



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1358/13

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

GPSSBC

First Respondent

MASIPA N.O.

Second Respondent

PSA obo P NKHONA

Third Respondent

THOMAS PONO NKHONA

Fourth Respondent

Heard: 27 July 2016

Delivered: 23 August 2016

Summary: Review – misconduct – findings not unreasonable.

JUDGMENT

STEENKAMP J

Introduction

[1] Thomas Pono Nkhona¹ is a refugee reception officer working for the Department of Home Affairs at its Durban refugee centre. He manually extended – or was about to extend -- temporary asylum seekers' permits for three Chinese nationals. He was dismissed. He referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council (GPSSBC).² Conciliation failed. The arbitrator, Mokgere Masipa³, found that his dismissal was unfair. She ordered the Department to reinstate the employee. The Department seeks to review the award.

Background facts

[2] The employee was charged with three allegations of misconduct:

“1. It is alleged that you committed an act of gross negligence or alternatively gross dishonesty, in that on or about⁴ 23 May 2011, at or near⁵ Durban Refugee Centre, you without following prescribed departmental procedures or obtaining authorisation, manually extended the asylum seeker temporary permits of the following Chinese nationals:

- (i) Xiao Qiang Lin;
- (ii) Jianwu Chen; and
- (iii) Chaohai Chen.

2. It is alleged that you committed an act of gross dishonesty, in that on or about [sic] 23 May 2011, at or near [sic] Durban Refugee Centre, you, against prescribed departmental procedures extended the temporary asylum seeker permit of Chaohai Chen whilst his permit had already expired.

3. It is alleged that you committed an act of gross negligence or alternatively gross dishonesty, in that on or about 23 May 2011, at or near Durban Refugee Centre, you, against the prescribed departmental

¹ The employee cited as the fourth respondent.

² The first respondent.

³ The second respondent.

⁴ [sic]. It is common cause that the incident happened on 23 May 2011.

⁵ Ditto. It is common cause that the incident happened at the Durban refugee centre.

procedures extended the temporary asylum seeker permits of the following Chinese nationals in their absence:

- (i) Xiao Qiang Lin;
- (ii) Jianwu Chen; and
- (iii) Chaohai Chen.

[3] All three allegations follow from the same incident. The extension of all three permits has the following two complaints in common: they were extended manually contrary to procedures and without authorisation; and the employee did it in their absence. In the case of Chaohai Chen, there is the further complaint that the employee extended his permit after it had expired.

The evidence

- [4] At the arbitration, the Department led the evidence of the chairman of the disciplinary hearing, Ronald Lancelot Jabu Mgobozi; the refugee reception office manager, Alec Siyabonga Madiba; a security officer, Lucky Sifiso Green; and a senior manager, Hester Sophia Hanekom. The employee, Mr Nkhona, testified and did not call any other witnesses.
- [5] Madiba was the most important eyewitness. He testified that the employee was meant to be seeing new applicants for permits on the day in question. Madiba came into his office where there were three other applicants (not the Chinese nationals) present. Instead of dealing with them, the employee was manually extending the permits of the three Chinese nationals by rubber stamping them and filling in new dates of expiry. Madiba asked him what he was doing. He apologised and tried to hide the permits. Madiba took them away and asked Green to witness the incident. They went to look for the three Chinese applicants but couldn't find them.
- [6] Madiba testified that the employee was not meant to work with permit applications on the day; the three applicants were meant to be present but were not; and one of the permits had already expired.
- [7] The employee, Nkhona, acknowledged that he extended one of the permits, that of Chaohai Chen. He explained that, when he received the

permits, the reception centre had already affixed a stamp with the Republic's coat of arms to them. That was the green light for the permits to be extended.

- [8] With regard to Chaohai Chen, he testified that he had already extended his permit on 9 May 2011. That is borne out by a stamp on Chaohai Chen's permit that was handed in as evidence at the arbitration. That permit had first been extended by another officer, Nomonde Makhathini, on 17 November 2010; again on 9 February 2011; and on 9 May 2011 the employee extended it to 9 August 2011. Even though it had expired on 2 February, it had been extended on 9 February until 9 May when he had extended it again until 9 August 2011; and because it had a coat of arms on it, he assumed that it had been to the registry and that the asylum seeker had been given a grace period.
- [9] It appeared to be accepted by all the witnesses that, once the registry had affixed a stamp with the coat of arms to a permit, it could be assumed that it had been checked by registry. This was confirmed in a memorandum of April 2011.

The award

- [10] The arbitrator found the dismissal to be procedurally fair but substantively unfair.
- [11] In a comprehensive award spanning 23 pages, the arbitrator dealt in some detail with the evidence and arguments before her. She concluded that the Department had followed a fair procedure in disciplining the employee. However, it had not proven that the dismissal was fair.
- [12] In coming to this conclusion, the arbitrator took the following into account:
- 12.1 It was common cause that there was a workplace rule. But the Department could not prove that the employee had contravened the rule.
- 12.2 The 2009 memorandum containing a rule that manual extensions had to be authorised by a supervisor, had been superseded by the

2011 memo which required only the coat of arms affixed by the registry.

12.3 The employee had checked the permit of Jianwu Chen. The registry had affixed a coat of arms stamp to it. The employee was therefore authorised to extend it. He would have done so, but for Madiba's interruption.

12.4 While he had stamped the permit of Xiao Lin, he did not renew it by signing it because he realised that it did not have a coat of arms on it.

12.5 On the probabilities, the employee had already extended Chaohai Chen's permit on 9 May 2011 when it had a coat of arms on it.

12.6 She accepted that the employee dealt with the permits in the absence of two of the Chinese nationals at the time that Madiba and Green interrupted him. But she accepted that Chaohai Chen had been to the office on 9 May already, when the employee extended his permit. There was no need for him to be there on 23 May. And the employee's evidence that the other two had been there but had left, could not be gainsaid. Green conceded that asylum seekers would sometimes leave their permits at the centre and come back later to collect them.

[13] In the light of her findings on the evidence, the arbitrator concluded that the Department had not proven the misconduct and that, therefore, the dismissal was unfair. With regard to the appropriate remedy, she applied s 193 of the LRA and ordered the Department to reinstate him.

Review grounds

[14] Mr *Matyolo* submitted that the award was unreasonable as set out in *Sidumo*⁶; and that she did not weigh up the evidence as required in *Stellenbosch Farmers' Winery v Martell et cie.*⁷

⁶ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para 11.

⁷ 2003 (1) SA 11 (SCA).

Evaluation / Analysis

- [15] The applicant essentially took issue with three factual findings. I will deal with each one.
- [16] Firstly, Mr *Matyolo* argued that the employee needed authorisation to extend permits. He did not have authorisation and therefore he did contravene a workplace rule. But the arbitrator found on the evidence and on the probabilities that the 2009 memo had been superseded by the 2011 requirement of a coat of arms. That is not an unreasonable conclusion.
- [17] Secondly, the applicant took issue with the permit of Chaohai Chen that had expired. The arbitrator accepted the employee's explanation that he had already extended that permit on 9 May 2011, following on the earlier extension of 9 February; and that a grace period is allowed. The permit had a coat of arms stamp on it. In those circumstances, the employee assumed that he could extend it. That conclusion is not so unreasonable that no other arbitrator could have come to the same conclusion on the evidence before her.
- [18] Lastly, the applicant objected to the finding that the Department had not proven that the employee had issued the permits in the absence of the asylum seekers. Once the finding in respect of Chaohai Chen is accepted, that does not apply to his absence on 23 May. And with regard to the other two, the arbitrator carefully considered the evidence and concluded that neither Madiba nor Green could say with any certainty that they had not been there earlier. In fact, Green conceded that the fact that he could not find them when he went looking for them, did not necessarily mean that they hadn't been there earlier; and that there are instances where people leave their permits behind "and go away and come back some other time". The arbitrator's finding in this regard is not so unreasonable as to make it reviewable.

Conclusion

- [19] The arbitration award passes the test in *Sidumo* and in *Gold Fields*⁸.

⁸ *Gold Fields Mining (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

[20] Both parties asked for costs to follow the result. I see no reason to disagree.

Order

The application for review is dismissed with costs.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: X D Matyolo
Instructed by The State Attorney.

THIRD AND FOURTH
RESPONDENTS: Glen Kirby-Hirst
of MacGregor Erasmus attorneys.