



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR 1613/10

In the matter between:

**MURRAY AND ROBERTS CEMENTATION**

**(PTY) LIMITED**

**Applicant**

and

**COMMISSIONER FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER TIMOTHY N.O.**

**Second Respondent**

**NATIONAL UNION OF MINEWORKERS**

**Third Respondent**

**MOLEFE SELLO EDWARD**

**Fourth Respondent**

**Heard: 18 July 2013**

**Delivered: 07 August 2013**

**Summary: Review application – Commissioner applied his mind to the evidence – Application dismissed**

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**JUDGMENT**

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MATYOLO, AJ

### Introduction

- [1] This is an application to review and set aside the arbitration award issued by the Second Respondent (“the Commissioner”) on 31 May 2010 under case number GAJB 34311-09. The Commissioner found that the dismissal of the Fourth Respondent was unfair because the Applicant did not prove that there was a fair reason for the dismissal. The Commissioner reinstated the Fourth Respondent with three months back pay.

### Background facts

- [2] The pertinent facts which are largely common cause are that:

2.1 The Fourth Respondent had been a shop steward and had attended a meeting at Bently park site on the 3 July 2009 and did not return to work after the meeting though he had been instructed to return to work.

2.2 The Fourth Respondent was charged as follows:

‘You are charged with gross misconduct and or fraud and or dishonesty and breach of the trust relationship by your actions in that it has come to our attention that following an investigation it was found that you:

- (a) Allegedly, you were instructed by myself, Elna Siebert, to return to work after the conclusion of a union/management meeting which ended at approximately 12h00 on Friday, 3 July 2009. You were absent from the workplace without permission after the instruction had been given by myself, it was found that you did not return to your place of work and that you left the park without permission.
- (b) Allegedly, committed fraud – you had booked 9 hours as

being at your place of work (meeting) - as you are being paid by hours worked, allegedly it was your aim to defraud the company and to enrich yourself.'

- [3] The Fourth Respondent admitted that he had been instructed to return to work but had not returned because he thought that Siebert (the person who issue the instruction) had been joking. In relation to the second charge, however, he denied trying to mislead the Applicant and stated that shop stewards ordinarily claimed nine hours after attending meetings.
- [4] The Applicant, through the evidence of Bezuidenhout and Siebert, also testified with Bezuidenhout saying sometimes shop stewards returned after meetings and sometimes they did not but they always claimed 9 hours.
- [5] Siebert stated that she was not aware that whether the Fourth Respondent returned to work after meetings in the past.
- [6] The evidence of the Fourth Respondent that the practice was for shop stewards to claim nine hours was confirmed by the full-time shop steward Caiphus Thokoana and the NUM National co-ordinator Romeo Mabe.

#### The Commissioner's award

- [7] The Commissioner found, *inter alia*, as follows:
  - 7.1 The Union was invited to attend a consultation meeting in compliance with item 4(2) of the Code of Good Practice: Dismissal, Schedule 8 of the Labour Relations Act 66 of 1995.
  - 7.2 The Fourth Respondent failed to comply with the instruction to return to work after the meeting.
  - 7.3 There was no evidence regarding the second charge relating to the charge that claiming nine hours in the circumstances

constituted fraud.

7.4 The Fourth Respondent had recorded that he attended a meeting and there was no attempt to present that he had been at work for nine hours.

- [8] Having made the afore-going findings, the Commissioner went on to determine what would be the appropriate sanction in view thereof and starts by reminding himself what he is required to do as the Commissioner.
- [9] He finds that the Fourth Respondent's conduct in not returning to work despite the instruction is serious but does not warrant dismissal. He justifies this decision by looking at the previous conduct and the record of service and finds dismissal inappropriate and too harsh a sanction.
- [10] The above finding comes after the Commissioner had applied his mind to the other charge, fraud, and found that there was no evidence to support it and therefore the only charge that remained was the first charge relating to failure to return to work despite having been instructed to do so.
- [11] The Commissioner further applies his mind to what would be the appropriate sanction in view of his findings and in particular has regards to section 193(2) of the Labour Relations Act 66 of 1995 and finds that there are no inhibiting factors to reinstatement and reinstates the Fourth Respondent but limits his back pay to three months on account of the disciplinary record and his refusal to attend the disciplinary enquiry.

#### Grounds for review

- [12] The Applicant seeks to have the Commissioner's award reviewed for, *inter alia*, the following reasons:

- 12.1 The Commissioner interjected when Seibert led her evidence and prevented her from presenting her evidence in a complete and cogent manner.
- 12.2 The Commissioner interjected during cross examination of the Fourth Respondent and prevented the testing of the veracity of his evidence.
- 12.3 The Commissioner's finding that there was no attempt to mislead the Applicant regarding the claim for nine hours was unreasonable.
- 12.4 The Commissioner failed to have regard to the relevant circumstances as only took into account the length of service and the one written warning.
- 12.5 The Commissioner failed to take into account the seriousness of insubordination and the dishonesty.
- 12.6 The Commissioner ignored the fact that the Fourth Respondent was a shop steward and ought to have set an example to other employees.
- 12.7 The Commissioner ignored the fact that the trust relationship had been tarnished under the circumstances.
- 12.8 The Commissioner committed misconduct in relation to his duties as an arbitrator.
- 12.9 The Commissioner committed gross irregularities in the conduct of the arbitration proceedings.
- 12.10 The Commissioner exceeded his powers as derived in the Labour Relations act 66 of 1995.
- 12.11 The Commissioner arrived at decisions that a reasonable a reasonable decision maker would not reach and/or decide

upon; and/or

12.12 The Commissioner arrived at a decision that prevented the Applicant from having a fair hearing.

Evaluation of the Commissioner award

- [13] Having gone through the evidence in the record of arbitration, I accept the Commissioner's factual findings. I have no hesitation in concluding that the Commissioner applied his mind to the evidence before him and considered the applicable law in coming to his decision.
- [14] In my view, there is no doubt that the Fourth Respondent committed the infraction referred to in charge one. He admitted the charge and the Commissioner dealt with it accordingly.
- [15] On reading the Commissioner's award, one gets a sense that he looked at the totality of circumstances, being the charges, and provided cogent reasons for his findings in each of the charges. Furthermore, he looked at what would be the appropriate sanction in view of his findings and came to conclusion that for charge one, the charge for which the Fourth Respondent was found guilty, dismissal would be too harsh if regards are to his disciplinary record and the length of his service. In the circumstances, I find the Commissioner's award to be within the bounds of reasonableness.
- [16] The Labour Appeal Court in *Phalaborwa Mining Co Ltd v Cheetam No and Others*,<sup>1</sup> in held that:

'*Sidumo* enjoins a court to remind itself that the task to determine fairness or otherwise of a dismissal falls primarily within the domain of the Commissioner. This was legislative intent and as much as the decisions of different Commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude

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<sup>1</sup> (2008) 29 ILJ 306 (LAC) at para 13.

despite the uncertainty it may create.’

- [17] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>2</sup> Ngcobo J (as he then was) held as follows:

‘In evaluating the reasoning of the Commissioner what must be borne in mind is that Commissioners are not expected to give detailed and impeccable reasoning for their awards. They are required to deal with the substantial merits of the disputes with the minimum of legal formalities...’

- [18] I am satisfied that the Commissioner’s award displays a clear understanding of the evidence bore him and the applicable law.

- [19] I am of the view that the Commissioner’s award accord with evidence led and is, accordingly, one that a reasonable decision maker could make.

- [20] In the circumstances, I make the following order:

20.1 The review application is dismissed.

20.2 There is no order to costs.

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Matyolo A.J

Acting Judge of the Labour Court of South Africa

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<sup>2</sup> (2007) 28 ILJ 2405 (CC) at para 282.

Appearances:

For the Applicant      Ms Leanne Kok of Van Zyl Inc

For the Respondent: Advocate P. Nkutha

Instructed by:          Finger Phukubje Attorneys

Labour Court