

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JA33/03

In the matter between :

**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA (NUMSA)**

First Appellant
(1st applicant *a quo*)

**MADODA MDUNYELWA AND 19
OTHERS**

Second & Further Appellants
(2nd to 20th Applicants

a quo)

AND

MAHOMED JAJBHAY NO

First Respondent
(1st Respondent *a*

quo)
**SABAT BATTERY COMPANY
(PTY) LTD**

Second Respondent
(2nd Respondent *a*

quo)

NICHOLSON JA, PILLAY AJA, NKABINDE AJA

JUDGMENT

NKABINDE AJA:

Introduction

- [1] The appellants appeal against the judgment of the Labour Court in which their application, brought in terms of section 33 (1) of the Arbitration Act No. 42 of 1965 (“the Act”), to review and set aside the award issued by the first respondent (“the arbitrator”) before whom the matter was referred by agreement, was dismissed with costs.
- [2] The dispute which culminated in this appeal concerns the substantive and procedural fairness of the dismissal in June 2001 of the second and further appellants (“the dismissed employees”) by the second respondent (“the employer”) subsequent to a disciplinary enquiry on a charge of them having participated in a retardation of production during the period 24 May to 18 June 2001. The arbitrator confirmed the dismissal. Leave to appeal has been granted by this Court.

Facts not in dispute

- [3] The employer conducts a business as a manufacturer and distributor of batteries. The manufacturing process is performed in different departments in the employer’s factory. The dismissed employees worked in two of these departments: seven of them worked in the Cast on Strap (COS) Department. Of these six worked on machine 4 (“the COS4”) and one on machine 1 (“the COS1”). The dismissed employees worked on two different shifts classified as team one and team two. They used machines as part of the manufacturing process. Twelve of the dismissed employees

worked on the finishing line which is at the end of the manufacturing process. There appeared to be two other employees who also worked in the finishing department. Two shifts operated in the finishing department. On each shift there are six employees and a supervisor. One of the six employees operates the machine and the others are essentially packers. The employees in this department receive batteries from the charge room (also referred to as the formation department) where batteries are filled with acid and placed into charging trays. Their target per hour was the production of 250 (two hundred and fifty) batteries. The batteries are tested in a machine and those batteries which pass the test are then furnished with stickers, clips, vent plugs, *et cetera*, before being stored. The whole process is initiated by lead ingots being received and culminates when batteries are tested by the bitrode tester using a high rate short duration discharge. When the finishing process is completed the batteries are levelled, coded and passed into the warehouse.

- [4] During late 1999 and early 2000 the formation department underwent an upgrading process for reasons the details of which are not relevant for the purpose of this judgment. The plant in that department was replaced with a modern device. This upgrading process was completed during the middle of May 2001. The job content, as a result of the upgrading, changed from one of manual handling of batteries to that of handling batteries by cranes and moving the trays in and out of the stacks. Consequently jobs in the formation department had to be re-graded. The employer, in

consultation with the first appellant, the National Union of Metal Workers of South Africa, (“NUMSA”), and non-union members agreed that the persons in the formation department, after such upgrading, required skill to move a half ton tray full of batteries on an overhead crane and locate it to the stacks. The positions of such employees were re-evaluated and eventually upgraded from grade 1 on the Patterson Scale to Grade 2, putting them in the same level as the COS operators.

The employer's case

[5] The case of the employer is based on the evidence of three of its employees, namely :Messrs Steyn, Van Staden and Heath. It was explained, on behalf of the employer, that the said upgrading triggered dissatisfaction among workers in the COS supervised by Steyn and the finishing department supervised by Van Staden. Their demand, according to Heath, was based on the perception that the charge room or formation department was seen as the lowest level job. Heath testified that they felt that they had to be moved up to a level 3 to maintain the distinction between them and those whose positions were re-graded. The dissatisfaction, according to him, resulted in a twenty minutes work stoppage in the COS department. Production level dropped. When enquiring from the operators of the reason for the decline he was told that there were no problems.

[6] Steyn testified that he kept a close watch on the performance of the

operators and packers. Both Steyn and Heath noted a trend of retardation in production from 24 May to 18 June 2001. There was, according to their testimonies, a big difference in the performance of teams one and two that were operating the COS 4. Steyn realised that team two was retarding the production process. The operators and packers were, according to Heath, counselled. Steyn was secretly informed by one of the operators, Mr Baloyi, that the packers were holding back the production because of their dissatisfaction with the job grading. Baloyi apparently tried to push the groups to increase production but was told not to do so. He was subsequently assaulted. According to Steyn and Heath targets had been set out and communicated to the workers in the COS department (through notice boards) and the finishing department (on a personal basis). Such targets were invariably not met. Steyn testified further that he observed the behaviour of the dismissed employees during the period under consideration.

- [7] Steyn also observed that Mr Mokoena, an operator on COS1, was busy retarding the process in the production. He kept a log book in which he recorded the hours during which the machines were operational, the down time and reasons therefore and other information which could assist in evaluating the level of production of a particular machine. The information in the log book revealed that the production level in the COS teams was not the same. Mention should be made of the fact that one Zwane in the COS2 was not dismissed. The reason, according to Steyn, was that the targets in the COS2 depended on the size of the battery. He

explained the reasons for the down time of each particular machine and testified that there were replacements when shortages were experienced. He was cross examined at length about the activities that took place around the machines on a day to day basis during the period in question. He fairly conceded that the targets set out were not met on many occasions but was steadfast that, even so, there was a marked downtrend in production level during the period under consideration.

- [8] The crux of Van Staden's evidence is that on 24 May 2001 the workers, who were singing and dancing, worked slower than usual. He observed that certain employees were obstructive in their work in that double plastic bags were being pulled over the batteries in order to retard the progress in production. He raised his concerns regarding the drop in production level with the individuals concerned. According to him the factory manager, Mr de Bruyn, also spoke to the workers about the drop in the level of production. The employees' response was that they were doing their job. Van Staden observed a back-log in the formation department. The employer, as a result of the retardation, had to employ extra casual workers between 29 May and 6 June 2001 to finish the work in order to finalise the production. He testified further that a backlog of approximately 3 000 batteries for the week-end was brought up to speed over two days by the casual workers. Under cross examination he testified, among other things, that he spoke to the employees individually and requested them to reach the targets of 250 per hour. According to him the employees were simply not

willing to reach the targets. He testified that the production, during the period under consideration, was below the target of 3 200 per day.

- [9] Much of Heath's testimony is common cause and is confirmed by Steyn. He confirmed the 20 minutes work stoppage on 24 May 2001. After this incident, according to Heath, there was a decline in the volume of boxes of the batteries produced. In addition the target of 80 batteries per hour in the COS4 was not reached. Graphs, which form part of the documentary evidence, were prepared to illustrate the employer's concerns with the levels of production then achieved. In the graphs an indication is given by the use of spikes when one of the following occurred: mould changes or when moulds were removed for cleaning and drilling, or when the machine broke down or when there was a shortage of components. The graphs also show daily production trends between teams one and two. According to Heath the production level of both teams ran level until 24 May. Thereafter, although the teams operated the same machine, albeit at different times, team one continued to run at a level of 500 batteries per shift while team two's production dropped to 450. He testified further that in the COS the lead parts were switched off making them cold overnight thus delaying production. Heath further testified that problems were also encountered in the finishing line where the targets were set for 250 per hour. He confirmed that the employees were dancing, singing and working slowly. He referred also to the two shifts in the finishing department where production, according to

the calculations of batteries supplied per hour, had dropped significantly. Heath testified further that after raising the employer's concerns with NUMSA, the latter, through Mangele, requested information of the overall COS production which was then furnished at the follow-up meeting on 15 June. NUMSA then undertook to discuss the matter with the workforce which they did on the same day during the shift change. He, thereafter, noted a marked improvement in the volume of batteries passing through the finishing line though such improvement only lasted for a short time.

- [10] Under cross examination Heath testified, among other things, that what the employees were doing was not 'loafing *per se*' but was industrial action in the form of a deliberate retardation of production. The graphs revealed that the one shift was producing less than the other shift in the COS. He could not say with certainty who turned the moulds on and off in the COS. He conceded that there was a decline in all the four machines in the COS and that not all employees in that department were charged. The reason, according to him, being that they 'attempted to isolate everybody that we could prove were involved'. He testified that they had difficulty in obtaining proof of the involvement of the others. The reason, according to him, for being able to detect with ease problems in the COS4 was because such machine produced a particular size of battery making it easy to measure volumes, while other COS machines produced different sizes resulting in difficulties in terms of measuring volumes. With regard to the

finishing department, he testified that the production level declined because of the employees' obstructive behaviour, which included work stoppages, dancing and singing. He testified that he saw them from his position in his office opposite the department. He testified further that the employees were not charged for underproduction on 20-23 May 2001 because during that period the machinery in the charge room was being commissioned.

The appellants' case

[11] The appellants' case in the arbitration, as testified to by the Organiser for NUMSA, Mangele, was a total denial of any work stoppage. According to him the employees were surprised by the allegations of the stoppage. The reduction in production was, according to what the employees had told him, attributable to the delays on the part of management in supplying the employees with material.

[12] One of the dismissed employees from COS4, Mr Mdoda, denied that he or his co-workers were involved in a retardation process. He also denied having any knowledge about the re-grading that had taken place in the formation department. He testified, however, that during certain periods when he commenced work in the morning he would find that the burners had not been turned on. According to him the shortage of packers, plates and cases, from time to time, resulted in him not meeting the targets. He testified further that he was absent from work on certain days. He and his co-workers were

informed about the targets thus confirming the version of the employer in this regard.

- [13] Mr Mkhize, one of the employees and a shop steward, represented the employees at the disciplinary hearing. He denied the allegations that there was retardation of production. He testified that he would have known if any retardation took place because he was a shop steward. The problem, according to him, was with the packers as well as the fact that the operator's work in the finishing department was excessive because they had to deal with the acid spills which resulted in the targets not being met. He testified that there was never a problem with employees sitting down and singing. He testified initially that he was not aware of the grading process but changed, under cross examination, and testified that 'the whole grading itself was being discussed.'

The findings by the arbitrator

- [14] The arbitrator, having considered the evidence presented, confirmed the dismissal of the employees and found their dismissal to have been substantively fair but that the employer did not follow a fair procedure in dismissing them. He ordered the employer to compensate each of the dismissed employees in the amount equal to the remuneration they would each have received between 29 June 2001 and August 2001. This is the award which was the subject matter of the review application in the court *a quo*.

The issues on appeal

- [15] The contention, on appeal, is basically that the court *a quo* erred –
- (a) in confirming the finding of the arbitrator and not finding that the dismissal of the employees was both procedurally and substantively unfair and finding that there was a causal link between the retardation of work and the individual employees;
 - (b) in not giving more weight to the parity principle and the application thereof: the contention being that the employer acted inconsistently and selectively in dismissing the individual employees in that while it relied on the information on the graphs in dismissing the individual employees on COS4 (Team 2) it should have used the same information and also taken disciplinary action of whatsoever nature against the other employees in the COS department; and
 - (c) in not holding that the arbitrator failed to perform his duties properly.

Powers on review

- [16] Section 33 (1) of the Act sets out the following four grounds of review:
- i) misconduct by the arbitrator in relation to his duties as arbitrator;
 - ii) where the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings;
 - iii) where the arbitrator has exceeded his powers; and
 - iv) where the award has been improperly obtained.

- [17] The principles that govern reviews are delineated by Van Dijkhorst

AJA in **Stocks Civil Engineering (Pty) Ltd v Rip NO & Another** (2002) 23 ILJ 358 (LAC) at paragraphs 33-60. They may be summarised as follows:

- (1) A court must determine whether an arbitrator acted honestly, duly considered all the evidence before him and had due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, the court on review will not interfere. But if he does not function as an arbitrator, he reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. The arbitrator must be fully cognizant with the extent of the limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* is not. If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.
- (2) Gross irregularities can be patent - and occur during the course of the trial, such as the refusal to allow cross-examination or latent – that occur in the mind

of the judicial officer. These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness or any conscious denial of justice. The crucial question is whether the irregularities prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the enquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.

- (3) An irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.

[18] It is not necessary to deal with grounds (iii) and (iv), above, as these were not relied upon on review or on appeal.

The determination of the first issue

[19] Counsel for the appellants correctly submitted that there was no progressive reduction in production as there was no pattern of decline. I am, however, of the view that the proper interpretation of the graphs reveals a clever and deliberate manipulation in the level

of production. The drop in the level of production between 20 and 23 May was, according to Heath, due to commissioning in the charge room. On 24 May the work stoppage lasted for 20 minutes. Van Staden testified that between 29 May and 6 June 2001 casual employees were employed to finish the backlog of approximately 3 000 batteries in order to finalise production. His testimony in this regard was unchallenged. As seen in the reading of the graphs it is beyond question that the level of production during the last mentioned period improved significantly. Heath testified that he noted a marked improvement in the level of production in the finishing line albeit for a short time around the 15th of June 2001 after the employer's concerns were communicated to the workforce. After that and until the 18th of June 2001 Heath noted a trend in the level of production by the dismissed employees. His evidence in this regard was also unchallenged. The sporadic drops and increases in the levels of production must be seen, *inter alia*, in the light of those factors. The suggestion by the appellants that the decline in production is solely attributable to the management's non supply of material and shortage of packers is, in the context of the evidence in its totality, highly improbable. Much of the evidence of Steyn and Heath, as well as the documentary evidence, reveal machine breakdowns and mould problems on certain occasions. Such incidents, however, contributed little to the decline in production. This view is fortified by the fact that on the unchallenged information supplied there is a major drop in production, for instance on 28 May 2001, even when there appears to have been no supply or shortage problems as alleged. That

explains the back-log which was completed by the casual employees.

[20] The evidence tendered on behalf of the employer does, in my view, lend support to the conclusion that the identified employees, in all probability, deliberately retarded production. Steyn, who was the production supervisor during the relevant period, testified about the methods used by the employer to monitor the productivity of the COS department. He kept log books in which hours the machines were operational and reasons, *inter alia*, for breakdown, were recorded. His evidence on this aspect was not challenged. It must, therefore, be accepted. The appellants' case was that the decline in production was caused by machine breakdowns and non supply of material. This is not entirely correct. Steyn conceded that there were breakdowns but explained that there were replacements when shortages were experienced. After the initial work stoppage for 20 minutes he noted a decline in production. He specifically requested the employees to increase production. He then kept a close watch on them and observed that they were retarding production for the period between 24 May until 18 June 2001. He also observed that Mokoena, an operator in the COS1, was busy retarding production. His testimony was also unchallenged on these aspects. Steyn's evidence is corroborated by Heath and Van Staden regarding retardation and decline in production.

[21] Van Staden also testified that as a result of the retardation there was a back-log of approximately 3000 batteries. This was remedied

by the engagement of casual labourers between 29 May to 6 June. There is no evidence to gainsay this. The dismissed employees were, according to his testimony, involved in the trend of retarding production. A scrutiny of the information in the graphs relating to the volume of production between 29 to 6 June 2001, when casuals were engaged, reveals a marked improvement in production of team two. Immediately thereafter a major decline from the 7th of the same month is observed. Such unchallenged information, clearly shows a marked difference in the level of production by team two as compared to the level of production by team one. It reveals also a trend in the decline of production by team two. That cannot be said in respect of the performance by employees in team one. Moreover there is no evidence on behalf of the appellants that the employer's records, including the graphs, were not accurate. As correctly stated by the arbitrator it is not suggested that any one of the dismissed employees distanced or dissociated himself or herself from the actions complained of by the employer. In fact Mdoda confirmed the employer's case that on certain occasions he found that burners were switched off. Baloyi, who tried to discourage his co-workers from retarding production was in fact victimised by them. The arbitrator found, correctly in my view, that such conduct must be considered in a serious light. Accordingly, I cannot find fault with the arbitrator's finding that the factual causal link between the drop in the production figures and the individual employees was established. I am satisfied that the evidence as a whole justifies the conclusion of the court below.

The determination of the second issue

[22] The next question that falls for consideration is whether the employer selectively dismissed the COS employees. It is contended, on behalf of the appellants, that the employer, while relying on the information of the graphs in dismissing the individual employees, should have done the same and dismissed the team one packers as well in the COS department.

[23] The principle underlying ‘parity principle’ has been applied in a number of court cases in which it has been held that ‘unjustified selective dismissal constitute an unfair labour practice. In *National Union of Metalworkers & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) Nicholas AJA remarked as follows regarding the principle :

“Equity requires that the courts should have regard to the so-called ‘parity principle’. This has been described as a basic tenet of fairness which requires that like cases should be treated alike (see Brassey ‘The dismissal of strikers’ (1990) 11 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word ‘equity’ as used in a United Kingdom statute dealing with the fairness of dismissal ‘comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment’ (Post Office v Fennel (1981) IRLR 221 at 223).”

[24] The issue of selective disciplinary action was also considered in **Riekert & Coleman SA (Pty)Ltd v Chemical Industrial Union & Others** (1991) 12 ILJ 806 (LAC) where the court remarked, at 813F, as follows :

“There is obviously no general rule to the effect that selective industrial action is *per se* unfair. It depends upon the circumstances.”

In considering whether or not the employer’s conduct was fair in that case the Court considered :-

- a) whether there was any ulterior motive in disciplining some of the employees and not the others;
- b) the fact that it is not unreasonable to take disciplinary action only against those individuals who can be identified;
- c) that one should be careful to come to a conclusion that a whole workforce or part of a workforce participated in disruptive activities;
- d) the fact that during the trial which took place before the Industrial Court, the individual respondents and the shop stewards throughout persisted in a denial that there was any disruptive activity; and
- e) the fact that those individual respondents who did testify in the industrial Court were unable to identify any co-employees who were involved in similar actions.

[25] In **Cape Town City Council v Masiko & Others** (2000) 21 ILJ 1957 (LAC) this Court found that there were no material distinguishing features to justify deviation from the parity of treatment. Needless to say, that case is distinguishable from the instant case in that there are material distinguishing features in the latter case which include the following :

- a) the fact that the dismissed employees who testified during

arbitration throughout persisted in a denial that they were involved in the retardation of production. Mkhize, who also testified on their behalf, stated that he would have known of the retardation, if any, as he was a shop steward. He gave conflicting versions with regard to whether re-grading was discussed or not. It is not surprising that his evidence was rejected. The NUMSA official, Mangele, also denied the allegations of retardation in production. He however did not refute Heath's testimony that the employer's concerns were raised with the NUMSA which then undertook to discuss the matter with the workforce. If all were well, as suggested on behalf of the dismissed employees, there was no reason, firstly, for the employer to raise the matter with NUMSA. Secondly, there would have been no point in NUMSA discussing the matter with the workforce. Thirdly, there would have been no reason for the sudden increase in production after such a discussion with the workforce. It is remarkable also that the appellants denied that the dismissed employees were involved in the retardation. Although Heath could not identify the culprit who turned the moulds off, Mdoda, one of the dismissed employees in the COS4, confirmed this evidence. Mkhize confirmed the evidence tendered on behalf of the employer with regard to the obstructive behaviour of the employees in the finishing line;

- b) the fact that none of them mentioned names of any employees they alleged were also involved and should have been treated the same. Even on the postulate that they mentioned the names,

the dismissed employees' case was throughout that they never participate in the retardation of production ;

- c) the fact that there is no evidence that the employer, in taking action against them and ultimately dismissing them and not others in the COS, acted in bad faith and/or with ulterior motive;
- d) the evidence of Heath as to why other employees in the COS were not disciplined even though a decline in the whole COS was noted was unchallenged. He clearly explained how difficult it was to prove the involvement of other employees in the COS especially those who produced different types of batteries. The employer simply did not have sufficient proof of their involvement in the retardation of production. On the evidence tendered it would, in my view, have been unjustifiable for the employer to have taken disciplinary action against the whole workforce in the COS department; and
- e) the fact that the employer did not rely solely on the information on the graphs which showed a decline in the COS department when it preferred charges against the dismissed COS employees. Apart from the information in the graphs which confirmed the trend in the reduction of production, the evidence of Steyn, Van Staden and Heath also implicated the dismissed employees.

[26] There is therefore no merit in the submission that all employees in the COS department should have been dismissed.

The determination of the third issue

[27] The last contention raised relates to whether the arbitrator performed his duties as required in terms of the law. Reference has been made above to the grounds of review of an arbitrator who acts in terms of section 33 (1) of the Act. It suffices to state that the arbitrator, in his award, carefully and properly analysed the evidence of the participation of the employees in the retardation exercise and analysed the evidence regarding the participation of each and every one of the employees in the affected groups. There is therefore no merit in that contention. I do not believe that the arbitrator committed any misconduct as envisaged in the Stocks Civil Engineering case, *supra*, or that he committed a gross irregularity.

Conclusion

[28] In the premises there is no evidence or grounds which would justify this Court's interference with the decision of the court *a quo*. Accordingly, the appeal is dismissed with costs.

NKABINDE AJA

I agree

NICHOLSON JA

I agree

PILLAY AJA

Date of hearing: 9 November 2004

Date of judgment : 23 March 2005

Appearances :

For the appellants : Adv. H van der Riet SC instructed by Ruth Edmonds Attorneys

For the first respondent: Adv M Van As instructed by Ken McDade Attorneys