

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: JR 83/07

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA (NUMSA)**

APPLICANT

AND

DINGA SIKWEBU

1ST RESPONDENT

THABANG SERERO N.O.

2ND RESPONDENT

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION (CCMA)

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number GAJB31794/05, dated 11 December 2006. The initial application to have the review application dismissed was dismissed by this Court on the 26 March 2008.

Background

[2] The first respondent, Mr Dinga Sikwebu (the employee), is the former employee of the applicant who prior to his dismissal was employed as head of education unit in the applicant's head office. The employee was accountable to the

secretariat consisting of the general secretary and the deputy general secretary. The secretariat constitutes both the administrative and the executive arm of the applicant.

- [3] Prior to his dismissal on the 26 October 2005, the employee was charged with four counts of misconduct relating to gross negligence and gross insubordination. The gross negligence charge arose out of the allegation of the employee's disruptive and disorderly conduct in that he was accused of disseminating false information about the deputy general secretary. It was alleged in this regard that the employee had stated that the deputy general secretary had to be phoned and reminded of the meeting which was to be held on the 20th and 21st October 2004. The alternative to this charge was that the employee acted outside his employment contract in that he misrepresented or gave false information relating to union activity which was regarded as being detrimental to the operations of the union. As concerning the charge of gross insubordination three counts of misconduct were preferred against the employee. The first count concerned the allegation that on or about the 19th of November 2004 the employee circulated to the secretariat a letter together with annexures to all regions despite the fact that this was a matter which fell within the sole prerogative of the secretariat. The second count was that the employee absented himself from work without obtaining the approval from the general secretary on the 22nd to the 23rd November 2004. The third count relates to the accusation that the employee failed to report for work on the 29th November 2004, and leave was not approved for that day.

- [4] The employee was found guilty of all the charges and was accordingly dismissed. He filed an appeal which was chaired by an external practising attorney. The appeal chairperson found that there was inconsistency in the application of the policy relating to leave but confirmed the outcome of the disciplinary hearing in as far as charges one and two was concerned and accordingly confirmed the dismissal. The matter was then referred to the third respondent (the CCMA), for conciliation and upon failure thereof to arbitration.

Grounds for review and arbitration award

- [5] The first attack on the award relates to the manner in which, the commissioner summarised the evidence. The complaint is that the summary of the evidence by the commissioner is too sketchy and the material evidence was omitted.
- [6] The applicant also contended that the material evidence that was led was not even considered by the commissioner. Had the commissioner, according to the applicant considered this evidence he would have reached a conclusion that the dismissal was substantively fair.
- [7] The alleged failure by the commissioner to deal with the material evidence which was not undisputed and appeared to be common cause, constituted gross irregularity according to the applicant.
- [8] The applicant further contended that the breakdown in the trust relationship between the deponent of the founding affidavit, the deputy secretary general and the secretary general on the one hand and the employee on the other hand was not disputed. To this extent the Courts and CCMA ought not, according to the

applicant to impose an employment relationship between the parties when trust had broken down. Another ground upon which the applicant challenged the award is that the commissioner failed to determine whether the conduct of the employee which is common cause constituted misconduct or not.

[9] Another irregularity which the commissioner is alleged to have committed is that he failed to determine whether it was proper for an employee to make disparaging allegations against his superior when there are channels to deal with his complaints.

[10] The manner in which the commissioner approached the evidence of Silowe, the employee's witness was criticized in that he failed take into account that was against the applicant in that it pointed out that even if an employee had applied for leave you do not leave until you are sure that the leave has indeed been authorised.

[11] In summarising the evidence of both the applicant's and the employee's witnesses the commissioner in his analyses of such evidence found:

- (i) that there was no evidence of persistent and wilful attempt to undermine the respondent's authority upon which the finding of gross insubordination could have been based. The fact that the general secretary engineered his dismissal was not a ground upon which it could be said that the trust relationship between the applicant and the respondent had broken down.

- (ii) that there was poor management of the leave application process and that it was unacceptable in this regard for an organisation to manage leave process in the manner described by the secretary general.
- (iii) that even if he was to accept that the employee did not follow the correct procedure the respondent waived its right to act against the employee. Putting this point differently the commissioner said “...*the respondent ought to have acted within a reasonable period in order for justice to prevail*”.
- (iv) the evidence of the employee that he had complied with the general secretary’s demands and the general secretary could not explain why he had submitted a secretariat report that alleges the contrary.
- (v) the applicant could not be faulted for responding to the request from other key structures of the respondent to provide an explanation of what happened between him and the secretary general.
- (vi) the employee’s conduct could not be said to be malicious or disrespectful of the authority of the secretariat.

[12] It was on the basis of the above that the commissioner ordered the reinstatement of the employee with compensation calculated on the basis of 8 months salary which equal R7440.00.

The test for review

- [13] At the time of filing the review application the test upon which the founding papers are based on was the justifiability test as was enunciated in *Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC)*.
- [14] The justifiability test was done away with and the reasonable decision maker test developed by the Constitutional Court in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)* introduced. The enquiry in the reasonable decision maker test is to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. In assessing the reasonableness of the award the Court takes into account the material evidence which was before the commissioner.
- [15] In the present case the applicant contended that the commissioner failed to deal with the material evidence which was undisputed and appeared to be common cause. If this was to be the case then indeed the decision of the commissioner could have been unreasonable and would have failed the standard required by *Sidumo*.
- [16] I am unable to agree with the contention of the applicant that the commissioner failed to deal with the material evidence which was before him. As indicated earlier after briefly setting out the background facts the commissioner evaluated the evidence of all the witnesses and came to the conclusion that the dismissal was unfair. It is apparent from the brief reasoning which the commissioner

provided in his award that he took into account the circumstances of this case in arriving at the conclusion as he did.

[17] I am therefore of the view that the award of the commissioner cannot be faulted for being unreasonable. Put differently the commissioner's decision is one which a reasonable decision maker could have reached.

[18] The other ground upon which the applicant based its challenge of the award is that the commissioner committed a gross irregularity in the manner in which he summarised the evidence in the award.

[19] In terms of Section 138 of the Labour Relations Act 66 of 1995 (the Act) the commissioner is firstly given the power to conduct the arbitration proceedings in the manner in which he or she considers appropriate in order to determine the substance of the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum legal formalities.

[20] The relevant part of Section 138 (7) of the Act requires the commissioner to issue the award with brief reasons. I am accordingly not in agreement with the applicant that the commissioner in the present instance has failed to comply with his duties as provided for in the Act and thereby committing a gross irregularity. It has to be remembered that with the speed with which the legislature anticipated the resolution of disputes under the Act and the work pressure of cases estimated at 80 000 referrals, the majority of the parties not legally represented, it could not have been "*expected that awards will not be impeccable*". See paragraph 118 of Sidumo.

[21] It follows therefore that the commissioner in providing the brief reasons in the award as he did cannot be said to have committed a gross irregularity as defined in *Ellis v Morgan* 1909 TS 556 and subsequently qualified in *Goldfields Investments Limited and Another v City Council of Johannesburg and Another* 1938 TPD 551. Both these cases were cited with approval in Sidumo. In *Ellis v Morgan* the Court in dealing with the general principles of irregularity said:

“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”

[22] In qualifying the principle set out in *Ellis v Morgan*-Schreiner J in *Goldfields* said:

"The law, as stated in *Ellis v. Morgan* (a) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is C whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.

[23] After endorsing the decision in *Goldfields and Ellis v Morgan*, Navsa AJ, when dealing with the distinction which was drawn in *Goldfields* between “*patent irregularities*” and “*latent irregularities*”, in the middle of paragraph 265 said:

“Determining whether the commissioner has committed a gross irregularity will inevitably require the reviewing court to examine the reasons given for the award.

In doing so the reviewing court must be mindful of the fact that it is examining the

reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross irregularity in the conduct of the proceedings.”

[24] The learned judge went further to say:

“[267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”

[25] In the light of the above, I am of the view that the applicant had failed to show that the decision of the commissioner was unreasonable and that this Court was further justified in interfering with the award.

[26] I see no reason why in law and fairness the costs should not follow the results.

[27] The review application is in the circumstances dismissed with costs.

Molahlehi J

Date of Hearing : 8th August 2008

Date of Judgment : 16th October 2008

Appearances

For the Applicant : Roland Sutherland SC

Instructed by : Ranamane Phugo Inc

For the Respondent: Timothy Bruinders SC

Instructed by : David Cartwright Attorneys