THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Not Reportable

Case Number: **C385/2018**

In the matter between

FIRST REALITY (KRUGERSDORP) (PTY) LTD Applicant

and

JEROME ARENDSE First Respondent

COMMISSIONER ANTHONY VERHOOG Second Respondent

COMMISSION FOR CONCILITION, MEDIATION

AND ARBITRATION Third Respondent

Heard: 15 October 2019
Delivered: 24 October 2019

JUDGMENT

CONRADIE AJ:

Introduction

[1] This is an unopposed review application in which the applicant (the company) seeks to review the arbitration award handed down by the second respondent (the arbitrator) under case number WECT4553-18, dated 22 April 2018.

[2] I am satisfied that the first respondent (the employee) received the notice of motion and founding affidavit as well as all other relevant documents relating to the application. The employee also presented himself at court on the day that the matter was heard. He was invited to make submissions but elected not to.

Background facts

[3] The employee was absent from 5 February 2018 until 9 February 2018 without a sick certificate.

[4] Upon his return to work on 12 February 2018, the employee was issued with a notice to attend a disciplinary hearing. The allegation against the employee was desertion, alternatively absence for a period of 5 days or longer without leave and/or a valid reason and/or notice to employer.

[5] On 14 February 2018 the employee was informed that he was summarily dismissed as a result of being absent without leave and for a valid reason and for not informing his employer for the period 5 to 9 February 2018.

[6] The employee referred a dispute to the third respondent (the CCMA) and the matter was arbitrated by the arbitrator.

[7] At the arbitration the company, who was represented by Cape Agri Employers' Organisation, called a director, Mr Chris Hamman, as its witness.

[8] The employee represented himself and gave evidence on his own behalf.

[9] The pertinent evidence before the commissioner can be summarised as follows:

9.1 The procedure when an employee is absent from work is that the employee must notify the company's management at the time of the absence and a medical certificate is required.

9.2 The employee did not contact the company about his absence for the duration of the 5 days and did not produce a medical certificate.

9.3 The company viewed absence for 5 days as serious misconduct. According to the company its disciplinary code stipulated that if found guilty of this offence it could lead to dismissal. Evidence was further led that the

employee was aware of this as it was explained to employees on 8 August 2017 and on 30 October 2017.

9.4 The employee's explanation for not reporting for work during the week in question was that on Saturday 3 February 2018, he was walking home from his brother-in-law with his wife and 8-year-old son when he was attacked by two males and was badly injured. His eyes were closed following repeated kicks to his face and head. The employee remained in bed on Sunday 4 February 2018.

[10] On Monday 5 February 2018 the employee was still badly affected by his injuries. (It is in dispute whether or not the employee, on the Monday morning, phoned a fellow worker at the farm, Mr Willem Januarie, to explain to him that he was in bed as a result of the attack and informed him that he would be absent from work on Monday 5 February 2018). The employee remained bed-ridden for the rest of the week.

[11] On Monday 5 February and Wednesday 7 February 2018, Mr Hamman went to the employee's home to find out why he was not at work. However, the employee was not at home.

[12] The employee returned to work on 12 February 2018 and was told that he would be subjected to a disciplinary hearing.

[13] Mr Hamman testified that:

13.1 the work relationship between himself and the employee was good over the last 6 months. In fact, in 2017 he chose the employee and another colleague to join him on a hunting trip as a token of appreciation for good performance at work up until June 2017.

13.2 The relationship between the company and the employee however changed in October 2017. This followed on a complaint that was received from workers on the farm that the employee and another person who lived on the farm made a fire under a tarred anchor pole which held up the wire fence on the farm. The fence had to be replaced twice and the other workers were unhappy. Mr Hamman viewed the matter to be serious and addressed the situation with the employee and the matter was referred to the police.

13.3 In addition to the above incident, although the employee was trained as a fire fighter at the workplace, in January 2018 he refused to assist in combatting fires that broke out at the farm after his working hours.

[14] After considering the evidence the arbitrator found that the employee was guilty of unauthorised absence without notifying the company. The arbitrator then proceeded to consider whether the sanction of dismissal was appropriate in the circumstances. In deciding this question the arbitrator took the following into account:

14.1 The applicant had a clean disciplinary record.

14.2 He had not been disciplined for unauthorised absenteeism prior to the incident in question.

14.3 He was a farmworker and belonged to a vulnerable group of workers in the country who remain marginalised in terms of working conditions, income, living conditions and general resources.

14.4 He worked for more than five years which was considered a substantial amount of time.

14.5 The employee's family lived on the farm and were dependent on his job.

14.6 Hamman went to the employee's home on 5 and 7 February 2018 and did not find him there.

14.7 No other attempts were made by the company to locate the employee.

14.8 No-one else was consulted to show that the company made further attempts (to locate the employee).

[15] The arbitrator concluded that dismissal was not appropriate in the circumstances as he was not convinced that corrective disciplinary action could not have remedied the situation. He therefore found the dismissal to be substantively unfair. He was however of the view that the employee's actions could not go unpunished and that a final written warning valid for 12 months from 14 February 2018 needed to be recorded.

Grounds of review

[16] The company's grounds of review, set out in the founding affidavit of Mr Hamman, have not been set out in the most elegant manner, making it difficult to

neatly deal with the grounds of review. In the circumstances and given that the grounds of review are not that long, I repeat verbatim the contents of the 6 paragraphs which purport to contain the grounds of review and deal with them accordingly.

Ground 1

[17] "The second respondent accepted in his analysis of the evidence that the first respondent had attended two meetings convened by the applicant, in which the applicant's disciplinary rules had been discussed. At one of the meetings attended by the first respondent, on 30 October 2017, the rule relating to unauthorized absence was addressed. I testified that absence for five days was regarded as serious misconduct, and the disciplinary rules provided that this could lead to dismissal if an employee were to be found guilty in a disciplinary hearing. I also referred to the requirement that an employee had to personally notify management at the time of the absence. The first respondent did not comply with these rules. This was accepted by the second respondent. However, the second respondent incorrectly found that the first respondent did not inform the applicant of his absence for four days, whereas the evidence clearly showed that the first respondent had been absent for five days. In paragraph 9 of the second respondent's findings, he correctly stated that "Five days of absence without medical proof is a long time. The applicant's excuse for not making effective contact with the respondent is not good enough". Although the first respondent had claimed that he had informed a colleague, Willem Januarie, that he would be absent on 5 February 2018, the second respondent ignored my uncontradicted evidence that I had personally been to the first respondent's home on 5 February and 7 February to look for the first respondent and he was nowhere to be found."

[18] The first part of this ground of review seems to be a complaint that the arbitrator incorrectly found that the company did not inform the employee of his absence for four days which was contrary to the evidence that the employee had in fact been absent for five days. Reference is also made to Mr Hamman's uncontradicted evidence that he personally went to the employee's home on 5 and 7 February to look for the employee but he was nowhere to be found.

[19] Even though the company's rule was that five days absence without leave was regarded as serious misconduct that could lead to dismissal, I do not believe that it is a material error if the arbitrator accepted that the employee did not inform the company of his absence for five days. In any event, reference to 4 days and 5 days seems to be referring to different things. The former referring to the employee not informing the company of his absence for 4 days, and the latter that the employee was absent for five days. In this regard, in paragraph 29 of his award the arbitrator states that "*Five days of absence without medical proof, is a long time."* As I have indicated, in my view not much turns on this in deciding whether or not the sanction of dismissal was appropriate in the circumstances.

[20] It is correct that Mr Hammond's evidence that he visited the employee's home on 5 and 7 February 2018 but did not find him there was unchallenged. This in itself does not necessarily mean that dismissal was appropriate in the circumstances.

Ground 2

[21] "The second respondent found as a fact that the first respondent had a clean disciplinary record. However, he ignored my uncontradicted evidence to the effect that the first respondent had been disciplined for his role in setting alight wooden anchor poles supporting the applicant's boundary fence. I also testified that as recently as January this year the first respondent had also been disciplined for failing to assist in extinguishing a fire on the applicant's farm, despite the fact that he had been trained as a fire fighter. One of the applicant's rules is that employees may be required to assist in emergency situations and after work hours but the first respondent had refused to help, saying that the fire had taken place after hours. I submitted at the arbitration before the second respondent that these instances of first respondent's conduct in totally disregarding the applicant's rules during the past few months, had contributed substantially to the deterioration of the relationship between employer and employee. The unauthorized absence in February 2018 resulted in the relationship being broken down irretrievably. This evidence was not contradicted, and the first respondent led no evidence at all in regard to the state of the relationship between employer and employee."

[22] The complaint under this ground of review is that the arbitrator ignored the supposed uncontradicted evidence by Mr Hamman that the employee was

disciplined for his role in setting alight wooden anchor poles supporting the company's boundary fence. The employee was also allegedly disciplined for failing to assist in extinguishing a fire on the farm despite being trained as a fire fighter. This argument is not supported by the record.

[23] The record reflects that the burning of the wooden anchor poles was referred to the police. No mention was made of disciplining the employee in respect of this incident. Mr Bosch, who appeared on behalf of the company, correctly conceded this much. In respect of the fire on the farm, the evidence was that Mr Hamman had a discussion with the employee who indicated that he was not interested in firefighting any longer and he had burnt his firefighting books and certificates. Once again, the employee was not disciplined for this.

[24] With reference to the rule that employees may be required to assist in emergency situations and after work hours, no evidence was led at the arbitration regarding this. This much was also conceded by Mr Bosch.

[25] The arbitrator was therefore correct in finding that the employee had a clean disciplinary record.

Ground 3

[26] "The second respondent correctly found that on a balance of probabilities, the first respondent "was guilty of misconduct, unauthorized absence, without notifying the respondent. It was clear that the applicant knew and understood the rule. The applicant contacted a fellow employee instead of Hamman. The applicant had Hamman's direct number available to him. The applicant was informed that five day's unauthorized absence from work was a dismissable offence".

[27] No further details have been provided with regard to the supposed grounds of review in respect of Ground 3 and as such I am unable to deal with it.

Ground 4

[28] "*In considering the sanction, I have indicated that the second respondent failed to take certain evidence into account. In direct contrast to this omission, the second respondent took certain alleged "facts" into account, where there was no evidence thereof at all. I refer to the statement made by the second respondent*

in paragraph 29 of his award that: "The applicant was a farmworker and belonged to a vulnerable group of workers in this country, who remain marginalised in terms of working conditions, income, living conditions and general resources". No such evidence was led by any witness at the CCMA."

[29] In respect of this ground the company takes issue with the fact that the arbitrator referred to the employee belonging to a vulnerable group of workers who remain marginalised in terms of working conditions, income, living conditions and general resources in the absence of evidence to this effect. This was but one of the considerations which informed the arbitrator's decision that dismissal was not an appropriate sanction. In any event, while an arbitrator is required to have regard to evidence placed before him, it cannot be expected of an arbitrator to act as if he or she is oblivious to the socio-economic conditions which prevail in our country. In any event, what was before the arbitrator was that the employee was a general worker earning R673.39 per week. Assuming the employee worked a five day week this amounts to approximately R135 per day. This is in itself a strong indication that the employee belongs to a vulnerable group of workers who remain marginalised in terms of working conditions, income, living conditions and general resources.

Ground 5

[30] "In the circumstances I submit that the second respondent has failed to pay any regard to the evidence which demonstrated that the sanction of dismissal would have been fair. Without any evidence to support his finding, and in direct opposition to my own uncontradicted and fact-based evidence, he concluded that he was not persuaded that the relationship of trust had broken down beyond repair."

[31] What the arbitrator was required to do was to weigh up the evidence before him irrespective of the understandably poor case put up by the employee, who represented himself, and to make an appropriate finding in the circumstances. In

this regard, Mr Bosch, in his heads of argument, referred to the following paragraphs from *Sidumo & another v Rustenburg Platinum Mines Ltd & Others*[1].

"The locus classicus on penalty review is the Constitutional Courts decision in Sidumo & another v Rustenburg Platinum Mines Ltd & others[4] Navsa AJ, writing for the majority, held that:

> *"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example the harm caused by the employee's conduct, whether additional training and instructions may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-serviced record. This is not an exhaustive list.*
>
> *To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances"* [5]

Similarly, Ngcobo J (in a concurring judgment) held that:

> *"the commissioner … does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting*

[1] [2007] 12 BLLR 1097 (CC).

[4] [2007] 12 BLLR

[5] Ibid paras 78-79. See also *Fidelity Cash Management Service v CCMA & Others [2008] 3. BLLR 197 (LAC) paras 94-95*

point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision not dismiss is fair. In answering the question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed, the exercise of a value judgment is something about which reasonable people may readily differ. But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner...fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction. These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to deference to the employer's decision in imposing a particular sanction… [W]hat is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business that the commissioner.

However, such respect for the employer's knowledge is not a reason for the commissioner to defer to the employer. The commissioner must seeks to understand the reasons for a particular rule being adopted and its importance in the running of the employer's business and then weigh these factors in the overall determination of fairness."

[32] In light of what I have stated above regarding their being no evidence that the employee had previously been disciplined for the anchor pole and the farm fire incidents, there is no basis for this ground of review. The arbitrator further

adhered to requirements imposed on him by the Constitutional Court in determining the appropriate sanction.

Ground 6

[33] "*In addition to the irregularities outlined above, I submit that the second respondent committed misconduct in relation to his duties as a Commissioner, in that he substituted his own personal opinion on matters relating to the first respondent's personal circumstances, when there was no evidence at all to substantiate his finding."*

[34] Even if this is the case, I do not believe that any failures on the part of the arbitrator in this regard affects the conclusion that he came to.

[35] In the absence of any disciplinary action having been taken against the employee in respect of the anchor poles and the farm fire incidents, there is no basis for the employer to argue that the trust relationship had broken down. On the contrary, Mr Hamman's own evidence was that in general he had a very good relationship with the employee. In support of this he testified that he goes to hunt every year and in 2017 he decided to take 2 of his employees with him that he thought worked well up until June/July 2017. They were not taken with to slaughter animals but to hunt with him and to chat. The employee was 1 of these 2 employees.

[36] Mr Hamman however proceeded to testify that the breakdown in the relationship started in October 2017. He then refers to the anchor pole and the farm fire incidents which I have already addressed. The only conclusion that I can come to is that although the employee was not disciplined for these incidents the employer sought to hold them against him when the absence from work incident later arose. This was unfair in respect of the employee.

[37] On the facts of this case I cannot see how it can be accepted that an employee who absents himself from work for 5 days can be summarily dismissed. I am in no way condoning the employee's misconduct in this regard but rather emphasising that progressive discipline is an integral part of our law. Whether or not the employee's version was questionable does not change the fact that dismissal was inappropriate in this case.

[38] Everything said and done, what the arbitrator was faced with was an employee with 5 and a half years' service and a clean disciplinary record. Summary dismissal was not appropriate in the circumstances.

[39] For the reasons set out above I therefore dismiss the application.

[40] In the circumstances I make the following order:

Order

1. The application is dismissed.

For the Applicant – Mr Bosch instructed by Bob von Witt Attorneys