LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

DURBAN CASE NO: DA6/2007

2008-05-09

In the matter between
BOXER SUPERSTORES (PTY) LIMITED Appellant

And

NOKUTHULA GRACE ZUMA & OTHERS Respondent

J U D G M E N T

DAVIS JA:

[1] This is an appeal against a judgment of Pillay J, 7 February 2007 in which she granted an application for review of an order of the third respondent.

Briefly, the matter involved allegations of dishonesty which the appellant lodged against the first respondent. The first respondent had been charged with misconduct for allegedly removing cash when loading an ATM machine in a shop situated in Eshowe. According to the appellant there were three such incidents and an amount of R9 400 was, in appellant's view, stolen by the first respondent.

[2] When the case came before the third respondent on arbitration, the questions which confronted third respondent were whether the first respondent had been dismissed fairly, both procedurally and

substantively. The third respondent concluded that the appellant had complied fully with the statutory requirements of procedural fairness.

[3] In evaluating the substantive reasons for the dismissal and whether there had been compliance with substantive fairness, third respondent found thus: "The standard approve applicable in arbitration is the civil law standard which is on a balance of probabilities. The arbitrator must weigh up the probabilities as presented in evidence and decide whose version is the more probable".

[4] In this case, the arbitrator was unable to decide the issue on a balance of probabilities: "Both parties' versions seemed equally probable and because the employer bared (sic) the onus, they will lose the case. A minor compensation award will however be applicable." The third respondent then ordered the appellant to pay compensation in the amount of R7 605 which amounted to the value of three month's remuneration.

[5] On review, Pillay J, found that this award was wholly irrational. She concluded, "the proper approach if the arbitrator found, as he did in the case, that the versions were equally probable, was to grant absolution from the instance, but the employer had failed to discharge the onus of proving the substantive and procedural fairness of the dismissal. The award of compensation was wholly incongruent with the finding that the employer had not discharged the onus".

[6] The learned judge then concluded, "In the absence of any finding that the employee was in fact guilty of misconduct, the only appropriate remedy was to reinstate the employee fully and substantively on the same terms and conditions of her employment, as at the date of dismissal, i.e. 27 September 2004".

[7] On appeal, Mr Smithers who appeared on behalf of appellant, raised three separate arguments against the finding of Pillay J. In the first place, he referred to the answering affidavit which had been deposed to in the proceedings before the court *a quo* by the appellant (the affidavit was deposed to by Mr Vusi Zuke) in which the following was stated as to the basis for the review:

"The applicant has not requested that this honourable court substitute its own finding in place of the order made by the arbitrator in the award. The applicant has merely asked that the award be reviewed and set aside. In the circumstances, I believe that if the applicant succeeds in this review application, she will request that the CCMA sets the matter down for arbitration again.

If the third respondent was not successful in its condonation application, it is likely the applicant will succeed in the review application and the matter will be referred back to the CCMA for arbitration".

[8] That is the only evidence dealing with the basis of the application for review brought by third respondent before Pillay J. Accordingly, Mr Smithers submitted that there was, in fact no basis on the review application for Pillay J to have substituted the decision of the third respondent and reinstated the first respondent without more. In short,

Smithers submitted that the relief granted by Pillay J was beyond the scope of the relief sought. The proper approach which Pillay J should have adopted would have been to refer the matter back to third respondent.

[9] Secondly, in attacking the conclusion reached by the court *a quo* that "the only appropriate remedy was to reinstate the employee fully". Mr Smithers correctly referred to the architecture of the Labour Relations Act 66 of 1995 ('the Act') and particularly to section 193(2) thereof. In a case, as in the present dispute, where it is found that an employer has not discharged the onus of proving that a dismissal was fair, the competent remedy is that of reinstatement. Reinstatement is in effect, the default position. Section 193(2) sets out alternative remedies that the Labour Court or an arbitrator may utilise other than reinstatement. These include reemployment or compensation.

In *Volkswagen SA (Pty) Ltd v Brand NO & Others*, 2001 (5) BLLR 558 (LC) 582, Landman J found that is was not open to an arbitrator, if the circumstances surrounding the dismissal were that a continually employment relationship would be intolerable, nevertheless to order reinstatement. In these circumstances, an arbitrator would have no discretion she could only award compensation and not reinstatement. In short, section 193(2) mandates the arbitrator or the court, where applicable, to examine the factors set out in the section, in order to craft the remedy. If the evidence indicates, for example, that a continued employment relationship is intolerable, the arbitrator cannot reinstate but must employ an alternative remedy, in this case compensation. Mr Smithers correctly noted that Pillay J had not engaged with the requirements of section 193(2) but simply concluded that the only appropriate remedy was to reinstate. The only appropriate remedy may well have been to reinstate but that could not simply be concluded without more. The enquiry required an engagement with the requirements of section 193(2) and the evidence before the court as to the nature of the relationship between the parties.

[10] Thirdly, Mr Smithers referred to the nature of the review and in particular Section 145(4) of the Act. Briefly, in *South Africa Fibre Yarn Rugs Ltd v CCMA & Others*, 2005 (6) BLLR 608 (LC) at para 20, the court said, "Section 145 of the LRA obliges this Court to scrutinise the legality and regularity of CCMA arbitration awards on review and not to substitute a decision by the Labour Court in place of the CCMA Commissioner. The section grants a power of review not appeal. As a general principle therefore, this court should be reluctant to substitute its own decision for that of the CCMA. However in exceptional circumstances and in the interests of speedy resolution of disputes, this principle may be departed from. The Court has a discretion to exercise judicially upon a consideration of the facts of each case … In this regard, the court will have regard to whether a fresh consideration would lead to a result, which is a foregone conclusion; the importance of time considerations; the

willingness and likelihood of the body being able to reapply its mind to the issues at stake; whether any indications of bias or incompetence cannot be remedied and whether the court is in as good a position as the functionary under review to make the decision itself".

In this particular case, it is uncertain as whether the court was in a better or in the same position as third respondent to make the decision that it did. This Court has no evidence as to the nature of the relationship between the two parties and whether it was so intolerable to justify a movement away from the default position, that is of reinstatement.

[11] The third respondent's award was manifestly irrational and to that extent the judgment of Pillay J is correct. It is irrational because the third respondent gave no reasons for awarding compensation after having found that the appellant had failed to discharge the onus in relation to substantive dismissal. What third respondent should have done was to have said in effect: I have examined the evidence. It appears to me that, given the grave nature of the charges levelled against first respondent that is of dishonesty, it is clear that the relationship between the two parties is at the level where they cannot longer work together. Reinstatement would therefore be inappropriate, reemployment would be inappropriate because of the conclusions reached by the appellant as set out in my award. Accordingly in terms of the powers that, I have under Section 193(2), I make a small award of compensation.

[12] Third respondent did not adopt this approach. There is thus no evidence before this court or before the court *a quo*, which would justify a court to substitute a decision taken by the third respondent and replace it with its own. For these reasons I am satisfied that the judgment of Pillay J, stands to be set aside and that the appeal should succeed.

There was considerable debate in court regarding the appropriate course of further conduct of this dispute. It appears that it would be unfair to the first respondent to have this matter reheard afresh. She has been found to have been dismissed unfairly, that finding must stand. One cannot allow the appellant another bite of the proverbial 'legal cherry' in relation to that particular question. What remains for determination is, on the appropriate evidence: what is the appropriate remedy given the finding of substantive unfairness in this case?

For these reasons therefore, the following order is made:

1. The appeal against the judgment of the court *a quo* is upheld;

2. The matter is remitted to third respondent, who is directed to:

    2.1 record his reasons for the remedy which he granted on 31 March 2005;

    2.2 hear such evidence as the parties are in a position to lead

before him on the following issues:

2.2.1 the sanction which falls to be imposed in consequence of the unfair dismissal of the applicant, including the question of whether or not is competent to order the applicant's reinstatement to her former employment with Boxer Superstores (Pty) Ltd;

2.2.2 If so, whether or not reinstatement should be ordered;

2.2.3 If so, should the reinstatement be retrospective and for what period.

3. Insofar as costs are concerned, I propose that no order of costs should be made, that both parties should pay their own costs. This case is unfortunate because the third respondent failed to adopt the proper course of action and that has been perpetrated further, compelling an appeal to be lodged by the appellant. I consider that it would only be fair that there is no order as to costs.

LEEUW JA AND NDLOVU AJA: Concurred.

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Appearances

For the appellant	**Mr MDC Smithers**
Instructed by	**Deneys Reitz Inc**
For the first respondent	**Mr I J Manickum**
Instructed by	**Durban Justice Centre**