



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1881/20

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION (AMCU)
obo DAVID MOROBISI**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER KHUTSO ELIAS MPAI N.O.

Second Respondent

**NORTHAM PLATINUM MINES
(BOOYSENDAAL OPERATIONS)**

Third Respondent

Heard: 16 August 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 26 January 2024.)

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant brings an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award by the second respondent dated 25 October 2020 in which the second respondent found that the applicant's dismissal was substantively fair.
- [2] The third respondent opposes the application.

Background facts

- [3] The was employed by the third respondent as LHD Operator.
- [4] On 4 March 2020, Mr. Beukes, a shift supervisor and senior to the applicant, requested Mr. Mashala, a team leader .and also a senior to the applicant, to instruct the applicant to clean an underground working area. If this area is not cleaned, health and safety risks ensue and the commencement of the following shift is delayed. The applicant refused to follow the aforesaid instruction, stating that it was time for him to knock off.
- [5] Later on the same date, Mr. Beukes requested Mr. van der Watt, another shift supervisor, to request the applicant to clean the aforesaid working area in preparation for the next shift. The applicant refused to acknowledge Mr. van der Watt when he blew his whistle to stop the applicant as he drove away.
- [6] Messrs. Beukes and van der Watt proceeded to the working area and noted that the applicant had not cleaned it.
- [7] On 6 March 2020, the Mine Overseer, namely, Mr. Mokotsi, arranged a meeting with the applicant to present him with a written warning as progressive discipline and in accordance with the third respondent's

¹ Act 66 of 1995, as amended.

disciplinary code and procedure. Also present at this meeting, were Messrs. Beukes, van der Watt and Mashala. The applicant's refusal to carry out their lawful instruction on 4 March 2020 was discussed with him. Mr. Beukes explained that the applicant's failure to prepare the working area for the next shift resulted in a loss of production for the third respondent. Mr. Mokotsi prepared disciplinary documentation containing a written warning and presented it to the applicant to correct his behaviour. Upon presentation, the applicant responded aggressively by saying, amongst other things, that the disciplinary documentation presented to him was "*masepa*", which is a vulgar word in the Sepedi, Sesotho and Setswana languages, meaning "*faeces*" and in slang language, "*sh**t*".

[8] The applicant was reprimanded several times for using the vulgar word "*masepa*" - when he refused to sign the written warning, terming it "*masepa*"; when he referred to the progressive discipline process as "*masepa*" and told his seniors that they should call him to a formal disciplinary hearing. The applicant was warned that he was being disrespectful by pointing fingers at Mr. Beukes and the other colleagues who were present and senior to him. In addition, the applicant referred to Mr. Beukes as a "*Boesman*", which is a derogatory term for a person of the coloured race. He also referred to Mr. van der Watt as a "*Boer*", a derogatory term for a person of the Afrikaans culture. In so referring to his seniors in derogatory terms, in comparison to himself, he stated that he is Motswana. The applicant did not accept the warning and threw it on Mr. Mokotsi's office table and left the meeting, shouting profanities.

[9] On 12 May 2020, the applicant was charged with the following acts of misconduct:

- '1. Refusal to carry out a reasonable lawful instruction - and that you was [*sic*] given an instruction by Mr. Graeme Beukes and you blatantly refused to carry the instruction [*sic*].

2. Gross insubordination - and that you disrespectfully in front of other employees said to the Shift Supervisor Mr Graeme Beukes that the disciplinary document he was presenting to you is “Masepa”.¹²

[10] The outcome of the disciplinary hearing was a finding of not guilty on the first charge and of guilt on the second charge of gross insubordination.³ The applicant was dismissed on 21 June 2020. He unsuccessfully appealed against the decision/sanction of the disciplinary enquiry. Consequently, on 28 July 2020, his dismissal was upheld.

[11] Thereafter, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicant did not challenge procedural unfairness. He challenged the substantive fairness of his dismissal on two aspects: firstly, he denied committing the misconduct, and secondly, he contends that the sanction of dismissal was unfair and inappropriate.⁴

The grounds of review

[12] The applicant raises three grounds of review.⁵ They are summarised below.

The first ground of review:

[13] The applicant avers that he was charged with insubordination and dismissed for this offence when he utilized the word “*masepa*”. He denies that he utilized this word and states that he used the word “nonsense”.

[14] At the very outset, the applicant downplays the charge against him. The charge is set out in clear terms. I paraphrase – he is charged for gross insubordination for being disrespectful to Mr. Beukes, the shift supervisor in the presence of other employees when Mr. Beukes presented him with a written warning and used the word “*masepa*”.

² Record of arbitration proceedings, p 65.

³ Record of arbitration proceedings, p 53.

⁴ Transcribed record, p 6, lines 1 to 10.

⁵ See: founding affidavit at paras 19 to 32, on pp 9 to 12, and supplementary affidavit at paras 5 and 6, pp 31 to 33.

- [15] The applicant avers, rather strangely, that he ought to have been charged with insolence and not insubordination. He seeks solace in the third respondent's disciplinary code that provides for the sanction of a final written warning for insolence as a first offence.⁶ He also seeks comfort in the finding of no guilt in the disciplinary hearing in relation to the first offence regarding his refusal to carry out a lawful instruction. He alleges that there was no evidence by the third respondent to prove that he failed to obey a reasonable instruction in relation to the second charge that was levelled against him. He draws a clear distinction between insolence and insubordination.
- [16] The applicant alleges that the second respondent committed a gross and reviewable irregularity in that he failed to properly assess the charge before him.
- [17] It is trite that disciplinary enquiries are not meant to replicate the criminal justice module.⁷ In *Police & Prisons Civil Rights Union v Minister of Correctional Services and others*,⁸ this Court held that the standard for a disciplinary charge sheet cannot be the same as one in a criminal trial. The Court went on to state that the information on the charge sheet must be sufficient for the employee to know the case she/he is to meet.
- [18] This Court has also stated that there is no place for formal disciplinary procedures that incorporate all the accoutrements of a criminal trial, including technical and complex charge sheets.⁹
- [19] In addition, this Court has held that disciplinary charges are not intended to be a precise statement of the elements of an offence but need only be sufficiently precise to allow the employee to identify the incident which forms the subject matter of the complaint in order for the employee to prepare a suitable defence.¹⁰

⁶ Record of arbitration proceedings, p 76.

⁷ *Bader SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZALCJHB 550 (20 December 2016).

⁸ [2018] ZACC 24; (1999) 20 ILJ 2416 (LC).

⁹ *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others* [2006] ZALC 44; (2006) 27 ILJ 1644 (LC) at p 1652.

¹⁰ *Zeelie v Price Forbes (Northern Province) (1)* (2001) 22 ILJ 2053 (LC) at para [37].

[20] In *Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others*,¹¹ the Labour Appeal Court (LAC) stated as follows:

‘... the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant’s disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained...’

[21] In *National Union of Mineworkers and others v Commission for Conciliation, Mediation and Arbitration and others*¹² (NUM), this Court held as follows:

[27] The applicants were charged with “aiding and abetting diamond theft”. On review, they complain that they were not charged with having broken fissure.

[28] The arbitrator found that the phrase “aiding and abetting diamond theft” was an umbrella term that included the breaking of fissure. He pointed out that “all witnesses for both parties agree that the activity with which the employees were charged consisted of the unauthorized breaking of fissure, that this was explained to the employees and their representative at the disciplinary proceedings, and that the activity in question is a dismissible offence”. He went on to state:

“Inelegant and poorly worded charges are a common feature of disciplinary proceedings in the workplace. There are occasions where the mis-description is of such a nature that it renders the ensuing disciplinary process and outcome unfair; and there are other occasions where this does not lead to unfairness. It is therefore necessary to look at the substance of the matter to see what actually transpired in this instance. As mentioned above, it was at all times clear to all parties what

¹¹ (2011) 32 ILJ 2455 (LAC) at para [32].

¹² (2011) 32 ILJ 956 (LC) at paras [27] – [30].

activity the employees were accused of - namely the unauthorized breaking of fissure.”

[29] The arbitrator went on to look at the description of the offence in the disciplinary code and the content of the charge. He confirmed the wording of the charge entails no unfairness to the employees.

[30] In my view, the arbitrator’s reasoning cannot be faulted...’

[22] In view of the foregoing, the following principles arise:

22.1 a disciplinary charge sheets need not be drafted with the precision of a legislative drafter;

22.2 disciplinary charges are not the same as criminal charges; and

22.3 an employee should be informed of the essence of the allegations against him or her, in order that she or he may raise his or her defence thereto.

[23] In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹³ (*EOH Abantu*), the LAC held that the categorisation by the employer of the alleged misconduct is of less importance. The second respondent considered *EOH Abantu* in analysing the charge against the applicant for which he was dismissed.¹⁴ After having done so, the second respondent concluded that the applicant’s misconduct can best be defined as insolence, which is a dismissible offence in terms of the third respondent’s disciplinary code and procedure.

[24] The charge of gross insubordination was sufficiently explained in the charge sheet for the applicant to understand the misconduct that he was charged for. The miscategorisation of the charge that the applicant harps on does not automatically result in a fatal irregularity warranting the setting aside of the arbitration award.

¹³ [2019] 12 BLLR 1304 (LAC).

¹⁴ See: para 88 of the arbitration award on p 24.

- [25] As stated in *NUM*, what is necessary is to look at the substance of the allegation, to consider what transpired. In the present case, the charge sheet, being sufficiently crafted to enable the applicant to answer the allegation and to provide a version as to whether or not he was disrespectful and whether or not he used derogatory terminology, on the totality of evidence before the second respondent, the arbitration award unreasonable. The second respondent categorising the offence as insolence does not make the substance of the allegation less serious. The second respondent is alive to this and applies his mind to the seriousness of the charge with the use of the word “gross”¹⁵ and points Mr. Mokotsi to the third respondent’s disciplinary code, where the offence of gross insubordination is categorised with the offences of serious disrespect, imprudence or insolence. Mr Mogotsi’s evidence is that gross insubordination includes the misconduct of serious disrespect, impudence or insolence.¹⁶
- [26] In the circumstances, the description of the charge as “gross insubordination” as opposed to “gross insolence” is of no moment, as gross insubordination is interpreted by the third respondent to include insolence and disrespect. The charge describes the misconduct of gross insubordination as disrespect to a senior in the presence of other employees and the use of a vulgar word when the senior employee was meting out progressive discipline to the applicant.
- [27] The evidence before the second respondent, the applicant’s conduct was so disrespectful that it posed a deliberate and serious challenge to the third respondent’s authority and it is for this reason that the second respondent found, and correctly so, that the applicant “*defied Beukes’ authority*”.¹⁷ Mr Beukes’ evidence is that he understood the word “*masepa*” as a swear word.¹⁸ Further, the referral to his supervisors as “Boesman” and “Boer” was insulting to them.¹⁹ In my view, therefore, the charge of gross insubordination is properly categorised. In my view, the second respondent did not

¹⁵ Transcribed record, p 136.

¹⁶ See: transcribed record, at pp 136 to 137.

¹⁷ See: para 120 of the arbitration award, on p 28.

¹⁸ Transcribed record, p 63, line 14 to 17 and p 64, lines 1 to 10.

¹⁹ Transcribed record, p 104. The evidence of Mr. van der Watt is that he was insulted when referred to as a “Boer” by the applicant. On p 39 of the transcribed record, Mr. Beukes states that the applicant’s referral to him as a “Boesman” is ‘diminishing’.

miscategorise the charge. The charge as described comprises of gross insubordination and gross insolence. If the applicant's contention is for a moment accepted, that he ought to have been charged with insolence, then, in view of his insolence, which was gross because he repeated the word "masepa", he insulted the dignity of his supervisors by referring to them as "Boer" and "Boesman", challenged and undermined their authority to discipline him progressively, dismissal is the appropriate sanction.²⁰

- [28] In view of the foregoing, I find that the second respondent correctly found that the applicant's conduct fell within the realm of gross insolence and found the dismissal to be substantively fair.
- [29] To drive the point home, in *Pallucci Home Depot (Pty) Ltd v Herskowitz and Others*,²¹ the LAC stated that insubordination may also be present where disrespectful conduct poses a deliberate and serious challenge to the employer's authority, even where there is no indication of an instruction being given for defiance of an instruction.
- [30] In his heads of argument, the applicant contends for the first time, that his conduct should be condoned because he was provoked.²² This was not pleaded by the applicant. It is incongruent for the applicant to deny that he is guilty of the misconduct and at the same time, to state that he should be condoned for the misconduct because he was provoked. For what it is worth, the case relied upon by the applicant for this contention is distinguishable from the facts of the present case, as there was no evidence before the second respondent of a strained relationship, abuse or unwarranted and unacceptable conduct that the applicant was subjected to by the third respondent which could be said to have provoked him.²³
- [31] In light of the foregoing, and having regard to the principles expressed in the foregoing cases, the applicant's contention, that the second respondent committed a gross and reviewable irregularity in failing to properly assess the

²¹ [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC).

²² Applicant's heads of argument at para 32.

²³ See: third respondent's heads of argument at para 19.15, and the authority cited therein, on which the applicant relies.

charges before him with the evidence indicated that the applicant ought to have been charged for insolence, lacks merit. I find that the second respondent applied his mind to the facts, the evidence and the law relating to the categorisation of the charges.

The second ground of review:

- [32] The applicant alleges that the second respondent committed a gross and reviewable irregularity in that he failed to determine whether the trust relationship between the applicant and the third respondent had broken down as a result of the applicant's misconduct and he failed to consider the applicant's facts in mitigation of sanction.
- [33] In *Easi Access Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,²⁴ this Court found that, where direct evidence of the breakdown of trust in the employment relationship has not been led, the enquiry into the fairness of the dismissal by the commissioner includes a determination of whether the breakdown cannot be inferred from the nature of the offence. Therefore, the third respondent's failure to lead direct evidence of the breakdown of the trust relationship does not in itself render the applicant's dismissal unfair nor does it mean that the trust relationship has not broken down irretrievably. The second respondent found that the applicant failed to provide justification for his conduct notwithstanding the repeated reprimands and that such conduct was displayed in front of employees who are more senior to him.²⁵ Therefore, the unwillingness by the applicant to admit and acknowledge his conduct demonstrates that the trust relationship has broken down irretrievably.
- [34] The second respondent considered all the foregoing. He also considered the appropriateness of dismissal as a sanction for a first offence when he took

²⁴ [2015] ZALCJHB 466; [2016] 8 BLLR 783 (LC).

²⁵ See: paras 118 and 119 of the arbitration award, on p 27 to 28.

into account the provisions of Schedule 8 of the LRA (The Code of Good Practice: Dismissal) and reasoned that gross insubordination is a serious misconduct that makes continued employment relationship intolerable.²⁶ In the circumstances and in my view, no irregularity was committed by him, as he took the facts before him into consideration in determining whether dismissal was the appropriate sanction.

- [35] The second respondent considered the applicant's facts in mitigation. He refers in his arbitration award²⁷ to the case of *Toyota SA Motors (Pty) Ltd v Radebe and others*²⁸ where the LAC held that a long service record of an employee cannot save an employee who is found guilty of serious misconduct from a sanction of dismissal. The ground of review accordingly lacks merit.

The third ground of review:

- [36] The applicant contends that the second respondent committed a gross and reviewable irregularity in that he failed to properly consider whether the sanction of dismissal was appropriate having regard to the nature of the offence. He contends that the second respondent ought to have considered progressive discipline and a sanction to "*remedy and rectify*" his conduct.
- [37] In my view, where an employee showed no remorse for his conduct, denied that he misconducted himself as charged and in the circumstances of the present case, where he swore at and insulted his supervisors when he was being progressively disciplined in the first place, it would serve no purpose to mete out progressive discipline when regard is had to the seriousness of the offence and the nature of the offence and the facts relating to the offence.

²⁶ Arbitration award at paras 116 to 126, on pp 27 to 28.

Item 3 (4) of the Code of Good Practice: Dismissal provides as follows:

'Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination....' [Emphasis added]

²⁷ At para 122 on p 28.

²⁸ [1999] ZALAC 42; (2000) 21 ILJ 340 (LAC).

- [38] On the evidence before the second respondent, the third respondent's disciplinary code and procedure provides for dismissal as a sanction for the first offence for gross insubordination, serious disrespect, impudence or insolence is dismissal. In so far as progressive discipline is concerned, the disciplinary code and procedure of the third respondent provides that in instances where misconduct is mere insubordination or insolence, the first offence is a final written warning and the second offence is a dismissal.²⁹ The applicant did not challenge the reasonableness, fairness and validity of this rule. Consequently, there is no dispute that the applicant was charged and disciplined in terms of the third respondent's disciplinary code and procedure. The second respondent considered the applicant's conduct and was satisfied that it fell squarely within the definition of gross insubordination, insolence and disrespect which warrant a dismissal for a first offence and not merely insubordination or insolence which warrants a final written warning on the first offence.
- [39] In *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and others*,³⁰ this Court held that it would be unfair to expect an employer to take back an employee when the employee was persistent in his or her denials and did not show any remorse.
- [40] In summarising the afore-going, in considering the appropriate sanction, the second respondent considered that the applicant did not provide any justification for the use of derogatory, abusive and vulgar language; he did not provide any justification for undermining and ridiculing Mr. Beukes in front of his colleagues, notwithstanding the repeated reprimands by Mokotsi. Further, that the applicant's conduct fell within the ambit of gross insolence and disrespect. The second respondent also took into consideration that the third respondent's disciplinary code and procedure stated that the sanction for gross insubordination, seriousness disrespect, insolence, and imprudence is dismissal for the first offence. Finally, the second respondent considered that the applicant's conduct was persistent and took place in full view of other employees.

²⁹ See: p 76 of the record of the arbitration proceedings.

³⁰ [2007] ZALC 93; [2008] 3 BLLR 241 (LC).

[41] In the circumstances, the second respondent properly considered that dismissal was the appropriate sanction taking into account the nature of the offence and the third respondent's disciplinary code and procedures.

Conclusion

[42] The LAC has stated that the test for substantive reasonableness of the outcome or result of a CCMA award is an outcomes-based enquiry entailing a stringent test aimed at ensuring that arbitration awards are not likely interfered with.³¹

[43] In light of the foregoing, on the totality of the evidence before the second respondent, in my view, his decision is reasonable. There is accordingly no basis to interfere with the arbitration award.³²

[44] In view of the foregoing, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

³¹ *Ellerine Holdings Ltd v Commission, Conciliation, Mediation and Arbitration and others* [2008] ZALAC 6; (2008) 29 ILJ 2899 (LAC) at 2906H; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC) at para [100]; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) (*Herholdt*) at para [13].

³² *Sidumo and another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

See also: *Herholdt, supra* at para [12], where the Supreme Court of Appeal held as follows:

'... That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator.'

Appearances:

For the Applicant: Adv. A Cook

Instructed by: Larry Dave Incorporated Attorneys

For the Third Respondent: Adv. R. Itzkin

Instructed by: Webber Wentzel Attorneys

LABOUR COURT