



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 181/13

In the matter between:

**NAMAKWA SANDS, a division of
TRONOX MINERAL SANDS (PTY)
LTD**

Applicant

and

CCMA

First Respondent

MADELEINE LOYSON N.O.

Second Respondent

S A CLEOPHAS

Third Respondent

Heard: 25 March 2014

Delivered: 16 April 2014

Summary: Review – dismissal for incapacity – order for reinstatement into different position – no such position available – award unreasonable.

JUDGMENT

STEENKAMP J

Introduction

- [1] The third respondent, Mr S E Cleophas (“the employee”), was dismissed for incapacity after a non- work related injury. The second respondent, commissioner Madeleine Loyson (“the commissioner”), found that the dismissal was unfair “only in so far as the [company’s] failure to accommodate him in an alternative position is concerned”. She ordered the applicant (the company, Namakwa Sands), to re-employ the employee. She further ordered that:

“The [employee] must be placed into any available clerical/administrative or other position of a sedentary nature which is in line with the recommendations contained in the report of Themaat Occupational Therapy, submitted to the [company] on 31 May 2012.”

- [2] The company wishes to have that award reviewed and set aside. It argues that the dismissal was fair.

Background facts

- [3] The employee worked as a laboratory operator. In July 2011 he injured his knee while playing touch rugby with his son at home. He stayed at home for a period of ten months as a result of the injury. The company instructed an independent company, Themaat Occupational Therapy, to assess his injury and his suitability to return to work. It reached the following conclusions in its report of 31 May 2012:

- 3.1 The employee did not meet the physical requirements of his job as a result of the injury;
- 3.2 The use of assistive devices did not appear to be a feasible option to accommodate his position in the laboratory;
- 3.3 He did not have formal training or alternative skills in any other field of work;
- 3.4 He should be deployed into a position where he can take more frequent resting breaks, e.g. administrative work; but that would require further training and skills development.

- [4] The company had several follow-up meetings with the employee, his trade union representative and the company nurse. Neither the employee nor his union made any proposals with regard to his possible redeployment elsewhere in the company.
- [5] The employee has a grade 10 education. He previously worked as a general worker. He has no administrative skills or qualifications. The company had a number of administrative vacancies available but they all required matric or tertiary qualifications.
- [6] After exhausting the consultation process the company concluded that it was unable to adapt the employee's position in order to accommodate his injury and it could not offer him other suitable employment. It dismissed him for incapacity on 31 July 2012. He referred an unfair dismissal dispute to the CCMA. He requested reinstatement into his previous position. Conciliation was unsuccessful.

The arbitration award

- [7] The commissioner made the following findings:
 - 7.1 The company had "technically" done all that could be expected of it to accommodate the employee and to investigate the availability of suitable alternatives. The injury was not work related and therefore the obligation to accommodate him was not as onerous as it would be if it had been work related.
 - 7.2 "Nevertheless, administrative positions were available and were indeed considered in the consultation process." A limiting factor was the agreed fact that he did not have matric or any administrative experience as required for those positions.
 - 7.3 "I find that the [company], a large business in the mining industry, has a duty to accommodate him, especially given his long service and age (45) and to enable him to continue to work. Despite the fact that several administrative positions were available at the time required a matriculation certificate, it is reasonable to expect that the [company] would at least have tried to accommodate the [employee] in one of those positions. He does have a grade 10 and knows the

business... It is not reasonable to assume that merely because he only has grade 10, which was presumably achieved many decades earlier, he would be incapable of performing the tasks associated with those positions.”

- 7.4 The commissioner concluded that the dismissal was unfair “only in so far as the [company’s] failure to accommodate him in an alternative position is concerned”; and ordered the company to re-employ him in an administrative position.

Review grounds

[8] The company argues that the commissioner’s award is not one that another arbitrator could reasonably have made because:

- 8.1 Despite advising the company’s representative at the arbitration not to lead evidence on the vacancies it considered in order to avoid the employee’s dismissal, the commissioner made conclusions with regard to the vacancies that was not supported by the evidence;
- 8.2 She made assumptions that were not supported by the evidence, and had those assumptions not been made, the conclusion would have been different;
- 8.3 She made contradictory findings that did not support her order; and
- 8.4 She made an order that was not practicable and capable of implementation.

Evaluation / Analysis

[9] I shall consider the review grounds together.

[10] The company submitted documentary evidence on 14 possible vacancies. It wished to lead evidence about the employee’s suitability or otherwise of these positions. The commissioner told the company representative that it was not necessary. She said:

“Ja, u hoef nie deur elke pos te gaan nie, ek sien u het hulle almal nou ter tafel gelê, tensy u spesifiek aanmerking wil maak oor enige van hulle, spesifieke aanmerkings, maar ek dink nie ons moet deur elkeen lees en sê wat die vereistes is nie, anders gaan dit te veel tyd neem.”

- [11] The company argues that the commissioner prevented it from leading relevant evidence and thus deprived it of a fair trial. Ordinarily, I would not agree. An arbitration must be conducted with the minimum of legal formalities. It was common cause that all of these advertised positions required a matric and that the employee had only passed grade 10. But what makes the commissioner’s award unreasonable in the light of her ruling that the company need not lead evidence on each of the available positions, is this conclusion:

“Despite the fact that the several administrative positions available at the time required a matriculation certificate, it is reasonable to expect that the [company] would at least have tried to accommodate the [employee] in one of those positions. He does have a grade 10 and knows the business... It is not reasonable to assume that merely because he only has grade 10, which was presumably achieved many decades earlier, he would be incapable of performing the tasks associated with those positions.”

- [12] The company was not given the opportunity to lead evidence as to whether it would have been possible to train the employee and to consider him for any of these positions despite him not meeting the minimum requirements. Despite this, the commissioner found that it could and should have offered him training and a clerical position. That conclusion was unreasonable, given the fact that the company did not have the opportunity to lead any evidence as to whether that would have been a feasible option, and given the common cause evidence that the employee was not qualified for the vacant positions.

- [13] Despite the common cause evidence that the injury was not work-related; that the company did try to accommodate the employee; that he could not be accommodated in his previous post; and that he was not qualified for any of the vacant positions, the commissioner ordered the company to create a position and to employ the employee into such a position.

[14] In *Director-General: Office of the Premier of the Western Cape and another v SAMA obo Broens and others*¹ the Labour Appeal Court upheld the finding of this Court² that the dismissal of the employee was unfair; however, it held that the Court could not order the Department of Health to reinstate the employee into a different post.

[15] The same holds true for the commissioner's award. On the evidence before her, there was no position available for the employee. By in effect ordering the company to create such a position for him, she exceeded her powers and reached a conclusion that a reasonable arbitrator could not reach.

Conclusion

[16] The commissioner could not reach the conclusion and order the relief that she did on the evidence before her. In doing so, she made an award that a reasonable arbitrator could not. The award must be reviewed and set aside.

[17] This is not a case where the Court can substitute its decision for that of the arbitrator. The company must be placed in a position to consider the evidence on the availability of alternative positions and the suitability of the employee for those positions. It must be remitted.

[18] That means that the dispute is not resolved. In law and fairness, I do not believe a costs order at this stage to be appropriate.

Order

The arbitration award of the second respondent dated 2 February 2013 is reviewed and set aside. The dispute is remitted to the CCMA (the first respondent) for a fresh arbitration before a commissioner other than the second respondent.

¹ Labour Appeal Court (CA 5/2011), 26 April 2012, unreported (*coram* Davis JA, Molemela AJA and Murphy AJA).

² (2011) 32 ILJ 1077 (LC).

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Siobhan Leyden (née Viljoen)
of Shepstone & Wylie.

THIRD RESPONDENT: Kurt Allen
Instructed by Manson Tobin attorneys.