LRA. What is required is that a commissioner apply his or her

mind carefully and thoroughly to all of the relevant factors and ultimately to the question of the appropriateness of the sanction.

The court specifically acknowledged that there would be cases where decision-makers acting reasonably may reach different conclusions,

but noted that this was the nature of the decision-making power afforded commissioners by the Labour Relations Act.

[7] Insofar as the applicant relies on the arbitrator's findings in paragraph [30] of his award to the effect that it could not be said that Benedict was the aggressor and that the applicant had a valid reason to dismiss the employee to support its contention that the arbitrator's finding was unreasonable, these findings must necessarily be appreciated in context. It is clear from what follows that the arbitrator was not saying that Benedict was not guilty of any provocation, nor was he saying that the employee's

dismissal was justified. The context is one of a consideration of the existence of misconduct, rather than an appropriate sanction for any misconduct found to be established. All that the arbitrator is saying is that Benedict, in a physical sense, was not the aggressor and that ordinarily, assault is a valid reason to dismiss. The arbitrator, as he was obliged to do, separately considered the issue of sanction and here, he was entitled to take into account (as he did) any provocation that may lead to the assault and all other relevant circumstances. The latter included the fact that Benedict was younger and that the words he had used constituted an act of serious disrespect which could have provoked the applicant to assault Benedict. In short, the commissioner had to balance the need to protect the applicant from harsh disciplinary action on the one hand and the need for efficient operation of the applicant's

business and its right to satisfactory conduct from the applicant. In the latter the facts and circumstances in the present case, it cannot be said, in my view, that the conclusion reached by the arbitrator that dismissal was not fair is a decision that falls outside of the band of decisions to which reasonable decision-makers could come on the available material.

- [8] To the extent that the applicant contends that the factual finding made by the arbitrator in relation to the existence of any provocation was unreasonable, the employee's evidence was that he had been provoked by Benedict swearing at him. It is common cause that Benedict was found guilty of using vulgar language toward the employee. Benedict's evidence was that he swore at the employee in retaliation for what the employee had said to him. The evidence does not clearly establish who initiated the verbal exchange, it does not preclude a finding to the effect that Benedict's words directed toward the employee provoked the assault. The arbitrator's finding is not unreasonable.
- [9] Finally, it should be emphasised that the test in the present instance is not what the court considers to be an appropriate penalty in the circumstances. The Sidumo rule affords arbitrators considerable latitude in relation to the determination of an appropriate sanction, with the consequence that it will not be often that this court is entitled to interfere. That is the purpose underlying the statutory model of expeditious dispute resolution – that dismissal disputes ought to be resolved in what might be described as a rough and ready process with a limited right of recourse against the outcome.

For the above reasons, make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. P Kirstein, instructed by AJ Stone Attorneys

For the third respondent: Union official

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