REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR381/12

In the matter between:

SATAWU obo RAMALEPE MATLATSO **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

NORMAN MBELENGWA N.O **Second Respondent**

ISIKHONYANE CLEANING

SERVICES (PTY) LTD **Third Respondent**

Heard: **16 May 2013**

Delivered: **30 July 2013**

Summary: Application to review arbitration award. The enquiry into fairness of dismissal broader than the enquiry about whether an employee is guilty of an offence. The enquiry involves investigating also the sanction of dismissal. The test to determine breakdown in trust. Dismissal if no breakdown in relationship shown by the employer, the sanction of dismissal a harsh sentence.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicants seek to review and set aside an arbitration award made by the first respondent under case number GAJB 25033/11 dated 12 December 2011, in terms of which the dismissal of the individual applicant was found to have been fair. The applicant who is represented by the union will for ease of reference be referred to as "the employee."

The background facts

[2] The brief background facts to this matter is that the employee who was employed by the respondent in a supervisory position was dismissed for being absent from work without authorisation.

[3] The employee denied during the arbitration hearing that she was absent without authorisation and contended that she was absent

because she was part of the employees who participated in the strike which took place on the August to 31 August 2011.

[4] The employee testified, during the arbitration hearing, that on the first day of the strike, 8 August 2011, she enquired from her manager as to what was to happen to them in relation to the strike. The manager could not answer her but later on, when she approached the same manger, she told her that they were waiting for the area manager. She then contacted a person known as Anna, one of the employees of the first respondent. She informed Anna that she had decided to join the strike. She further testified that prior to this, the employees were addressed by the managing director who addressed them regarding their role during the strike action. She further testified that three other supervisors also participated in the strike.

[5] The managing director of the first respondent testified, during the arbitration hearing, that he convened a meeting with all the supervisors as soon as the wage negotiations failed and the union indicated its intention of embarking on a strike action. He informed the supervisors that because they were not part of the bargaining unit they were expected to report for duty even during the strike.

[6] The managing director further testified that, on arrival at the place where the employee was posted, he was informed by the head supervisor that the applicant had left the site. The first respondent contends that the applicant did not communicate her absence during the strike action to management.

The arbitration award

[7] It would appear from the reading of the arbitration award that the Commissioner identified the issue for determination to be whether the absence of the applicant from work was valid and justifiable. The Commissioner found that there was no evidence that the applicant participated in the strike or failed to attend work due to intimidation. It would seem that in as far as intimidation was concerned the Commissioner found that that it could not have happened because the site at which the applicant was posted was the safest.

[8] The Commissioner also found that it was common cause that the third respondent had convened a meeting with its supervisors prior to the commencement of the strike. She rejected the version of the employee that they were informed at a meeting that they were free to participate in the strike. He further found that the applicant used the strike as a scapegoat for the absence without authorisation.

The grounds of the view

[9] The applicant contends that the Commissioner committed gross irregularities and also that his arbitration award is one which no reasonable decision-maker could reach because he failed to deal with the issue of credibility. The applicant further contends that the Commissioner committed gross irregularities in that he upheld the dismissal even though the relationship between the parties had not broken down.

Evaluation

[10] In applying the reasonable decision-maker test as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[1] I find for the reasons set out below that the Commissioner's decision is reviewable.

[11] It is common cause that there was a national strike in the industry in which the third respondent operates in. The employee, who is part of the supervisory team, claims to have informed one of the managers that she would be joining the strike as a member of the SATAWU. There is a dispute between the parties as to whether the person to whom the employee claims to have reported to about her joining the strike is manager.

[12] It is common cause that the employee was absent from work for the duration of the strike. As indicated earlier, the employee contends that she was entitled to participate in the strike and that is the reason for being absent from work during that period. The third respondent on the other hand contends that the employee was not entitled to participate in the strike as she was part of the management team which does not form part of the bargaining unit involved in the wage dispute.

[13] It is apparent from the reading of the arbitration award that the Commissioner focused his mind only on the narrow question of whether the employee was guilty of absence without authorisation. In adopting this narrow approach, the Commissioner failed in his duty of

[1] (2007) 12 BLLR 1098 (CC) at para 110.

determining the fairness of the dismissal of the employee which requires a much broader inquiry than a simple determination of guilt.

[14] As already stated, it is common cause that the employee was absent from work. That being the case, she had the duty to show that she had the authority to be absent from work due to the strike. It was, therefore, her duty to call Anna to confirm that she had given her permission to be absent from work. There is no clarity as to whether Anna was a manger who had the necessary authority to approve of the absence from work of the employee. What seems clear is that the employee was not part of the bargaining unit and that they were, as supervisors, told that they did not qualify to participate in the strike because they fell outside the bargaining unit. Although she contends that she was entitled to strike, she does not deal with the issue of whether she is part of the bargaining unit that had called the strike. In this respect, I am of the view that the Commissioner cannot be faulted for finding that the employee had been absent without authority for the duration of the strike and that she was not entitled to participate in strike action involving issues that falls outside the bargaining unit.

[15] There is, however, one aspect of the enquiry which the Commissioner failed to conduct in this matter, which is whether the relationship between the parties had irretrievably broken down as a result of the misconduct, warranting the sanction of dismissal. In this respect, the Commissioner seems to have failed to appreciate that there was no evidence of breakdown in the relationship between the parties. In fact,

the evidence before him indicated very clearly that the relationship between the parties had not broken down due to the misconduct.

[16] In *Edcon Ltd v Pillemer NO and Another*,[2] the Supreme Court of Appeal in setting aside the decision of the Labour Appeal Court,[3] and upholding the decision of the Commissioner of the CCMA, found that in the absence of evidence showing the alleged breakdown in the trust, the dismissal was unfair. In upholding the decision of the Commissioner, Mlambo JA as he then was had the following to say:

> 'In my view, Pillemer's finding that Edcon let no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly filed to be unfair. She cannot be faulted on any basis and had conclusion is clearly rationally connected to the reasons she gave, based on the material available to her.'[4]

[17] The test to apply in determining whether the trust relationship had broken down is set out in *SACCAWU v OK Bazaars Kimberley*,[5] as follows:

> 'The real test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable.
>
> The question whether the trust relationship between employee and employer has in fact broken down in a particular case is a question of

[2] [2010] 1 BLLR 1 (SCA); (2009) 30 ILJ 2642 (SCA).
[3] The decision of the Labour Appeal Court is reported as *Edcon Ltd v Pillemer NO and Others* (2008) 29 ILJ 614 (LAC).
[4] *Edcon*, SCA decision, at para 23.
[5] [1998] 7 BALR 887 (CCMA) at 895.

fact and not a question of law. One must scrutinise the evidence on record carefully ...'

[18] It is clear from the above that in order to succeed in discharging its onus of showing that a dismissal was an appropriate sanction the employer has to show by evidence, *inter alia* that the trust relationship between it and the employee has as result of the impact of offence committed by the employee broken down. In other words, as put by Smit N in an article in *De Jure* Law Journal,[6] "... an employer can dismiss fairly if it can prove that there was a transgression, the nature as well as the effect or impact of which was such as to make the sanction of dismissal appropriate."

[19] In the written submission made during the arbitration proceedings the third respondent had the following to say:

'6.7.1 During the period of the Applicant being absent another Supervisor by the name of Thelma Nong was also absent. She was also called to attend a disciplinary enquiry for the same charges and was demoted to an ordinarily cleaner. It has been the Respondent's intention to make the same offer to the Applicant, but she failed to attend the appeal meeting that had been set down for 20 November 2011.…'

[20] And more importantly the third respondent further stated the following in its submission:

[6] Smit, N, "How do you determine a fair sanction? *Dismissal as appropriate sanction in cases of dismissal for (mis)conduct*" [2011] *DE JURE* 5.

> 'Further to the above the Respondent is even willing to offer the Applicant a position as a cleaner at a cleaner's salary but we will not lose the years of service.'

[21] In addition, to the above the Commissioner failed to have regard to the fact that the third respondent did not regard the offence committed by the employee as being serious enough to warrant termination of the employment relationship. In this respect, the third respondent's witness revealed during cross examination that there was another supervisor who was absent during the strike period who was not dismissed.

[22] For the above reason, I find that had the Commissioner applied his mind to the facts before him, he ought to have found that the dismissal was in appropriate as the relationship between the parties had not broken down and he would have further taken into account the period of service that the employee had with the third respondent.

[23] It would seem to me that the appropriate approach which the Commissioner ought to have adopted based on the facts before him was to find that the employee was guilty of absence without authorisation but that the sanction of dismissal was inappropriate. The sanction of dismissal was inappropriate because the third respondent did not regard offence as being serious enough to warrant a dismissal and also that the trust relationship between the parties had not broken down. The reasonable decision in the circumstance of this case would have been to order reinstatement with a final written warning.

[24] In my view, it would be inappropriate to allow the costs to follow the results in the circumstance where evidence indicates that the parties are still in a relationship.

[25] In the premises, the following order is made:

1. The arbitration award made by the first respondent under case number GAJB 25033/11 dated 12 December 2011 is reviewed and set aside.

2. The arbitration award is substituted with the following order:

"1. The dismissal of the applicant, Ms Ramalepe Matlatso, was substantively unfair.

2. The respondent is ordered to reinstate the applicant without loss of benefit.

3. The applicant is to be issued with a final written warning."

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S Mabaso of Mabaso Attorneys

For the Respondent: Mr S Snyman of Snyman Attorneys