IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: JA 4/15

In the matter between:

XSTRATA SOUTH AFRICA (PTY) LTD

(LYDENBURG ALLOY WORKS) **Appellant**

and

NUM OBO MASHA, R **First Respondent**

PIERRE DE VILLIERS, *N.O.* **Second Respondent**

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **Third Respondent**

Heard: **12 May 2016**

Delivered: **14 June 2016**

Summary: Review of arbitration award –- reinstatement primary remedy for unfair dismissal unless reasonably impractical or employment relationship irretrievably destroyed – reinstatement not appropriate relief when it is not practically feasible - arbitrator misconstrued the nature of the enquiry he was obliged to undertake to determine the practicability of reinstatement. Employer leading no evidence as to the impracticability of reinstatement - arbitrator committing reviewable irregularity by taking irrelevant considerations into

account – Labour Court's judgment upheld – Appeal dismissed with costs. Coram: Davis, Musi JJA *et* Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant ("Xstrata") appeals against the judgment of the Labour Court (Shai AJ) in which it upheld the application of the first respondent ("NUM") for review of the award of the second respondent ("the arbitrator") granting the employee ("Masha") compensation for unfair dismissal. The Labour Court set aside the award and substituted it with an order reinstating Masha with retrospective effect.

[2] Xstrata operates a ferrochrome smelting plant at Lydenburg, Mpumalanga. Masha commenced employment with Xstrata as a human resources assistant on 1 February 2010. In this position, she was required to complete route and induction forms for contractors before they could be granted access or admission cards (clock cards) allowing them access to the premises, and to ensure that the contractors were referred to departmental supervisors or the safety department for job specific induction. She initially performed her duties and functions under the supervision of two other employees, referred to in the record as Otto and Petro. She assisted them with the administration of contractors. After some mentoring, she was given responsibility for capturing all contractors on the company's systems, namely SAP and ADC, and the issuing of clock-cards. Otto trained and mentored her in performing the aforesaid functions. The mentoring that Masha received from Otto was inadequate in that it was based upon an established incorrect practice. After Otto left Xstrata at Lydenburg, the company introduced a new route form to be used for the capturing of all contractors on the company's system and the issuing of clock-cards. It is common cause that Masha did not receive any training on how to complete the new route form properly.

[3] On 24 January 2011, a contract employee of Enviro Experts, Mr Letsoalo, was killed on site in an accident. Masha had issued Letsoalo with a clock card on 7 January 2011. The clock card was not issued by Masha in accordance with the procedure for the new route form. It was completed and issued in the manner in which she was mentored previously by her supervisors Otto and Petro, in accordance with what she believed and understood to be standard practice. After investigation, it was discovered that Letsoalo had not been handed over to the safety department to ensure that he followed the correct procedure in terms of his job specific induction. Had the route form been completed properly and procedure followed, Letsoalo would have benefited from the site specific induction. Xstrata considered the failure to be gross negligence by Masha and charged her accordingly. A disciplinary hearing was held pursuant to which Masha was found guilty of gross negligence and dismissed on 3 February 2011. Aggrieved by the outcome, NUM referred a dispute on behalf of Masha to the third respondent (*'*the Bargaining Council*')*, contending that the dismissal was substantively unfair. Conciliation failed and the matter proceeded to arbitration. Xstrata's second witness in the arbitration proceedings, Mr Bosch, confirmed that Otto had been found to have incorrectly completed the route forms but, unlike Masha, had not been disciplined for the transgression.

[4] The arbitrator found that Masha had not been properly trained in respect of the new route forms and consequently that she was not guilty of the charge of gross negligence. He then expressed the view that Masha was guilty of poor work performance, a charge never levelled against her, and in respect of which she had not had an opportunity to lead evidence about attempts to train her, if any, to improve. Nonetheless, the arbitrator concluded that dismissal was not the appropriate sanction, in the absence of counselling or warnings, and hence that the dismissal of Masha was substantively unfair. Despite Masha having sought reinstatement, the arbitrator refused to reinstate her and awarded her compensation equivalent to three months' remuneration.

[5] In reaching his decision not to award reinstatement, the arbitrator had regard to section 193 of the Labour Relations Acts (LRA) which provides that where

an arbitrator finds that a dismissal is unfair he/she may order reinstatement, re-employment or compensation. Section 193(2) of the LRA makes reinstatement the primary remedy unless one of four exceptions is applicable. Section 193(2) reads:

> 'The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless-
>
> (a) the employee does not wish to be re-instated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure."

[6] The employee in this case sought reinstatement and the procedural fairness of the dismissal was never placed in dispute before the arbitrator. Consequently, having found that the dismissal was substantively unfair, the arbitrator had authority to refuse reinstatement only if the evidence established that the circumstances surrounding the dismissal were such as to render continued employment intolerable (section 193(2)(b)), or reinstatement was not reasonably practicable (section 193(2)(c)). The arbitrator's finding was as follows:

> 'The applicant stated that if I were to find in her favour she wished to be reinstated. Reinstatement is not practical in the matter at hand. The applicant had short service. The dismissal was over a year ago. The applicant showed little initiative in the period she was employed. In the circumstances I am only awarding compensation. Taking into account the applicant's short length of service I am awarding her three months compensation.'

The arbitrator's finding that reinstatement was "not practical" was probably intended to mean that "it was not reasonably practicable". The factors he took into account in reaching that conclusion were three: (1) the employee's short

service; (2) the fact that the dismissal took place a year before the award was made; and (3) that she showed little initiative in the period she was employed. There was no evidence, and nor was it submitted by the employer at the arbitration, that the continuation of an employment relationship would be intolerable.

[7] In the court *a quo,* and in the submissions on appeal before this Court, much was made of the employee's alleged poor performance. However, there was no cross-review of the finding of the arbitrator that the dismissal was substantively unfair. In the premises, the only issue was whether the decision of the arbitrator not to order reinstatement was reviewable. The reasoning of the court *a quo* went beyond the issue for determination, but it nonetheless held that the three factors relied upon by the arbitrator were insufficient to conclude that it was "impractical" to reinstate the employee. Although nothing was said about the employee's short service, or the period between the dismissal and the award, the learned judge clearly regarded the alleged lack of initiative during employment as insufficient foundation for concluding that reinstatement was impracticable, especially in light of the fact that the employee, a relatively new and junior employee, had been incorrectly trained on the old route form and had received no training at all in relation to the new form. The court decided that the arbitrator's decision was accordingly not reasonable and appeared also to accept that the arbitrator had misconstrued the true nature of the enquiry. It therefore set aside the award and replaced it with an order of retrospective reinstatement.

[8] In *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others,*[1] this Court confirmed that reinstatement is the primary remedy under the LRA and involves placing an employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply, the Labour Court and arbitrators only have a discretion with regard to the extent to which reinstatement should be made retrospective. An employer wishing to avoid reinstatement must satisfy the arbitrator that one of the exceptions to reinstatement applies, in this case to show that it would not be

[1] [2012] 2 BLLR 142 (LAC) at para 28.

practicable. The employer should lead evidence concerning relief in anticipation of a finding that a dismissal might be ruled unfair.[2] Xstrata did not raise or present any evidence in respect of any of the factors relied upon by the arbitrator or in opposition to an order for reinstatement. The issue of the impracticability of reinstatement was not mentioned in the arbitration proceedings and no evidence was tendered to support such. Xstrata submitted before us that the arbitrator nevertheless considered the totality of the evidence and correctly found that reinstatement would not be practical. It argued that having found the employee was guilty of poor performance and in the light of a concession made by the employee that she needed continuing direct supervision, as she did not feel competent to work alone, it was, in its view, entirely reasonable for the arbitrator to find it was not "practical" to reinstate the employee.

[9] There are a number of obstacles in the way of accepting that submission. While an arbitrator is bound to determine the true nature of the dispute between the parties, it was unreasonable for the arbitrator to raise the issue of poor work performance and make an adverse determination in this regard for the first time in the award. This was not the case Masha had to meet. At no stage prior to or even during the arbitration was Masha called upon to deal with her alleged incapacity. The approach and principles applicable to a dismissal based on poor work performance differ in material respects from those applicable to a dismissal based on misconduct. Misconduct and poor work performance are distinct concepts requiring different remedial procedures with different sanctions. Consequently, the relevant evidence and arguments to be presented in each case are different. When an employee is dismissed for poor work performance, the arbitrator must examine whether the employee was trained to perform the functions that he or she was tasked to do; whether such training was adequate; and whether the employee may benefit from further training or counselling. The common cause evidence before the commissioner was that the initial mentoring that Masha received in relation to the completion of the route forms was incorrect; and she did not receive any training or counselling with regard to the completion of the new

[2] *Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA) at para 23.

route forms. It is therefore not surprising that Masha testified that she did not feel competent to do her job alone. Having determined that the dismissal was substantively unfair on the grounds that the alleged misconduct had not been proved, it was problematic for the arbitrator to then seize upon an untested allegation of poor performance as the essential reason for refusing reinstatement.

[10] Moreover, Masha's short service is irrelevant and does not relate to whether or not it was practicable to reinstate her. Were that a relevant consideration, contrary to the purpose and intention of statute it would potentially deny the remedy of reinstatement to all unfairly dismissed employees with short service. Similarly, it is not rational to use the lapse of time between Masha's dismissal and the arbitration to deny her the primary remedy of reinstatement. If that was a relevant factor, an employer could avoid reinstatement by merely delaying the completion of the arbitration.

[11] The arbitrator's reliance on these two irrelevant considerations is symptomatic of the irrationality and unreasonableness of his decision in relation to the applicable remedy. It signifies that he misconstrued the nature of the enquiry he was obliged to undertake to determine the practicability of reinstatement. He did not conduct the enquiry properly by asking the questions he ought rightly to have asked to decide if reinstatement was feasible. The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile. An employee's length of service, the delay in the arbitration and alleged untested shortcomings in capacity are not normally relevant to the question of practicability. The taking of such irrelevant considerations into account

amounted to an irregularity of the part of the arbitrator. Moreover, the arbitrator ignored the relevant consideration that remedial training to assist the employee attain the desired standard had not been attempted.

[12] In *Herholdt v Nedbank Ltd*,[3] the Supreme Court of Appeal held that a review of an award is permissible in terms of section 145 of the LRA if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA, including the ground of "gross irregularity" in section 145(2)(a)(ii). For a defect in the conduct of the proceedings to amount to such a gross irregularity, the arbitrator must have misconceived the nature of the enquiry *or* arrived at an unreasonable result. In this case, the arbitrator failed to grasp the meaning of the term "not reasonably practicable", took irrelevant considerations into account and ignored relevant factors. His interpretation constituted a material error of law resulting in a misconception of the enquiry which prevented a fair and proper determination of the issue of reasonable practicability. These irregularities had a distorting effect on the outcome of the arbitration with the result that it was not one that a reasonable arbitrator could have reached. There was no reasonable basis for denying the employee reinstatement. The court *a quo* was accordingly correct to set aside the award. The appeal falls to be dismissed. There is no reason why costs should not follow the result.

[13] The appeal is accordingly dismissed with costs.

_____

JR Murphy AJA

I agree

_____

Davis JA

[3] 2013 (6) SA 224 (SCA) at para 25.

I agree

_____

Musi JA

APPEARANCES:

FOR THE APPELLANT: Mr Masher of Edward Nathan Sonnenberg

FOR THE RESPONDENT: Adv LM Malan

Instructed by Finger Phukubje Attorneys