IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA16/2016

LC Case no 2013/JR2189

In the matter between:

GLENCORE HOLDINGS (PTY) LTD	**First Appellant**
XSTRATA COAL SOUTH AFRICA	**Second Appellant**
AND	
GEGI JOSEPH SIBEKO	**First Respondent**
WILFRED NOKA NKGOENG N.O.	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION	
AND ARBITRATION	**Third Respondent**

Heard: **15 August 2017**

Delivered: **01 November 2017**

Summary: Appropriate relief in terms of section 193 of the LRA – arbitrator finding employee's dismissal substantively unfair but declined to order primary remedy of reinstatement. Held that behaviour post-dismissal should not be taken into account to infer breakdown in the trust relation justifying departing from the primary remedy further that the functional role performed by the employee within the employer's organisation was not adversely impacted by his conduct during the arbitration

proceedings thus rendering reinstatement impracticable. Labour Court's judgment setting aside award upheld - appeal dismissed with costs.

Coram: Waglay JP, Coppin and Sutherland JJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The controversy in this matter originates from the decision of an arbitrator who, having held that the dismissal of the first respondent (Sibeko) was substantively unfair, refused to order reinstatement as desired by Sibeko. The arbitrator concluded that Sibeko had behaved badly during the arbitration proceedings and that this behaviour demonstrated a breakdown in the employment relationship to such a degree that reinstatement was an inappropriate remedy. On review, Hardie AJ set the decision aside and substituted an order of reinstatement. The appeal lies against the substitution of remedy. The proper interpretation of section 193 of the Labour Relations Act 66 of 1995 (LRA) is implicated in the award and in the review court's judgment.

The Assessment of the critical facts

[2] Sibeko was employed as a dozer driver. The occupation was hazardous and it was required of him to wear protective safety gear. Among the required gear was protective ear muffs. An altercation took place in the course of which Sibeko refused to wear the usual muffs. He was charged with misconduct in which employer managed to compile the elements of refusing to comply with a reasonable instruction, of insubordination and of dishonesty. His dismissal followed. The arbitrator concluded that the employer had not proven misconduct. That conclusion has not been challenged.

[3] Sibeko wanted reinstatement. Consequently, the provisions of section 193(2) of the LRA applied. That section reads thus:

> 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
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> (a) the employee does not wish to be reinstated or re-employed;
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> (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 reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[4] In this case, (a) and (d) were inapplicable.

[5] The review court succinctly captured the critical portion of the award at [4]- [5] thus:

> '[4] …. the Commissioner found that the Applicant's dismissal was procedurally fair. …. the Commissioner found that the dismissal was substantively unfair because the First Respondent had failed to discharge the onus on a balance of probabilities, that the Applicant was guilty of the misconduct levelled against him. Thereafter, the Commissioner turned to deal with the appropriate remedy. His reasoning, in this regard, is contained in paragraphs 72-74 of the award. It reads as follows:
>
> "72. I now turn to the appropriate remedy. The Applicant sought for retrospective reinstatement. Section [193] of the [LRA] provides reinstatement as a primary remedy in case of the dismissal that was found to be substantially unfair. However, in this case I am inclined to deviate from the primary remedy based on the following reasons:
>
> 73. The manner in which the Applicant conducted himself throughout the proceedings leaves much to be desired. If he was not the only witness to his case, and for the purposes of finalising this matter, I could have shown him

> the door. He accused the Respondent's representative of bribing witnesses but could not substantiate his allegation. He further accused not only the representative but the whole HR personnel in attendance to the proceedings of talking to each other through legs. This was later extended to me as a Commissioner. I had to stop the proceedings on numerous occasions due to his unbecoming conduct. He said in his own words that this was just the beginning of a bigger battle between him and the Respondent.
>
> 74. Given the above, it is my conclusion that the employer/employee trust relationship has been broken irretrievably. It is in this context that I believe six months' compensation would be appropriate remedy as opposed to reinstatement."'

[6] It is plain that this passage from the award contains the entire rationale for the arbitrator's decision. It can be taken as an accurate description of the factual happenings during the proceedings. Broken down into its components, it seems that Sibeko was habitually disruptive and three outstanding deeds are invoked. First, there were allegations of bribery, secondly, allegations that the employer's representatives were giving one another and the arbitrator cues during the hearing, and thirdly, a declaration that a battle between the employer and Sibeko has only just begun.

[7] From the record, it appears that Sibeko made the bribery remark in response to a taunt about his union representative withdrawing from the case which, so it was insinuated, the union had no confidence in his case and explained why he was alone and abandoned in the arbitration. It is equally plain that the riposte from Sibeko was triggered by the sense he felt of a need to rebut this adverse inference. It was emotive reaction not a seriously considered contention. At another stage, Sibeko became incensed by the various people in the proceedings who, it seems, were seated around a table in relatively confined space, ostensibly giving each other a kick under the table which he inferred was a mode of signalling to one another. The arbitrator too was kicked in this manner. When he protested, the obvious denials and explanations were offered, but also the employer's

representatives laughed at his complaint. Within this context, Sibeko said that "this is the start of a battle", a remark which was obviously an expostulation of an embarrassed person who felt beleaguered, rather than a considered declaration of war.

[8] As the text of the award, as cited, made no reference to the exact jurisprudential basis, as contained in section 193(2), upon which the arbitrator relied to "deviate" from the primary remedy. Hardie AJ thereupon fairly considered whether in terms of either section 193(2)(b) or (c), the only possible grounds, such a conclusion by the arbitrator could be justifiable as one to which a reasonable arbitrator could reach on the given material.

[9] Hardie AJ, at [12] of the review judgment, concluded that (b) was ruled out because, on the authority of the minority concurring judgment of Zondo JP in *Maepe v CCMA* (2008) 29 ILJ 2189 (LAC) (*Maepe*) at [14] that the ambit of (b), owing to the phrase "circumstances surrounding the dismissal…" was limited to events up to the point of dismissal but not afterwards, such as arbitration proceedings.[1]

[10] The applicability of (c) was then considered by Hardie AJ. That subsection does not include any phraseology which might inhibit an assessment of all and every consideration, whenever it might have occurred. In *Maepe,* the LAC had upheld a review court which had concluded that an aggrieved applicant who was a CCMA commissioner, who had been, *qua* employee of the CCMA, found not guilty of sexual harassment, but who had nevertheless lied in both his disciplinary enquiry and at the arbitration could not be reinstated because it would be "impracticable" to do so, within the meaning of (c). this conclusion was reached having regard to an inherent requirement of the role of a CCMA Commissioner; ie unimpeachable

[1] Zondo JP stated [14] ….The situation envisaged in para (b) is where 'the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable'. It is possible that insofar as the giving of false evidence under oath may have occurred in the disciplinary enquiry before the dismissal, it could be said that it is one of the circumstances surrounding the dismissal, particularly where it was one of the factors that were taken into account in making the decision to dismiss. *However, it does not appear to me that the same can be said of a situation where the giving of false evidence only occurs in the arbitration or at the trial subsequent to the dismissal*. Paragraph (c) envisages a situation where 'it is not reasonably practicable for the employer to reinstate or re-employ the employee'. …." (Emphasis supplied)

integrity; it simply would not do to have a proven liar adjudicating cases under the auspices of the CCMA.

[11] Hardie AJ, at [22] of the review judgment, correctly understood that (c) was relevant to the core operational requirements of an employer, a proposition made clear in *Maepe*. He concluded that Sibeko's conduct, even if deserving of reproach could not be construed to inhibit his reinstatement as a dozer driver, and thus his reinstatement was not, as imagined by the arbitrator, "impracticable" in the sense meant in (c). This conclusion is unquestionably correct because the role performed by Sibeko as a dozer driver did not embrace a dimension that a display of bad manners in the arbitration proceedings would render a reinstatement inappropriate. The true issue is not that Sibeko was justified in his outbursts, or that there is a degree of mitigation in the given circumstances for his poor manners, but rather that the *functional role* performed by a dozer driver within the employer's organisation, including the functional rapport or lack therefore with his superiors, was not adversely impacted by such conduct, within the meaning of (c)

[12] What Hardie AJ had to say about Sibeko's controversial behaviour is, in our view, insightful, both as regards this matter and about Labour Litigation in general, and bears repetition with our endorsement:

> '[16] Arbitrations under the auspices of the Fourth Respondent are litigious proceedings and thus adversarial in nature. During the course of such proceedings, it is not uncommon for parties to behave irrationally. Such irrationality can manifest in the show of emotions, a personal attack on an opponent, wild and unsubstantiated allegations, paranoia and defensiveness. Indeed, even seasoned legal practitioners in the course of the fray are known to vent. More so, lay litigants caught up in litigious proceedings. From a reading of the opening statements made by the Applicant and the First Respondent before the Commissioner in the arbitration, it was apparent that both parties came out all guns blazing in promoting their cases. The First Respondent stated that they would like to prove that the Applicant was a "habitual liar" whilst the Applicant ventured that all the allegations in the disciplinary process were a conspiracy against him. Accusations of conspiracies

and lies abound in litigious proceedings and alas in these ones, the Commissioner found that there was neither a conspiracy to get rid of the Applicant nor that he was a habitual liar rather that the First Respondent had simply failed to discharge the onus of proof, on a balance of probabilities, that the Applicant had committed the acts of misconduct complained of.

[17] It is apparent from the transcript of the arbitration proceedings before the Commissioner that both the Applicant and the First Respondent's witnesses became emotional at times. This happens in the heat of the fray. It is the Commissioner's task to guide the process back to rationality in the pursuit of resolving the issues in dispute.

[18] It is not uncommon for unrepresented employees to irrationally feel that they are up against it, particularly, when they are faced with multiple employer witnesses who they believe are conspiring against them. At one stage, during the arbitration proceedings, the Applicant raised an objection that the First Respondent's witnesses were assisting each other under the table by kicking each other and passing notes to each other while giving evidence. Further, that they were laughing at him and that the Commissioner was doing nothing to stop this, with the result that it was the Applicant's view that the First Respondent would "win the award". His perception was that not only were they kicking each under the table but that the Commissioner himself was also kicking certain of the First Respondent's witnesses that way. The Commissioner acknowledged that when one of the witnesses sitting next to him had moved her leg and he had stretched his, there had been an inadvertent touch, and that there was nothing sinister in this. This precipitated the Applicant challenging the Commissioner as to his objectivity and the perception that he was biased towards the First Respondent. It was in this context that the Applicant mentioned variously that that arbitration process was the start of the battle and that, ultimately, the case would be decided by Judges and that he would have the last laugh. This exchange between the Commissioner and the Applicant became heated. The Commissioner indicated that because of his conduct, the Applicant should address him as to why costs should not be awarded against him for his disrespect of the Commissioner. At no stage, during the arbitration, did the Commissioner indicate that as a result of the Applicant's conduct, he would exercise

his powers in terms of Section 193(2) not to reinstate him and nor were costs ordered against the Applicant by the Commissioner in the award.

[19] Under cross-examination, the Applicant alleged that the representative, who represented him, during his disciplinary enquiry, had been bribed by the First Respondent. He alleged that he could substantiate this allegation but was not given an opportunity to do so.'

[13] Consequently, it is plain that Hardie AJ was correct to conclude that the award was indeed one to which a reasonable arbitrator could not have come and the appeal must be dismissed.

Conclusion

[14] The appeal must fail on the facts, and the judgment *a quo* upheld.

The costs

[15] Both parties contended that a costs order should be made. Accordingly, costs must follow the result.

The Order

The appeal is dismissed with costs.

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Sutherland JA

Sutherland JA (with whom Waglay JP and Coppin JA concur)

APPEARANCES:

FOR THE APPELLANT:	Mr D Cithi of Mervyn Taback Inc
FOR THE RESPONDENT:	Adv L Oken, pro bono.