
IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. J774/99

In the matter between:

Lebowa Platinum Mines Limited

APPLICANT

and

Commission for Conciliation

FIRST RESPONDENT

Mediation and Arbitration

SECOND RESPONDENT

Mashego, M L N.O.

THIRD RESPONDENT

Le Roux, M H J

JUDGEMENT

PIENAAR, A J

INTRODUCTION

1. This is a review in terms of section 145 of the Labour Relations Act No 66 of 1995, as amended.

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2. The Applicant, Lebowa Platinum Mines Limited, seeks to review the award of the Second Respondent, given under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration.
 3. The Third Respondent (Le Roux) is an ex-employee of the Applicant.
 4. The application for review is not opposed by any of the Respondents.
 5. The Applicant applied for condonation for its failure to comply with the 6-week period prescribed in the Act. This condonation is granted.

BACKGROUND

6. Le Roux was dismissed by the Applicant for desertion, which dismissal was set aside by the Second Respondent.
7. Le Roux was employed by the Applicant in a highly responsible position at its platinum mine in the Northern Province ("the mine"). Le Roux's position was also integral to attempts by the Applicant to ensure health and safety of persons at the Applicant's operation.
8. Le Roux failed to report for duty on 29 December 1997 after returning from leave. Although Le Roux denied that he had to report for duty on 29 December 1997, it was clear from the roster handed in at the arbitration proceedings, which was signed by Le Roux, that he had to report for duty on 29 December 1997.

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9. Le Roux did not personally advise the Applicant of his absence and allegedly sent a message via a co-employee (Stoltz) that he could not return due to an illness in the family, i.e. that of his wife's grandfather. This alleged message was never conveyed to the Applicant. Stoltz was however not called as a witness to support Le Roux's version.
10. Le Roux however called his wife as a witness to corroborate his telephone call to Stoltz. According to Le Roux's wife, she was present when the call was made and when Le Roux advised Stoltz that he could not come to work due to a death in the family and until after the funeral.
11. The death, however, only occurred on 11 January 1998, 5 days after Le Roux had reported back to the mine, to discover that he had in the meantime been dismissed.
12. Le Roux's wife however testified that her grandfather's illness did not necessitate Le Roux's absence from work.
13. During Le Roux's absence, employees of the Applicant visited the Le Roux's house in order to establish his whereabouts, without success.
14. It was the Applicant's case that Le Roux failed to make any attempt to establish from any person in authority whether the Applicant had received the alleged message from Stoltz, to explain his absence.
15. Mr Van der Merwe, the foreman to whom Le Roux reported, testified that he was on standby at the time and that Le Roux could have and should have contacted him at his house. Le Roux had in fact contacted him on an earlier occasion at his house when one of Le Roux's parents was ill.

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16. Le Roux returned to work on 6 January 1998.
17. According to Le Roux, he was advised by another employee, James Linch ("Linch"), on his return to the mine, that he had been dismissed.
18. Le Roux accepted the word of Linch and did not properly pursue this message from any other person in authority.
19. Accordingly to Ms Van der Merwe, a personnel clerk of the Applicant, Le Roux approached her (on his return) and simply told her that he had come to collect his papers. He furthermore advised her that he had obtained work in Carletonville, since it was closer to his family. Le Roux denied this version by Van der Merwe, but could not suggest any reason why Van der Merwe would fabricate such evidence.
20. According to the Applicant's policy on absenteeism, it treated unexplained absenteeism for a period of 6 days or more, as desertion. On an employee's return from such absenteeism, a formal disciplinary enquiry would normally be convened.
21. It is the Applicant's version that Le Roux was well aware of the rule and should have contacted his line supervision, which he failed to do.
22. Although Le Roux was a trade union member and had been assisted by a trade union representative in disciplinary matters in the past, he failed to pursue this avenue on the date of his return to work. He simply chose to accept the word of a fellow-employee and thereafter collected his documents from Ms Van der Merwe, a personnel clerk.

23. It appears from the above that Le Roux at no time made a concerted effort to report to the relevant authorities. Had he done so, the Applicant would have been able to institute the necessary enquiry in terms of its policy.

24. The Second Respondent found that the dismissal of Le Roux was both substantively and procedurally unfair and reinstated Le Roux from date of dismissal.

25. The basis of the Second Respondent's award appeared to be that:

25.1. Le Roux was unaware of the 6-day rule pertaining to absenteeism.

25.2. The Applicant failed to afford Le Roux a hearing on his return to work.

GROUNDINGS FOR REVIEW

26. According to the Applicant, its internal administrative arrangements with regard to absenteeism and desertion, in the absence of a notice to Le Roux, could never constitute dismissal.

27. Secondly, even if the Second Respondent was correct in finding that there was a dismissal, the substantive justification thereof was desertion.

28. The Applicant furthermore submitted that the findings and conclusion of the Second Respondent are utterly unsustainable on the evidence and that the award is not justifiable on the terms of the reasons given for it.

29. Lastly, the Applicant submitted that the Second Respondent committed a gross irregularity in that he failed to apply his mind to the very issue, which he was required to decide.

FINDING

30. It is my view that the desertion of an employee constitutes a repudiation of the contract of employment.

31. The breach of the contract does, in itself, not bring about a termination of the contract.

32. The termination requires an acceptance of the breach by the employer, which then amounts to a dismissal. Le Roux was accordingly dismissed by the Applicant.

33. The Second Respondent's finding can, however, not be justifiable given the evidence and facts presented to it. In this regard I, inter alia, refer to the following:

33.1. The Second Respondent's award, inter alia, stated that the Applicant failed to show that Le Roux "knew of the rule". The Applicant's main witness in fact testified that Le Roux was well aware of the procedure and he had in fact applied it before.

33.2. I furthermore find it difficult to believe that an employee in Le Roux's position could abstain from work for the reasons he stated, without suffering the consequences of same. Le Roux was in essence the architect of his own misfortune.

33.3. One would also have expected Le Roux to be more progressive in taking the appropriate action to contact the responsible persons on his return to work and to immediately submit his version

to the relevant authorities, which he failed to do.

33.4.I am in agreement with the Second Respondent that there is a duty on an employer to conduct a disciplinary enquiry, once an employee returns to work, as Le Roux did. Such duty can however only arise when there is a proper report and tender of service by the employee, failing which it would be unfair to expect from an employer to conduct such enquiry. Le Roux's failure to properly report and tender his service, on the basis as set out above, exempts the employer from conducting an enquiry in these circumstances. This is in line with item (4) of Schedule 8 of the Code of Good Practice.

34.The Arbitrator should furthermore have made an adverse finding from Le Roux's failure to call Stolz as a witness (*Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A)*).

ORDER

35.The Second Respondent's findings were in my view unsupported by the substantial evidence, and are not reasonably justifiable in terms of the evidence produced.

36.Consequently, the award of the Second Respondent warrants interference in terms of section 158(1)(g) of the Act and needs to be set aside in its entirety.

37.For all the aforesaid reasons, the arbitration award dated 26 November 1999 under Case No NP3260 is set aside.

38.There is no order as to costs.

ACTING JUDGE PIENAAR

17 April 2001

PARTIES APPEARING BEFORE THE COURT:

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