REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2189/13

In the matter between:

GEGI JOSEPH SIBEKO	**Applicant**
and	
XSTRATA COAL SOUTH AFRICA	**First Respondent**
GLENCORE HOLDINGS (PTY) LTD	**Second Respondent**
WILFRED NOKA NKGOENG N.O.	**Third Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	**Fourth Respondent**

Delivered: 4 May 2016

JUDGMENT- APPLICATION FOR LEAVE TO APPEAL

HARDIE, AJ

[1] This matter came to my attention on 6 April 2016 as I was about to depart for Europe. I was therefore only able to give it my full attention

upon my return on 1 May 2016. The delay in giving this judgment is regretted.

[2] The Application for Leave to Appeal was filed at Court on 26 February 2016 in which leave is sought to appeal my judgment delivered on 3 February 2016. In this judgment I set aside the Award given by the Third Respondent on 10 September 2013 and substituted the Award with an order that the Applicant is reinstated retrospectively and that such retrospectivity be limited to 15 months. No order as to costs was made.

[3] The first ground of appeal is that I erred in applying the reasonableness test to the facts of the case which concerned the exercise of discretion in terms of Section 193 of the Labour Relations Act no 66 of 1995 ("LRA") to award compensation. In my judgment I make the finding that the Commissioner committed an error of law in awarding compensation to the Applicant, and not awarding the primary remedy of reinstatement.[1] As such, it is **also** (my underlining) a decision that a reasonable arbitrator could not have reached.[2] I therefore did not apply a reasonableness test to the exercise of a discretion by the Commissioner. I rather found that in law, he was simply not entitled to exercise a discretion to award compensation, based on the Applicant's conduct during the arbitration proceedings.

[1] Paragraph 22.

[2] Paragraph 23.

[4] As far as the further grounds of appeal are concerned, I am of the opinion that they suffer the same fate as the first ground of appeal dealt with above. Firstly, I understand the First and Second Respondents to argue that I erred in refusing to find that the Applicant's conduct during the arbitration proceedings, rendered his further employment with the First and/or Second Respondent intolerable. There is no basis in law for this argument. The judgment in ***Maepe v CCMA and Another***[3] initially relied upon by the First and Second Respondents is clearly distinguishable on the facts as illustrated in my judgment.[4] The First and Second Respondents do not refer me to any further authority on this point. I am therefore of the view that another Court will not reasonably come to a different conclusion.

[5] I am also of the view that another Court will not reasonably come to a different conclusion on the remaining grounds of appeal. Significantly, the Commissioner did not refer to any other factors relating to the Applicant's conduct, other than his conduct at the arbitration proceedings, in coming to the conclusion that the Applicant's employment relationship with First and Second Respondents has become intolerable. The only conduct which the First and Second Respondents refer me to in this regard, is the Applicant throwing his earmuffs on the floor when instructed by De Wet to wear them. This conduct must be considered in the light of the finding by the Commissioner that it was not competent for De Wet to order the

[3] [2008] 8 BLLR 723 (LAC).

[4] Paragraphs 8 to 12 of my judgment.

Applicant to wear the ear muffs as Applicant was declared medically unfit.[5] The order to wear the ear muffs was therefore unlawful and the Commissioner found that the dismissal was substantively unfair. I therefore can find no justification in finding, based on this fact alone, that the Applicant's employment relationship with First and Second Respondents has become intolerable.

THE LEARNED JUDGE EXERCISED HIS DISCRETION ERRONEOUSLY

[6] In the First and Second Respondents' Written Submissions it is contended that I exercised my discretion erroneously by ordering that the Applicant must be reinstated retrospectively for period of 15 months. This is not contained in the grounds of appeal and I am therefore not constrained to entertain same. However, it is trite law that the Court has a discretion regarding the extent of the retrospectivity of the reinstatement. There is no allegation to the effect that the Applicant was "to blame for his dismissal" whatever that means, or that he delayed in pursuing his referral to the CCMA or the review application to this Court. The Applicant has from the outset sought reinstatement and has persisted with this prayer in his review application. The only reasonable possible inference to be made is that the Applicant has been unemployed and therefore without income since the date of his dismissal. I am therefore of the view that another Court will not reasonably come to a different conclusion.

[7] I therefore make the following order:

1. The Application for Leave to Appeal is dismissed;

[5] Paragraph 69 of the Award.

2. There is no order as to costs.

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Hardie, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Ms A Roestorf of Legal Aid South Africa,

For the First Respondent: Mr D Cithi of Mervyn Taback Inc