



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 2170/11

In the matter between:

SASOL MINING (PTY) LTD

Applicant

and

CCMA

First Respondent

COMMISSIONER WILFRED NKOENG N.O

Second Respondent

NUPDW obo SIFISO CHILIZA

Third Respondent

Heard: 20 May 2015

Delivered: 26 May 2015

Summary: Safety of employees in the mining industry cannot be compromised. An award finding the dismissal of an employee who has breached part of a safety procedure unfair is unreasonable.

JUDGMENT

Lallie J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent (“the Commissioner”) in which he found the third respondent’s dismissal by the applicant substantively unfair and ordered his reinstatement with effect from 1 August 2011, and the period between the date of his dismissal and 1 July 2011 to be regarded as suspension without pay. The application is opposed by the third respondent.

Background facts

- [2] The applicant conducts business in mining. It employed the individual third respondent (“third respondent”) as an artisan, who, amongst his responsibilities had to ensure the safety of employees in his environment. His responsibilities included locking a machine or conveyor belt electrically and physically by following a procedure known in the mining industry is the lock out. Its main purpose is to ensure that a machine or conveyor belt will not cause harm or fatally injure employees or damage to the applicant’s property. On 21 January 2011 the third respondent breached the lockout procedure. The applicant submitted that the manner in which the third respondent breached the procedure exposed its employees to the risk of injury and fatality and its property to the risk of damage. It further caused the applicant to suffer financial prejudice in lost production as it made production impossible. The third respondent submitted that he breached the procedure by failing to remove chain locks and allow the conveyor belt to go back to production and not handing over the shift to his colleague before going home. He conceded that his conduct cost the applicant loss of production. Under cross examination he conceded that failure to follow the lockout procedure constituted fatal behaviour in the applicant’s policy.

Grounds for review

- [3] The applicant submitted that the second respondent committed gross misconduct by reinstating the third respondent although he had made a concession of having committed dismissible misconduct. He disregarded the evidence that the lockout rule was reasonable and applied consistently by the applicant. His decision that the sanction was too harsh was not based on

evidence. He committed gross misconduct by reinstating the third respondent when the relationship of trust had been irreparably broken. Opposing the application the third respondent submitted that there were no valid grounds to review the arbitration award as the criticism levelled against the award by the applicant was unfounded. No evidence of the breakdown of the trust relationship was led. It submitted that the Commissioner correctly exercised the power vested in him by the Labour Relations Act 66 of 1995 (“the LRA”) in determining the appropriate sanction particularly because no evidence was led to the effect that the breach of the lockout procedure was punishable by dismissal.

The arbitration award

- [4] The Commissioner found that the probabilities were that the applicant did not follow the lockout procedure on 21 January 2011. He took into account that the third respondent was the only artisan on duty in his shift as the second one had been instructed to work night shift. He criticised the applicant for not applying progressive discipline or considering sanction less than dismissal before dismissing the third respondent. He found the sanction of dismissal too harsh and concluded that the third respondent’s dismissal was substantively unfair. He substituted it with an order reinstating him with effect from 1 August 2011 and ordered the period between the date of his dismissal and the date of reinstatement to be regarded as suspension without pay.

Evaluation

- [5] This court may interfere with an arbitration award of a CCMA Commissioner if the decision is one a reasonable decision-maker could not reach on the facts before him or her. In this regard see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). In determining the reasonableness of an award the reviewing court needs to consider the totality of the evidence before the arbitrator, ascertain whether the arbitrator considered the principal issue, evaluated the facts presented and came to a conclusion that is reasonable. See *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and*

Others [2014] 1 BLLR 20 (LAC) para [16]. In *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) para 13 the court found that the “*Sidumo* test” will justify the setting aside of an award on review if the decision is “entirely disconnected with the evidence” or is “unsupported by any evidence” and involves “speculation by the commissioner”.

- [6] When the evidence before the Commissioner is considered in its totality, it reflects that the third respondent’s misconduct is considered as fatal behaviour by the applicant. The third respondent conceded having breached the lockout procedure by not complying with it in full. However, the Commissioner’s finding that probabilities are that he breached it is not qualified. Safety of employees at the workplace is paramount. It cannot be compromised. An employer cannot be expected to wait until an employee is maimed or has lost his or her life, before taking decisive action against an employee who has exposed fellow employees to danger. Procedures which are intended to prevent injury and fatality particularly in the mining industry need to be complied with properly because a lapse has disastrous consequences. In exercising his power to determine the fairness of the third respondent’s dismissal, the Commissioner had to decide the appropriateness of the sanction of dismissal. His decision that dismissal was inappropriate disregards the value of the lives and safety of the employees the third respondent had the responsibility of protecting. It is not supported by the evidence before him. It constitutes a decision a reasonable decision-maker could not reach on the facts before him and stands to be reviewed and set aside.
- [7] The applicant sought an order substituting the arbitration award. The applicant filed a complete record of the arbitration proceedings. It is common cause that the third respondent breached procedure which is designed to protect the safety of the applicant’s employees and property. He claimed to have forgotten to perform part of the procedure. He also stated that he had no time to perform the procedure in full. His evidence that he was the only artisan on duty on the shift is not supported by evidence which proves the presence of another artisan in the same shift. Exposing employees to the risk of injury and

fatality is inexcusable when one is charged with the responsibility to protect them. The third respondent's conduct also exposed the applicant's property to the risk of damage and caused lost production. To appreciate the gravity of the misconduct which led to the third respondent's dismissal and the appropriate sanction, one needs to take a cue from this Court's attitude towards theft at the workplace and unauthorised possession of employers' property. It is not tolerated and justifies dismissal of employees with years of unblemished service. The purpose of the approach is to prevent closures owing to financial loss caused by pilferage and theft with the concomitant job losses. Safety of employees deserves more protection. In the circumstances the third respondent's dismissal was substantively fair.

[8] The applicant sought a costs order against the respondent. I am not convinced that the order should be granted as the respondent opposed this review application armed with an arbitration award in his favour. His conduct of opposing the application was not unreasonable.

[9] In the premises the following order is made:

9.1 The arbitration award issued by the second respondent under case number MP 4540 – 11 and dated 10 August 2011 is reviewed and set aside and substituted with the following:

“The dismissal of Sifiso Chiliza by the applicant was fair.”

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr M J Ramathe of Ramathe M J Inc

For the Respondent: Mr I Shongwe

Instructed by: TMN Kgomo and Associates Inc