N THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA32/2022

In the matter between:

SIBANYE RUSTENBURG PLATINUM MINE **Appellant**

and

AMCU obo D SONO AND OTHERS **First Respondent**

COMMISSION FOR CONCILIATION MEDITATION

AND ARBITRATION **Second Respondent**

FOSTER MALULEKE N.O. **Third Respondent**

Heard: **11 May 2023**

Delivered: **02 May 2024**

Coram: **Waglay JP, Savage *et* Gqamana AJJA**

JUDGMENT

GQAMANA, AJA

Introduction

[1] In this matter, Sibanye Rustenburg Platinum Mine, the appellant, appeals against the judgment and order of the Labour Court (per Mangena AJ) which reviewed and set aside the arbitration award issued by the third respondent under case no: NWRB 1225-19 and remitted the matter back to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration *de novo* by another commissioner other than the third respondent. This appeal is with the leave of the Labour Court.

Background

[2] The facts on which this appeal turns are as follows. The Association of Mineworkers and Construction Union (AMCU), acts on behalf of 59 of its members (employees) who were dismissed by the appellant for submitting false sick notes. The employees were found guilty at a disciplinary enquiry and dismissed. After their internal appeal was unsuccessful, AMCU referred an unfair dismissal dispute to the CCMA on behalf of the employees.

[3] In preparation for the arbitration hearing, the appellant and AMCU held a pre-arbitration conference with the purpose of *inter alia,* setting out the issues in dispute that the commissioner was required to arbitrate. Subsequent thereto a pre-arbitration minute was signed and filed by the parties. The parties recorded in the pre-arbitration minute the facts in dispute as:

> '4.1 Substantive fairness in that:
>
> 4.2 The applicants did not contravene the offences for which they were charged, found guilty of and dismissed for as they consulted a Professional Nurse/Sister/Medical Practitioner who provided them sick notes. The sick notes were submitted to the HR Department processed and they were granted sick leave.'

[4] Again, under issues that the arbitrator was required to decide, it was recorded that, in issue was whether they had committed the offences for which they were charged and dismissed.

[5] At arbitration, two witnesses testified for the appellant and only one witness was called and testified for all the employees. The commissioner in his award found the dismissal of the employees to have been substantively fair.

[6] Disenchanted with the award, AMCU launched a review application in the Labour Court and challenged the award on the basis that the commissioner failed to consider mitigation and aggravation factors, the inconsistency of discipline and the severity of the dismissal sanction.

Judgment of the Labour Court

[7] Although AMCU took issue with the delay in the institution of the disciplinary proceedings against the employees, the Labour Court found the delay justified because it was caused by an investigation having been undertaken which had revealed that the sick notes submitted by the employees were fraudulent. Once that information came to the fore, disciplinary proceedings were instituted without any delay.

[8] On sanction, AMCU argued that the commissioner adopted a "one size fits all" approach and failed to consider the individual circumstances of each of its members. The Labour Court was persuaded by such submissions and took issue with the approach by the commissioner to the issue of sanction. The commissioner's findings on sanction were found to have been based on the seriousness of the misconduct and lack of remorse, without evidence led in mitigation. The failure of the commissioner to consider mitigating factors was found to constitute an irregularity sufficient to vitiate the arbitration proceedings. On that basis, the court *a quo* reviewed the matter and remitted it to the CCMA for a hearing on the issue of sanction.

Issues in this appeal

[9] In issue in this appeal is whether the court *a quo* misdirected itself in relation to the issue of sanction and in its remittal of the matter to the CCMA.

Evaluation

[10] The parties delineated the issues in dispute at arbitration in their signed pre-arbitration minute. The commissioner was therefore confined to determine only whether AMCU members were guilty of the misconduct charges against them. The appellant submitted that the issue of sanction therefore fell outside the scope of the dispute before the commissioner, with the import of the pre-arbitration minute being that, were it to be found that the misconduct had been committed, there was no dispute that dismissal was a fair sanction to be imposed. AMCU disagreed.

[11] Parties are bound by an agreement reached in pre-trial minute and it is not open to the courts to adjudicate on the issues that fall outside the scope of issues agreed upon by the parties. In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another*[1], the Supreme Court of Appeal made it clear in relation to pre-arbitration agreements that in the absence of any special circumstances a party is not entitled to resile from such an agreement. In *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another*[2] (*Driveline*), this Court held that "*a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issues set out therein*."[3] Again, in *South African Breweries (Pty) Ltd v Louw*[4], this Court confirmed the decision in *Driveline* and found that a court is bound to the narrowing of issues in the pre-trial minute and cannot adjudicate on an issue that was not raised for determination in the pre-trial minute. Furthermore, a pre-arbitration minute is to be read holistically and not in a restrictive fashion in relation to the headings used therein.[5]

[12] From the pre-arbitration minute concluded by the parties, it is apparent that the only issue in dispute between the parties in relation to the substantive fairness of the employees' dismissals to be considered by the commissioner

[1] [2010] ZASCA 58; 2010 (4) SA 122 (SCA).
[2] [2000] 1 BLLR 20 (LAC).
[3] At para 16.
[4] [2018] 1 BLLR 26 (LAC).
[5] *Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) para 44.

was whether the misconduct had been committed or not. The commissioner, having found that serious misconduct had been committed by the employees, cannot therefore be faulted for focusing his enquiry on this limited issue, which the parties had agreed was to be determined at arbitration. It follows that his finding that the dismissal of the employees was fair, having been found to have committed serious misconduct, fell within the ambit of reasonableness required.

[13] This was so in that the facts showed that the employees had submitted fraudulent sick notes and received pay for days they did not work as a result. Their sick notes were purportedly issued by Platinum Health but stamped at the RPM Hospital. The investigation revealed that the employees did not visit Platinum Health as recorded in the medical certificates. The certificates were signed by the same unknown person without her/his initials or surname and none of them had a serial number. The employees submitted the certificates with one motive, namely to deceive the appellant in circumstances in which the appellant has a zero-tolerance approach in as far as dishonesty and fraud. The misconduct committed by the employees was of a serious nature and was grossly dishonest. Such conduct patently undermined the trust relationship between the parties.

[14] In light of the pre-arbitration minute agreed upon and given the finding that serious misconduct had been committed, the commissioner reached a decision which fell within the bounds of reasonableness required. The Labour Court erred in finding differently.

[15] The appeal against the judgment and orders of the Labour Court must therefore succeed. With regard to costs, the requirements of law and fairness dictate that each party pay its own costs.

[16] In the result, the following order is made:

Order

1. The appeal is upheld with no order as to costs.

2. Paragraphs 2 and 3 of the order of the court *a quo* are set aside and replaced with the following order;

   "The review application is dismissed".

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GQAMANA AJA

WAGLAY JP and SAVAGE AJA agree.

APPEARANCES

For the Appellant:	Advocate A. Redding SC (together with Advocate R. Itzkin) Instructed by Solomon Holmes Attorneys
For the Respondent:	Advocate A. Cook Instructed by LDA Inc.