



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

NOT REPORTABLE

Not of interest to other judges

Case no: JR 2061/2010

In the matter between:

**CULLINAN DIAMOND MINE (PTY)
LTD**

Applicant

and

S S MOLAPO

First Respondent

CCMA

Second Respondent

JOHN MASONDO

Third Respondent

Heard: 05 February 2013

Delivered: 08 February 2013

Summary: Review of an award in instances where the Arbitrator is alleged to have ignorud material and relevant evidence and factors.

JUDGMENT

MOSHOANA AJ

Introduction

- [1] This is an application to review and set aside an award issued by the first respondent under the auspices of the second respondent.
- [2] The second respondent found that the dismissal of the third respondent Masondo was procedurally fair and substantively unfair. Whereafter he ordered the applicant to reinstate the third respondent on the same terms and conditions that existed prior to his dismissal. On 26 March 2006, he made an order to restore benefits and to pay the third respondent back pay.

Background facts

- [3] The third respondent was employed as an artisan. He was booked off sick from 29 October to 4 November 2009. On 5 November 2009, he was due to report for duty at 06h00 am. He reported for duty at 10h42. He testified at the arbitration that he went to a Pharmacy to collect his medication. On his return, he completed a form to the effect that he was there for the full day. His supervisor allegedly advised him to change the form on two occasions but to no avail. He disputed this advice. On 10 November 2009, his supervisor, Mr Horn advised payroll to dock from his salary 5 hours pay.
- [4] On 23 November 2009, the third respondent received a notification with allegations of misconduct. He was charged with fraud for booking the full shift, absent without permission, alternatively, poor time keeping in that he entered the mine at 11:20 instead of 06:00 and leaving an hour before time. He was found guilty and dismissed. Aggrieved thereby, he referred a dispute to the second respondent. The first respondent arbitrated the dispute and found in his favour. The applicant was aggrieved and launched this application.

Evaluation

- [5] This being a review application, this court shall be guided by the test as developed in the *Sidumo and Another v Rustenburg Platinum Mines Ltd* judgment.¹ The test requires no repetition in this judgment. It is by now well known in the labour law community. The applicant's complaint is essentially that the first respondent made findings not supported by evidence adduced and failed to apply his mind to the evidence presented before him. He failed to consider the balance of probabilities and to apply his mind to the probabilities. He failed to consider corrective discipline. He erred in reinstating the third respondent.
- [6] On the facts properly placed before the second respondent, it appeared to have been disputed that there exists a norm that when an employee attend to collect medication such an employee would be deemed to have been there for full day. A further dispute was whether Horn asked the third respondent to correct the forms. On the evidence before him, he found that the probabilities are evenly balanced. On the strength of that, he found that a party with an onus has failed to discharge the onus. On the issue of absence without permission, he found that since there was a justification the dismissal was unfair.
- [7] In the light of the above, this court is unable to fault the first respondent on his finding of fraud. The evidence suggested that the norm support the representation made by the third respondent. In the circumstances, fraud requires an element of intention. I do not believe that with the norm in place, it would have been the intention of the third respondent to misrepresent facts. However, with regard to the finding that since the third respondent had a reasonable explanation that he is not guilty of the misconduct alleged. The finding is at odds with the evidence that the third respondent's absence was without permission. The evidence is overwhelming that the third respondent needed permission. The fact that he had a justification to be absent does not detract from the fact that his absence was without permission. Had he made a finding that the third

¹ (2007) 28 ILJ 2405 (CC).

respondent was absent without permission, which he should have in the light of the evidence, have had regard to the final written warning in considering whether a sanction of dismissal was appropriate or not. By not doing that, he committed an irregularity which vitiates his award.

[8] In the light of the above, it is my view that the award of the first respondent is reviewable. Having found that I believe that this court is in a better position to substitute the award. I do not believe that dismissing the third respondent for being absent for five hours was appropriate. The fact that he understood the norm to apply in a particular manner diminishes his blameworthiness. Also the fact that his salary was docked suggests that he was punished for his conduct and to dismiss him also was harsh. I do not accept that the relief of reinstatement would have been out of kilter even in the circumstances where the first respondent would have considered that there was no permission. However, what concerns me is a factor that the first respondent seems to have turned a blind eye on. The fact that there was evidence suggesting bad blood between the third respondent and his supervisor Mr Horn is a relevant factor when it comes to a relief.² It was a critical factor to have been taken into account even if not raised by any of the parties.

[9] It renders, in my view, reinstatement impracticable. It was never contended that once reinstated, the third respondent would not work with Mr Horn anymore. Although the first respondent found that the better version on the allegation of correction of the form is that of the third respondent, it must follow that it will make it impossible for the two to work together. It will be difficult it seems for Horn to place any trust on the third respondent given the circumstances surrounding the dismissal, which clearly renders continued employment intolerable in the light of the operative final written warning as well.

[10] The LAC recently quoted with approval the decision of this court in *Southern Sun Hotel Interest (Pty) Ltd v CCMA and Others*³ in the

² See *Maepa v CCMA and Others* [2008] 8 BLLR 723 (LAC).

³ [2009] 11 BLLR 1128 (LC).

reported judgment of *Herholdt v Nedbank Limited*.⁴ In essence, the LAC approved the sentiment that if a commissioner fails to take into account material evidence or has regard to irrelevant evidence commits misconduct and or gross irregularity. I find the second respondent to have done that in ignoring a relevant factor when he ordered reinstatement.

Order

- [11] In the results, I make the following order:
- [12] The award issued by the second respondent is hereby reviewed and set aside and is replaced with the order below.
- [13] The dismissal of the third respondent is procedurally fair but substantively unfair.
- [14] The applicant is ordered to pay the third respondent compensation in the amount equivalent to 12 months salary applicable at the time of dismissal less the statutory deductions applicable.
- [15] Each party to pay its own costs.

Moshoana, AJ

Acting Judge of the Labour Court of South Africa

⁴ [2012] 9 BLLR 857 (LAC) at para 33.

Appearances:

For the Applicant: Advocate C Prinsloo

Instructed by: Helena Strijdom Attorneys, Meyerspark

For the Third Respondent: Advocate J Oschman

Instructed by: GVDB Inc, Pretoria

LABOUR COURT