

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA66/2020

In the matter between:

JACQUES PIETER HORN

Appellant

and

COMMISSIONER S M BEESNAAR N.O.

First Respondent

SISHEN IRON ORE (PTY) LTD (KOLOMELA MINE)

Second Respondent

**THE COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 3 November 2021

Delivered: 18 November 2021

Coram: Waglay JP, Davis JA and Savage AJA

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (Rheeder AJ) delivered on 2 August 2019 in terms of which the review application brought by the appellant, Mr Jacques Pieter Horn, was dismissed with no order of costs.

[2] The appellant was employed for eight years as a Systems Specialist Geologist by the second respondent, Sishen Iron Ore (Pty) Ltd, operating as Kumba Iron Ore (Kolomela Mine). He was a middle management employee who, at the time of his dismissal, earned R78 438,00 per month. On 30 January 2018, the appellant was dismissed from his employment for the assault of a fellow employee, Mr Hilarious Lekhula, on 10 January 2018 on a public road outside the mine. On that day, around 07h00, the appellant witnessed the reckless driving of Mr Modisa Molokwane, also an employee of the second respondent, on a public road leading to

the mine. On his arrival at the mine gate, the appellant reported the matter to security and Mr Molokwane was stopped at the mine entrance. The appellant was angered by Mr Molokwane's conduct and went over to his vehicle to confront him. Mr Molokwane did not exit his vehicle while the appellant took issue with the serious traffic violation which he had committed at speed in a manner which had endangered the lives of a number of people in both his own and the appellant's vehicle.

[3] While the appellant confronted Mr Molokwane, Mr Lekhula, also an employee of the second respondent, stopped his vehicle and walked over to the appellant. An argument ensued between the appellant and Mr Lekhula during the course of which Mr Lekhula pointed a finger at the appellant and said to him: "*You are a boer...this is not your farm*". Mr George Potgieter, the security manager on duty, intervened physically to separate the appellant and Mr Lekhula on two occasions before the appellant pushed Mr Lekhula on his chest and he fell to the ground. Mr Potgieter called his superior to the scene. Following an investigation into the incident, the appellant was suspended from duty and after a disciplinary hearing he was dismissed for assault.

Arbitration award

[4] Aggrieved with his dismissal, the employee referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). Four witnesses testified for the second respondent at the arbitration hearing. Employee relations manager, Mr Thabiso Molefe, emphasised the seriousness with which assault is treated by the second respondent and stated that, if proved, it warrants dismissal on the first occasion. He stated that in two previous cases employees who had committed assault were dismissed. Given the appellant's seniority, Mr Molefe expressed the view that he would have expected the appellant to have handled the matter differently.

[5] Mr Potgieter testified that the appellant was aggressive when he spoke to Mr Molokwane, who remained quiet. Mr Lekhula then "*climbed out of his car also in an aggressive mode*", walked over to the appellant, pointed at him and said to him "*julle boere*". Mr Potgieter stated:

‘At that moment I could [see] something is going to happen here and I went in between them because they were very, very close to each other, standing face to face. I then went in between them with my arms and just pulled them apart.’

[6] Mr Potgieter’s evidence was that he separated the men on two separate occasions. Following his second intervention, the two “just stood there, did not talk much” and that thereafter -

‘...Mr Horn then pushed ...[Mr Lekhula], just pushed him with the hands out of his, *op sy bors*. The guy then fell on the ground. He stood up and came back to us, me and Jacques Horn. By that time I saw now really the flame is hot, something is going to get crazy around here and I phoned [his superior] Mr Dewald Botha to come and assist me...’

[7] In cross examination, Mr Potgieter said that the push had not been hard but was “something like a little *stamp*”, a “soft push” and that Mr Lekhula “could have” fallen due to the push “but maybe his foot also slipped or something happened, I cannot say”. When asked by the commissioner what had caused the fall Mr Potgieter said he could not say “but I believe it was because of the push” and that it was known on the mine that “there is no way you are allowed to fight physically”.

[8] Mr Gerald Brand, the mine manager, chaired the disciplinary hearing. He had regard to the fact that the appellant suffers from a generalised anxiety disorder and that he had been verbally assaulted by Mr Lekhula. However, Mr Brand found that the appellant had the opportunity to leave the scene on two occasions when Mr Potgieter intervened and that given his seniority he should have conducted himself in accordance with the mine’s disciplinary code. It was as a result of the seriousness of the misconduct committed and the second respondent’s attitude to such misconduct that the appellant was dismissed from his employment.

[9] The evidence of the appellant was that Mr Lekhula pointed his finger at him and insulted him. He denied that he became angry, stating:

‘I was trying to avoid conflict...At first I tried to push away his arm with my shoulder...He swung his arm back again. So what I did then was both arms. I just took them and I pushed them down. That is where the pushing comes in....At that time he faked a fall...he sat like that... and said I am going to charge you with assault.’

[10] When asked in cross-examination why it was necessary to push Mr Lekhula away he replied:

Because his finger, he was provoking me...I did not assault him. I just pushed his finger away from my face. It is not assault”.

[11] The appellant could not explain why at the disciplinary hearing he had not mentioned anything about pressing Mr Lekhula’s arms away but had said that Mr Lekhula was in his personal space and that he had just pushed him away. He suggested that it was safety violations to which the second respondent took a zero tolerance approach and that his anxiety disorder, which caused him to have a flight or fight response, ought to have been taken into account in the imposition of sanction.

[12] In his arbitration award, the first respondent (the commissioner), found that if the appellant’s push had not been so hard, Mr Lekhula would not have fallen in the manner he did. Although the appellant had been provoked and “*had every reason to be upset and to respond in the manner he did*”, he had a choice, given his knowledge of his medical condition and his seniority, to leave the scene and “*not to entertain the verbal assault of Mr Lekhula*” yet failed to do so. As a result, the assault of Mr Lekhula was of such a nature that, with reference to *De Beers Consolidated Mines Ltd v CCMA & others*,¹ the dismissal of the appellant amounted to “*a sensible operational response to risk management*” and was both procedurally and substantively fair.

Judgment of the Labour Court

¹ [2000] 9 BLLR 995 (LAC) at para 22.

[13] Dissatisfied with the arbitration award, the appellant sought to have it set aside on review by the Labour Court. The Labour Court took the view that the commissioner had, in considering the probabilities, correctly rejected the appellant's evidence and found that the appellant had sufficient opportunity to move away and avoid the assault but failed to do so. The Court took the view that the decision reached by the commissioner fell within the ambit of reasonableness required and that the findings arrived at were not disconnected from the evidence presented. The review application was therefore dismissed with no order as to costs.

On appeal

[14] In this Court, the appellant raised a number of grounds of appeal. Issue was taken with the procedural fairness of the appellant's dismissal on the basis that certain material witnesses had not been called to testify at the disciplinary hearing. As to the substantive fairness of the dismissal, it was argued variously that the conduct did not occur during working hours or on mine property; that the appellant's actions did not amount to assault when the appellant had simply "moved Mr Lekhula out of his personal space in reaction to the [verbal] assault on him", giving him a slight push following which Mr Lekhula faked a fall to the ground; that there was no evidence of a "severe assault" and that Mr Potgieter's evidence was that "it was just a little push and he might have slipped somehow"; that he had been provoked by Mr Lekhula; that he acted in self defence; and that his general anxiety disorder warranted the imposition of a sanction short of dismissal. Since the commissioner accepted that the appellant had been provoked and from the evidence it was apparent that he had acted in self defence, it was submitted that the appellant should not have been found to have assaulted Mr Lekhula and that the finding to the contrary was not one which a reasonable commissioner could have reached.

[15] In opposing the appeal it was argued for the second respondent that the appellant's contradictory defences should weigh heavily against him. The mine was entitled to discipline the appellant given that although the misconduct occurred outside of the mine it was "*of relevance to, the workplace*". Mr Potgieter had twice separated the two men before the assault occurred, which indicated the extent of the aggression between them and the opportunity given to the appellant to conduct

himself differently. The outcome reached by the commissioner was supported by the facts which showed that the appellant had aggressively pushed Mr Lekhula on his chest as a result of which he fell onto the ground. Given the seniority of the appellant's position with the second respondent, the nature of the misconduct committed and the mine's zero tolerance to assault, it was submitted that the Labour Court had correctly found that, despite any provocation, the appellant had sufficient opportunity to move away from the scene and that dismissal was appropriate. Having regard to the applicable test on review, the arbitration award did not fall to be set aside on review. The Labour Court did not therefore err in its judgment and, it was submitted, the appeal should fail.

Evaluation

[16] Item 7(a) of Schedule 8 to the Labour Relations Act 66 of 1995 (the LRA) provides a guideline for the treatment of misconduct "*in, or of relevance to, the workplace*". In *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another*² it was made clear that an employer is not necessarily precluded from disciplining an employee's misconduct which occurs away from the workplace, but that the decision to discipline is subject to a factual enquiry:

'...This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously

² (1993) 14 ILJ 1449 (LAC) at 1459B-J.

damaging, the relationship of employer and employee between the parties’.”

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[17] Such factual enquiry enables an employer to determine the relevance for a workplace of misconduct which occurred outside of that workplace, as contemplated in Schedule 8. The conduct which is the subject of this appeal was of a serious nature. It occurred before work on a road outside the mine and involved employees of the second respondent, including the appellant who was employed on the management level. As such, it was clearly of relevance to the second respondent and had a direct impact on the employment relationship. The second respondent was therefore entitled to take disciplinary action against the appellant in such circumstances.⁴

[18] The uncontested evidence of Mr Potgieter at arbitration was that the appellant was angry when he confronted Mr Molokwane about his reckless driving and that when Mr Lekhula entered the scene he too was aggressive and verbally abused the appellant. The commissioner accepted that Mr Lekhula’s conduct amounted to provocation but found that the appellant had a choice to leave the scene and not to respond in the manner he did. To arrive at this finding required a careful consideration of the facts, including the nature and extent of the provocation and whether it warranted the retaliatory action taken; whether the retaliation was premeditated; whether the retaliation followed immediately after the provocation; the nature and extent of the retaliation; and whether it was reasonable, moderate and commensurate in its nature and degree when considered against the provocation so as to allow it to be accepted as an appropriate and proportional response to the provocation in the circumstances.⁵ In concluding that a physical response to Mr Lekhula’s provocative verbal statements was not justified, the commissioner cannot be faulted. Such a finding fell well within the ambit of reasonableness required having regard to the facts.

³ Ibid.

⁴ See for example *Dolo v CCMA and others* (2011) 32 ILJ 905 (LC) at para 19.

⁵ See cases including *Powell v Jonker* 1959 4 All SA 380 (T); 1959 4 SA 443 (T); *Mordt v Smith* 1968 4 All SA 472 (RA); 1968 4 SA 750 (RA); *Dzvairo v Mudoti* 1973 3 All SA 214 (RA); 1973 3 SA 287 (RA); *Bennett v Minister of Police* 1980 3 All SA 817 (C); 1980 3 SA 24 (C) at 31–32.

[19] As to the appellant's contention that he had acted in self defence in response to Mr Lekhula's act of aggression against him, for such a defence to succeed the act of defence must *inter alia* have been shown not only to have been commensurate with the danger created by Mr Lekhula, but also reasonably necessary, proportional and not excessive having regard to the circumstances.⁶ Although Mr Lekhula's words were insulting and unwarranted they created no pressing danger for the appellant of a nature that it would have allowed a finding that his aggressive physical response was reasonable, necessary or appropriate. It followed that a defence of self defence was simply not available to the appellant, more so given the appellant's seniority and when Mr Potgieter had already intervened to prevent a physical altercation between the two men.

[20] It is trite that a court on review is required to determine whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.⁷ In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*,⁸ it was made clear that:

'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.'⁹

[21] This Court in *Head of the Department of Education v Mofokeng & others*¹⁰ stated:

⁶ *Ntanjana v Vorster & Minister of Justice* 1950 4 All SA 248 (C); 1950 4 SA 398 (C); *Chetty v Minister of Police* 1976 2 All SA 508 (N); 1976 2 SA 450 (N) 455; *S v Jansen* 1983 4 All SA 173 (NC); 1983 3 SA 534 (NC).

⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

⁸ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

⁹ At para 25.

¹⁰ (2015) 36 ILJ 2802 (LAC) at para 32.

‘Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.’

[22] In undertaking his task, the commissioner was required to have regard to the conspectus of the material before him. This included but was not limited to the nature and seriousness of the misconduct, the importance of the rule, the extent of similarity between the employee’s misconduct and other incidents of a similar nature, the consistent application of the rule by the appellant, the harm caused by the employee’s conduct, his seniority and knowledge of the rule, the reason the employer imposed a sanction of dismissal, the basis of the challenge to his dismissal, the employee’s disciplinary record and relevant mitigating factors. The commissioner had regard to the various defences raised by the appellant, finding that the appellant had been provoked. Even if the commissioner found that the appellant “*had reason ... to respond in the manner he did*” while at the same time finding that dismissal for the misconduct committed was appropriate, this is not enough to vitiate the award when the enquiry undertaken was correct and the commissioner did not arrive at an unreasonable result.

[23] The commissioner had regard to the relevant material before him and found that the appellant had pushed Mr Lekhula, when given his knowledge of his medical condition and his seniority, he could and should have left the scene and refused “*to entertain the verbal assault of Mr Lekhula*” but failed to do so.

[24] A commissioner, as was clearly stated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,¹¹

¹¹ At para 78.

‘...has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.’¹

[25] The commissioner had regard to circumstances relevant to a determination as to the fairness of the appellant’s dismissal. It was a relevant consideration that, in spite of the relevant mitigating factors, the appellant had sought to underplay his conduct, contending he had given Mr Lekhula a “slight push”, in response to which he suggested Mr Lekhula had “faked” a fall to the ground, as opposed to taking responsibility for his conduct in breaching an important rule.

[26] The commissioner’s finding that the dismissal was fair did not fall outside of the ambit of reasonableness required. The Labour Court cannot therefore be faulted for arriving at the decision it did. The appeal cannot therefore succeed. There is no reason in law or fairness why an order of costs should follow the result.

Order

[27] For these reasons, the following order is made:

1. The appeal is dismissed.

Savage AJA

Waglay JP and Davis JA agree.

APPEARANCES:

FOR THE APPELLANT:

Mr C Coetzee

Coetzee and Jansen van Rensburg Attorneys

FOR THE FIRST RESPONDENT:

Mr F Boda SC and Mr T Moshodi

Instructed by Cliffe Dekker Hofmeyr Inc.