IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 950/06

In the matter between:

JAYSEELIN NAIDOO	APPLICANT
AND	
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER C J B SCHOEMAN	2ND RESPONDENT
VODACOM (PTY) LTD	3RD RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an application for review of an arbitration award issued by the second respondent (the commissioner) on 10th March 2006 under case number GAPT 9198-06. In terms of the award the commissioner found the dismissal to have been both procedurally and substantively unfair and ordered only compensation. The complaint of the applicant (employee) as appears more in details later relates to the issue of reinstatement.

[2] The application is opposed by the third respondent.

The facts

[3] The employee who was employed by the third respondent on 1st July 1999 as a call centre consultant was charged with misconduct and dismissed subsequent to a disciplinary hearing which was held on 14th July 2005. The dismissal took effect on 2nd September 2005.

[4] The employee referred a dispute concerning his alleged unfair dismissal to the first respondent on 20th September 2005. The dispute which remained unresolved after conciliation was subsequently referred to arbitration.

[5] As indicated earlier the Commissioner issued his award on 10th March 2006, in terms of which he found the dismissal of the employee to have been procedurally and substantively unfair. The third respondent was ordered to compensate the employee in the sum of R20 433-09 which was an equivalent to employee's three months salary.

[6] Applicant seeks to review the order and have it side aside.

The parties

[7] The applicant is Jayseelin Naidoo, an adult male ex-employee of the third respondent.

[8] The first respondent is the Commission for Conciliation Mediation and Arbitration, a juristic person established in terms of section 112 of the Labour Relations Act, 66 of 1995.

[9] The second respondent is JCB Schoeman an adult male Commissioner of the first

respondent. The second respondent is cited herein in his capacity as the Commissioner who presided at the arbitration proceedings under case No: GAPT 8918/05.

[10] The third respondent is Vodacom (Pty) Ltd, a company duly incorporated with limited liability in accordance with the company laws of the Republic of South Africa with its registered offices at Vodacom Corporate Park, 082 Vodacom Boulevard, Vodavalley, Midrand Johannesburg.

Grounds for review

[11] In the founding affidavit the employee contends that:

> (a) The second respondent erred in finding that the employee failed to take him into his confidence and thereby finding that he was unable to reinstate the employee.
>
> (b) The second respondent committed misconduct in relation to his duties by failing to take into account and attaching sufficient weight to the evidence of the third respondent's witness that she had**,** as the initiator in the employee's disciplinary hearing**,** requested the chairperson to impose a final written warning.
>
> (c) The second respondent failed to properly, rationally and justifiably apply his mind to the facts and evidence properly placed before him and the factual findings made by the second respondent is therefore not justifiable in relation to the reasons given for such award.
>
> (d) Factual findings made by the second respondent did not correspond

with the evidence properly placed before him.

(e) The second respondent failed to comply with the provisions of the Labour Relations Act pertaining to the conducting of fair and proper arbitration proceedings and the award made by the second respondent is therefore not justifiable in relation to the reasons given for such award.

(f) The award is not justifiable in relation to the reasons given for such award and such award is not rational or justifiable in its merit or outcome.

[12] The employee submitted that the reasons formulated by the second respondent for not ordering reinstatement being "***applicant's persistent denial of the alleged activations and his failure to take me into his confidence make it difficult for me to reinstate him***" are in no way related to the merits of the dispute.

[13] In opposing the application for review, the third respondent raised points in limine and stated amongst others the following:

Point in limine

[14] The third respondent raised a point *in limine* relating to:

(i) Failure by the employee to serve a copy of an Index on it (the respondent).

(ii) The employee's notice in terms of Rule 7A(8)(b) is defective as the affidavit was not deposed before a commissioner of oaths.

(iii) There is no record of the proceedings before the Honourable Court. The Arbitrator submitted an affidavit to confirm that the CCMA has no records of the proceedings. The Applicant failed to have the handwritten notes transcribed.

(iv) The employee is obliged to transcribe the hand written notes if the record is incomplete.

(v) The application for review should be dismissed.

Applicant's Submissions

[15] In his submissions, employee reiterated the grounds for review stated above. His main contention was that since the commissioner had found that his dismissal was substantively unfair, he should have granted reinstatement instead of compensation as a remedy. He submitted that second respondent's failure to grant reinstatement in the circumstances constitute a gross irregularity warranting that the order be reviewed and set aside.

Third Respondent's Submissions

[16] The award handed down by the second respondent was a reasonable award and there is no reason for the honourable court to intervene.

[17] The employee failed to tender any plausible explanation as to why he activated the value added services without the consent of the customers. The applicant remained defiant throughout the proceedings and showed no element of remorse for his actions.

[18] The employee is wrong to state that the second respondent failed to apply his

mind by commenting that **"*applicant's persistent denial of the alleged failure to take me into his confidence make it difficult for me to reinstate him"*** are in no way related to the merits of the dispute.

[19] Third respondent will be severely prejudiced to litigate in a matter where the only reason for the review is that the Applicant does not like the award that was made. The personal likes and dislikes do not constitute grounds for review.

[20] The second respondent considered all the evidence before him and did not commit misconduct as envisaged in Section 145(2)(a)(i) of the LRA.

[21] There was no evidence placed before second respondent to justify a reinstatement order.

Analysis

[22] I now proceed to deal with the point *in limine* raised by the third respondent, starting with the issue of serving the index on the respondents. In this matter it is not in dispute that the employee did not serve a copy of the index on the respondent. However while serving an index is necessary to ensure that a party is able to use the documentation provided with ease, the respondent has not indicated in what way it was prejudiced save to state that it had took more time to prepare due to the absence of the index. This issue can however not be a ground to dismiss a review application but can however be relevant in dealing with the issue of costs. However in this matter, employee was not legally represented and in my view, it may not be appropriate to saddle an unrepresented employee with an order for costs in the circumstances.

[23] I have perused the documents referred to above and I found that, contrary to the third respondent contention the affidavit referred to has in fact been deposed to before

a commissioner of oaths, I therefore reject the third respondent's contention in this regard. However what has not been deposed before a commissioner of oaths is an annexure to the founding affidavit. In my view the nature of the ground for review which applicant relies on is such that this review can be decided upon without the annexures in question. I have therefore not considered the annexure to the founding affidavit for purposes of this judgement. I am satisfied that the applicant has complied with Rule 4(2)(a). The point in limine is therefore dismissed.

[24] Turning to the transcribed record of the CCMA proceedings, it is common cause that the record has not been made available, the handwritten notes of the arbitrator are illegible and the arbitrator has filed an affidavit stating that the tape recordings of the arbitration proceedings could not be located and that he (the commissioner) is not in a position to reconstruct the record using his handwritten notes.

[25] The issue which is subject of this review proceeding is the order to compensate the employee. I am of the view that this court is in a position to deal with the issue even without the record as the arbitrator has recorded his reasons why he is of the view that reinstatement is not an appropriate remedy.

[26] The employee is only reviewing the order to compensate him which order was made by the commissioner. The said order reads as follows:

"5. AWARD

Having read the papers and having considered the evidence and arguments advanced on behalf of the parties I rule as follows:

5.1. The dismissal of Applicant on 2 September 2006 was unfair – procedurally and substantively;

5.2. Respondent, Vodacom, is ordered to compensate Applicant, J Naidoo, in the amount of R20433-09 – this is equivalent to three months' salary;

5.3. Amount to be paid not later than 31 March 2006;

5.4. Amount of R20 433-09 will earn interest from 1 April 2006 at the rate prescribed in section 2 of the Prescribed Rate of Interest Act 55/75."

Legal position

[27] The issue of relief in an unfair dismissal case is governed by section 193 of the Labour Relations Act 66 of 1995 (the LRA). Section 193 of the LRA provides:

"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may –

(a) order the employer to re-instate the employee from any date not on earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) 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."

[28] In *Adams & others v Coin Security Group (Pty) Ltd [1998] 12 BLLR 1238 (LC),* the court per Zondo J (as he then was) held that the norm should be to order re-instatement and the denial of that primary relief should occur only as an exception" under the circumstances set out in paragraphs (a) to (d). In *Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC)* at para 116 Zondo JP suggested in a minority judgment that:

> "the absence of a discretion on the part of the Labour Court or an arbitrator to deny reinstatement to an unfairly dismissed employee in the absence of any one of the situations set out in section 193(2)… must be understood against the background that reinstatement was made a statutory primary remedy in unfair dismissal disputes in return for organised labour's agreement that there should be a capping of compensation that could be awarded to unfairly dismissed employees."

[29] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)* Navsa AJ at para 72 stated the following:

> "In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that the security of employment is a core value of the Constitution which has been given effect to by the LRA. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies..."

[30] Section 193(2) therefore obliges courts and arbitrators to order reinstatement or re-employment of an employee whose dismissal is found to be substantively unfair unless the dismissed employee does not wish to return to the employer, or where the commissioner or the Judge is satisfied that the resumption of the employment relationship would be *"intolerable or impracticable."*

[31] In this case, the arbitrator found that the dismissal of the applicant was both procedurally and substantively unfair. One would have expected the arbitrator to have ordered reinstatement unless the applicant did not wish to be reinstated, or the commissioner is satisfied that the resumption of the employment relationship would be intolerable or impractical.

[32] On page 8 paragraph 4.2 of the arbitration award the second respondent stated the reasons for not granting re-instatement to the applicant as follows:

> "A*pplicant's persistent denial of the alleged activations and his failure to take me into his confidence make it difficult for me to reinstate him".*

[33] After making a finding that the dismissal was substantively unfair, the

commissioner should have checked if the exceptions as contained in Section 193(2) existed. What is apparent from the award is that the reason why the second respondent did not grant reinstatement is firstly that employee persisted in denying the alleged activations for which he had been charged. At any rate, this ground as stated in the award does not fall under any of the grounds listed in section 193(2) as a ground for denying reinstatement to an employee whose dismissal is substantively unfair.

[34] The second reason advanced by the second respondent that Applicant did not take him into his confidence also does not fall within any of the factors mentioned in section 193(2) which justify denying an applicant reinstatement.

[35] I am satisfied that the reasons advanced by the second respondent for denying applicant reinstatement were irrelevant more particularly in that they do not fall under the exceptions listed in section 193(2) which justify denying reinstatement to an employee whose dismissal is substantively unfair. The second respondent therefore misdirected himself and thus committed a gross irregularity.

[36] In *Sidumo (supra)* the court held that in reviewing an arbitration award, the test should be whether *"...having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach."*

[37] In this matter, the second respondent had found that the applicant's dismissal is

both procedurally and substantively unfair. As stated above, section 193(2) obliges an arbitrator or judge who has found that the dismissal is substantively unfair to reinstate an employee unless any of the exceptions mentioned in the section existed. I have already found that the reasons advanced by the commissioner in this matter for not granting reinstatement do not fall under the exceptions mentioned under section 193(2). I am therefore satisfied that a reasonable decision maker could not have reached the conclusion which the second respondent has reached in the circumstances. The order is thus reviewed and set aside.

Order

[38] In light of the above analysis, I am of the view that the arbitrator's award stands to be reviewed and corrected.

[39] In the premises I make the following order:

(i) The award issued by the arbitrator under case number GAPT 9198-06 dated 10th March 2006 is reviewed and the order made is substituted with the following:

"1. The respondent is ordered to reinstate the applicant, J Naidoo without loss of salary and benefits and conditions not less favourable than the ones applicable prior to his dismissal.

2. The applicant should report for duty within 14 (fourteen) days of date of this order."

(ii) There is no order as to costs.

Nyathela AJ

Date of Hearing : 30 April 2009
Date of Judgment : 27 July 2009

Appearances

For the Applicant : Applicant appeared in person

For the Respondent: Adv. U Nunes