IN THE LABOUR COURT OF SOUTH AFRICA HELD

AT JOHANNESBURG

Case no: JR 1869/06

In the matter between:

NATIONAL UNION OF MINE WORKERS 1st Applicant

S T. SEEMISE 2nd Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION 1st Respondent

TEFFO, N.O. 2nd Respondent

NORTHAM PLATINUM LTD 3rd Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award

issued by the second respondent dated 29 May 2006, under case number LP4387-05.

[2] The third respondent applied for condonation for the late filing of its answering affidavit. The application was opposed by the applicants.

[3] The third respondent filed its answering affidavit 22 (twenty two) days late. The reason furnished for the lateness relates to the preoccupation with the industrial action which members of the first applicant had embarked on from 29 March 2007, arising from certain grievances they had with the third respondent. The issue that gave rise to the industrial action was resolved on 8 May 2007.

[4] It is trite that in considering whether or not to grant condonation the Court exercise a judicial discretion after taking into account factors such as; the degree of lateness, the explanation for the lateness, the prospects of success, etc

[5] In my view the period of lateness is not excessive regard being had to the explanation. The explanation given by the third respondent is reasonable and acceptable. Accordingly the late filing of the answering affidavit by the third respondent is condoned.

Background Facts

[6] The second applicant (the employee) was prior to his dismissal on 18 August 2005, employed as a locomotive driver at the third respondent's mine. He was dismissed following the charge of sleeping on duty.

[7] The incident of being found sleeping underground at the eight level fitter shops occurred on 17 February 2005. It also occurred on the day the employee had taken his locomotive in for service. He fell asleep according to him whilst waiting for his locomotive to be serviced. His explanation for sleeping on duty was that he had taken medicine for flu which made him drowsy.

[8] In support of the explanation why he fell asleep two medical certificates from a doctor who attended to him were produced. The first medical certificate was produced during the disciplinary hearing and the second one at the appeal hearing.

[9] The Commissioner in finding that the dismissal was substantively fair reasoned that it would have made a difference if the second medical certificate was produced at the disciplinary hearing and not the appeal hearing. The reason for not according any weight to the second medical certificate was, according to the Commissioner because:

> *"One should understand appeal proceedings are not fresh and new proceedings. It is for the chairperson to look for the grounds of appeal against what was decided at the disciplinary hearing and give his own decision. The letter in page 21 was submitted late and could not assist the applicant any further."*

[10] As indicated above the incident in question occurred on the 17 February 2005, and the notice to attend the hearing was issued on 18 July 2005, some 5 months after the incident. As concerning the delay of 5(five) months in instituting the disciplinary inquiry the Commissioner found that:

> *"From the respondent's explanation, which explanation the applicant did not deny on the 17 February 2005 it was clear to him that he was going to face an inquiry at a later date. It was*

why on the 18 July 2005 that he received a notice to attend a hearing on 21 July 2005. This notice was given and within ten days the hearing commenced. The respondent explanation that between February and July, they were busy with investigating the allegations. "

[11] In my view the issue which the Commissioner was called upon to consider was whether the third respondent complied with its own disciplinary code in instituting the disciplinary action after 5 (five) months from the date of the incident. The disciplinary code requires disciplinary action to be instituted *"as soon as possible after the incident becomes known."*

[12] The Commissioner failed to appreciate the issue he was required to determine. The issue was not whether the employee was informed on the day of the incident that he would at a future date be charged, but whether the third respondent complied with the standard it had set for itself in its disciplinary code. The second enquiry, once it was established that the third respondent had deviated from its standard would have been to determine whether there were good reasons or circumstances justifying the deviation from the standard.

[13] The applicants further contended that the Commissioner failed to apply her mind when she failed to realise that the respondent's disciplinary code clause 6.1.3(b) allows for evidence which was led in the disciplinary hearing to be led on appeal.

[14] In terms of clause 6.3.1 an employee who is not satisfied by the outcome of the disciplinary enquiry may challenge the outcome on any of the following grounds:

> *"a) it can be shown that the disciplinary procedures were not followed.*
>
> *b) New evidence, which was not presented at the disciplinary enquiry and which has a direct bearing on the incident is presented."*

[15] It is clear that the third respondent's disciplinary code does envisage new evidence being presented at the appeal hearing. Even if the disciplinary code did not have this provision, in my view there is a need to adopt less formalistic approach and consider whether there exist special circumstances to admit new evidence at the appeal level. A factor to consider in this regard is whether such evidence would

shed light into the fairness of the dismissal including the circumstances surrounding its non submission at the disciplinary hearing.

[16] I now proceed to deal with the general standard for reviewing CCMA arbitration awards. The standard required of the CCMA awards as set out in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 12 BLLR 1097 (CC), is that of a reasonable decision maker. The question to be asked in determining whether there has been compliance with the standard is whether the decision of the Commissioner is one which a reasonable decision maker could have reached.

[17] The Constitutional Court in Sidumo discussed at length the two issues that Commissioners need to consider when dealing with dismissal disputes.

[18] The CCMA Commissioners are required in dismissal cases to determine the fairness of the dismissal. In determining the fairness of the dismissals the first inquiry that the Commissioners need to conduct is a factual inquiry concerning whether or not the misconduct

was committed.

[19] The second inquiry that the Commissioners must conduct if it has been established that misconduct was committed is that of determining the fairness of the dismissal. In other words the Commissioners must determine whether the dismissal is in the circumstances of a given case, an appropriate sanction. In conducting this inquiry the Commissioners must take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement.

[20] In Sidumo the Court held that in arriving at a decision whether or not the dismissals are fair, the Commissioners exercise a value judgement. In exercising the value judgement the Commissioners need to take into account all the circumstances of the case, including the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal. The employee's inputs need also to be taken into account.

[21] The other relevant factors to be taken into account are; (a) the harm caused by the employee's conduct, (b) whether the repetition thereof

might be avoided through training or counselling, (c) the length of service of the employee and (d) the impact and the effect of the dismissal on the employee.

[22] The Commissioner in the present case failed to apply her mind in the first instance to the provisions of the disciplinary code which provides for progressive discipline and secondly to the provisions of Schedule 8 of the Code of Good Practice as provided for in the Labour Relations Act 66 of 1995 (the LRA).

[23] In the first instance Clause 6.1.1 of the disciplinary code provides:

> *"6.1.1 Dismissal is the most severe form of disciplinary action. A formal disciplinary would have been held and established on a balance of probabilities that the transgression is of a serious nature and / or when the employee has a valid final warning for the same/similar offence."*

[24] And clause 6.1.3 (c) recognises the need to impose a fair sanction whenever an employee is found guilty and dismissed for such an offence. One of the possible grounds of appeal provided by the policy is apposite in this regard and reads as follows:

"The disciplinary action taken was unprecedented or too harsh in the light of mitigating circumstances".

[25] Had the Commissioner applied her mind, she would have found that the dismissal sanction was unfair in the circumstances of the case. There is no dispute that the employee was found asleep in breach of the rule prohibiting such conduct. There was also no argument about the reasonableness of the rule.

[26] However, the facts and circumstances which the Commissioner should have taken into account before confirming the dismissal are:

a. the employee did not dispute that he was sleeping.

b. the employee apologised immediately he was woken up.

c. he was not driving the locomotive at the time he was found asleep.

d. he fell asleep whilst waiting for his locomotive to be serviced.

e. there was no evidence of previous similar misconduct.

f. his explanation showed remorse by not disputing that he was sleeping.

g. there was no evidence suggesting that the situation could not be remedied by further training to avoid a repeat of the misconduct.

[27] In my view, for the reasons set out above, the decision of the Commissioner in is not reasonable and therefore stands to be reviewed.

Order

In the result I make the following order:

1. The arbitration award of the second respondent is reviewed and set aside.

2. The award of the second respondent is replaced with the following award:

> "(a) The respondent (the third respondent in the review) is ordered to reinstate the applicant (the second applicant in the review application) into his employ retrospective to the date of his dismissal without loss of benefits.

(b) The applicant is issued with a final written warning."

3. There is no order as to costs.

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MOLAHLEHI J

Date of Hearing: 22 November 2007

Date of Judgement: 21 February 2008

APPEARANCES:

For the Applicant: Mr A. Goldberg from Nomali Tshabalala Attorneys

For the Respondent: Adv. R.G. Beaton

Instructed by: Van Zyl, Le Roux & Hurter Inc