IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1676/14

In the matter between:

L A CRUSHERS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

JOSIAS SELLO MAAKE N.O. **Second Respondent**

NUM obo JOSEPH MOHLALA **Third Respondent**

Heard: **1 March 2017**

Delivered: **8 March 2017**

Summary: **An arbitrator has no powers to determine the sanction afresh. His duty is to determine whether the sanction imposed by the employer is a fair one or not. In doing so he applies his own sense of fairness and need not defer to the employer. An arbitrator who interferes with the sanction of dismissal in the circumstances where there is no basis to conclude that the**

sanction is unfair commits a reviewable irregularity and does not act in accordance with the Labour Relations Act 66 of 1995. His award is bound to be unreasonable and reviewable in accordance with the *Sidumo* test. Held: [1] The award of the second respondent is reviewed and set aside and it is replaced with an order that the dismissal is fair. [2] The Union to pay the costs.

JUDGMENT

MOSHOANA AJ

Introduction

[1] This is an opposed review application. The applicant seeks to review and set aside an arbitration award made by the second respondent. This is one of those known as sanction reviews. The second respondent interfered with the applicant's sanction of dismissal.

Background facts

[2] Mr Joseph Mohlala (Mr Mohlala) was employed by the applicant as an Industrial Relations Officer from 1 October 2012. Mr Mohlala applied for leave of absence for the period 11-15 November 2013. After the authorised leave of absence, he did not return to work. He stayed absent without authority for a period of a week. Despite being asked and instructed to return to work, he failed to do so. On his return, he was requested to submit written reasons why he was absent in what the applicant considered to be a critical month of November. Mr Mohlala was then charged with misconduct. He was found guilty and dismissed. He was aggrieved thereby and referred a dispute of alleged unfair dismissal. The second respondent was appointed to resolve the dispute through arbitration. On 16 July 2014, he issued the award under attack in the present application.

Evaluation

[3] As pointed out, the issue in this review is the interference with the sanction. The second respondent concluded that Mr Mohlala was properly convicted. Elsewhere in his award, he concluded that the

applicant made itself guilty of inconsistence. It is not altogether clear what inconsistency was he dealing with. Inconsistency applies in instances where an employer takes discipline against some employees and not takes it against other employees. Also where different sanctions are meted out for similar offences. Nonetheless, the second respondent seems to have rejected the general principle that each case is decided on the basis of its own merits. This he did against what he found to be a failure to refute examples cited by Mr Mohlala as inconsistencies. I do not understand this finding at all. However, given the view I take later, I shall not canvass this issue any further in this judgment.

When is an arbitrator entitled to interfere with the sanction of the employer?

[4] It is by now settled law that in terms of the Labour Relations Act,[1] an arbitrator is empowered to enquire into the appropriateness of the sanction of dismissal. In so doing, the arbitrator invokes his own sense of fairness and should not defer to the employer.[2] In this matter, before interfering with the sanction of the applicant, he found thus:

> "[46] It is my considered view that granted he was properly convicted, the dismissal sanction was harsh in the circumstances, regard being had to the personal problems he faced, as also the fact that he was a first offender. There were alternative sanctions to dismissal, such as, for an example, a final written warning, a demotion or the docking of salary or the deeming of the extended leave period unpaid leave. I am of the view that the dismissal sanction was unduly influenced by his perceived defiant posture, both when he returned for duty and after and regarding the latter, when he allegedly failed to comply with a request that he furnish written representation.

[1] 66 of 1995.

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at paras 75, 78 and 79.

[5] In *Quest Flexible Staffing Solutions (Pty) Ltd v Abram Legoabe,*[3] the Labour Appeal Court clarified the issue thus:

> "In *Sidumo*, the Constitutional Court held that a Commissioner is not empowered to establish afresh what the appropriate sanction is, but rather to decide whether the employer's decision to dismiss is fair. In making this determination, the commissioner should not defer to the decision of the employer but should weigh up all the relevant factors, including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee, and the employee's service record. These factors are, however not considered by the Constitutional Court to be an exhaustive list. Hence other relevant factors that may warrant consideration in assessing the fairness of a sanction include the seriousness of the misconduct, the effect of such conduct on the continuation of the employment relationship, the nature of the job and the circumstances of the infringement.
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> . . .
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> In addition, the appellant regarded seriously disrespectful conduct, of the nature committed by the respondent, as an offence that warranted dismissal on the first occasion. Its code of conduct provides as much. In failing or refusing to demonstrate any acceptance of wrongdoing or remorse, the respondent rendered the continued employment relationship with the appellant intolerable and undermined the applicability of corrective or progressive discipline."[4] (Footnotes omitted.)

[6] The principle enunciated above is clear. In this matter, it seems that in interfering with the sanction, the second respondent only took into account the situation of Mr Mohlala and completely ignored the applicant's situation. It does seem that the evidence of Ms. Mokgoko that

[3] [2014] ZALAC 55; [2015] 2 BLLR 105 (LAC).

[4] Id at paras 19 and 22.

November was a crucial operational budget cycle fell on deaf ears. Instead, what the second respondent did was to find a reason for the applicant why it dismissed Mr Mohlala. In this regard, the second respondent entered the realm of speculation. He was no longer performing his duties to determine the fairness of the sanction of dismissal. Mr Mohlala as an Industrial Relations Officer is a custodian of policies of the applicant and should lead by example. To just stay away from work at a crucial period and refuse to give a proper explanation affected the continuation of the employment relationship and is a clear sign of lack of remorse.

[7] In summary, the second respondent was not empowered to interfere with the sanction of the applicant in the manner in which he did. By so doing the second respondent committed a reviewable irregularity, which renders his award to be unreasonable.

Order

[12] In the results, I make the following order:

1. The award issued by the second respondent under case number LP 409/14 dated 13 July 2014 is hereby reviewed and set aside.

2. It is replaced with an order that the dismissal of Mr Joseph Mohlala is fair.

3. The third respondent to pay the costs.

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GN Moshoana

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr C J Geldenhuys
Instructed by:	Geldenhuys CJ @ Law, Irene.

For the Third Respondents:	Mr Q M Dzimba
Instructed by:	Mothobi Attorneys, Midrand