



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA16/2014

TWO RIVERS PLATINUM MINE (PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION

First Respondent

SHIKO RAPHELA, N.O

Second Respondent

CHRISTO ROOS

Third Respondent

Heard: 13 May 2015

Delivered: 10 December 2015

Summary: review of arbitration award – employee dismissed for gross negligence for breaching safety related rules – commissioner finding employer not applying discipline consistently and that dismissal substantively unfair – appeal court finding that employer not giving opportunity to lead evidence to rebut inconsistency claim – commissioner failing to advise parties to lead evidence on the inconsistency claim. – Award unreasonable – Labour Court’s judgment set aside – employee’s dismissal substantively fair. Appeal upheld.

Coram: Tlaetsi DJP, Sutherland JA, and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

- [1] The appellant appeals against the whole judgment of the Labour Court (Gaibie AJ) handed down on 27 August 2013, dismissing an application to review and set aside the award of Mr Shiko Raphela (“the arbitrator”), acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). The appellant seeks the substitution of the arbitrator’s decision with a decision declaring the third respondent’s dismissal to be fair or for the matter to be remitted to the CCMA.
- [2] On 29 August 2013, the Labour Court granted leave to appeal.

Factual background

- [3] From 01 February 2008 until his dismissal on 08 January 2010, the appellant employed the third respondent (hereinafter referred to as ‘the respondent’) as a miner at its Two Rivers Platinum mine. The dismissal of the respondent emanated from an incident, which occurred at the appellant’s mine on 15 December 2009. The main allegation against the respondent was that on the day in question, he failed to follow the prescribed standard operating procedures, thereby putting at risk the safety of the other employees who were supposed to work in that area. One of the respondent’s duties as a miner was to secure the working environment and make sure that it is safe before the production team is allowed to enter into the working area. The charges proffered against the respondent were the following:

‘3.1 Gross negligence in that: You allowed employees to enter and work in an unsafe workplace on 15 December 2009.

3.2 On 16 December 2009 you abandoned explosives underground.’

- [4] At a disciplinary hearing held on 5 January 2010, chaired by Mr Vincent Phahlane (“Phahlane”), the respondent although present, refused to participate in the hearing. Phahlane found the respondent guilty of the charge relating to gross negligence and imposed the sanction of a dismissal. In considering dismissal as the appropriate sanction, Phahlane took into account

the fact that the respondent was on a final written warning for a safety breach misconduct.

Arbitration

- [5] The respondent did not appeal the disciplinary chair's ruling through the internal appeal processes. Instead, the respondent referred an unfair dismissal dispute to the CCMA. When conciliation failed, the dispute was referred for arbitration. On the CCMA referral form, the respondent indicated as issues in dispute the following: (i) inconsistency; (ii) procedural unfairness; and (iii) non-existing working places.
- [6] At the arbitration hearing, the appellant led evidence through, *inter alia*, Mr Hendrik Pienaar ("Pienaar"), the respondent's immediate supervisor, Mr Wouter Erasmus ("Erasmus"), a mine overseer and Phahlane. Pienaar testified that on the relevant day, he had instructed the respondent to inspect the underground working area and make sure that it was safe before the production team entered the working area and start working. Later Erasmus had alerted him to the fact that the roof of the working area where the production's team was working was unsupported and unsafe for the production team. As a result, Erasmus removed the production team from the area. Erasmus testified that after removing the production team from the working area, which he perceived to be unsafe, a large rock fell from a hanging wall. Phahlane testified that he considered dismissal as an appropriate sanction in that the respondent was already on a final written warning, which, in his opinion, does not appear to have led to any (improvement) behaviour modification in terms of safety issues; that the respondent showed no remorse and because of the respondent's short length of service with the appellant.
- [7] The respondent thereupon testified. He stated that he did not participate in the disciplinary hearing because he did not want to incriminate himself. The respondent further testified that in his opinion the workplace was safe to work in. Furthermore, the respondent, for the first time in the hearing, raised as an issue the allegation of the appellant's inconsistent application of discipline. In

this regard, the respondent referred to two of his colleagues, Janie Britz ("Britz") and Christo Havenga ("Havenga"), who he alleged were previously found guilty of similar misconduct but were not dismissed. The respondent alleged that Britz had breached safety regulations leading to him losing an arm and Havenga had sat on a conveyor belt. In response to the allegation of the appellant's inconsistent treatment of discipline, the appellant's representative submitted to the arbitrator that the respondent's case was distinguishable from Britz's case in that the respondent was on final written warning and Britz had shown remorse.

- [8] It is apposite to note that during the arbitration hearing and up to the stage when he gave his evidence in chief, the respondent had not raised the issue of the inconsistent application of discipline. Neither Mr Johannes Christiaan Labuschagne, the appellant's industrial relations superintendent nor Phahlane were cross-examined by the respondent on this issue.
- [9] The arbitrator found the respondent's dismissal to be procedurally fair in that the respondent, though present at the disciplinary hearing, had foregone the opportunity to present his case by refusing to take part in the hearing. The arbitrator further found that the respondent was guilty for failing to comply with the safety standard procedures of the appellant.
- [10] Even though the arbitrator concluded that the respondent had misconducted himself, the arbitrator came to the conclusion that the respondent's dismissal was substantively unfair in that the appellant had inconsistently applied discipline in the case of the respondent, unlike previous similar cases. The arbitrator came to the conclusion that the reason given by the appellant for the differential treatment of the respondent on the one hand and Havenga and Britz on the other hand was not sufficient to justify the respondent being treated differently. As a result, the arbitrator found the dismissal of the respondent to be substantively unfair on the ground of inconsistent application of discipline. In concluding that the respondent's dismissal was substantively unfair, the arbitrator stated that:

[25] The employer's basis for differential treatment is that the two employees (Brits and Havenga) did not have any record of final written warning against them. I don't agree that this is a valid basis for differential treatment or to distinguish between employees. The employee is, in my view, justifiable to consider himself aggrieved. The Labour Court in SRV Mill Services (Pty) Ltd v CCMA & Others [2004] 2 BLLR 184 (LC) added that inconsistent treatment is 'likely to produce in the mind of interested and impartial observers alike a perception of unfairness and, possibly, one of bias or ulterior purpose. In Greater Letaba Local Municipality v Mangabe NO & Others [2008] 3 BLLR 229 (LC), the court said consistent discipline, on the other hand, enhances employees' faith in the impartiality of the employer's disciplinary system and promotes respect and obedience for the rules.

[26] Taking into account the generally applicable industrial norms, I find the decision to dismiss the employee was substantively unfair.'

[11] The arbitrator ordered the reinstatement of the respondent with retrospective effect from 8 January 2010 without any loss of benefits.

Labour Court

[12] The appellant brought a review application in terms of section 145 of the Labour Relations Act¹ ("LRA") in the court *a quo* for the review and setting aside of the arbitrator's award. The appellant sought the review and setting aside of the arbitrator's award on the ground that the arbitrator had committed a reviewable irregularity in concluding that the respondent's dismissal was substantively unfair on the ground that the appellant had inconsistently applied discipline. It was the appellant's contention that the arbitrator failed to take into account the fact that the respondent only raised the issue of inconsistent (discipline) treatment for the first time when he gave evidence and that the issue of inconsistency had not been put to the appellant's witnesses.

¹ Act 66 of 1995.

[13] The court *a quo* found the respondent's dismissal to be substantively unfair as the appellant had not, on a balance of probabilities, proven that the respondent was guilty of gross negligence.

[14] On the issue of inconsistency, the court *a quo* made two findings. Firstly, the court was of the view that the respondent had clearly indicated on his referral form that he was relying on the ground of inconsistent treatment in challenging his dismissal. The court *a quo* held that the appellant, on whom the *onus* was to prove that the respondent's dismissal was fair, did not provide any evidence in rebuttal, showing that there was a fair and proper distinction between the misconduct by the respondent and that of Britz and Havenga. The court *a quo* went further and stated that:

'[25] There is clearly no evidence on the record to indicate that there was any distinction made between Roos on the one hand and Brits and Havenga on the other hand on the basis of their disciplinary records. And, if anything, the applicant did not establish any basis for distinction, not even in the form of an assertion between Roos and Havenga.'

[15] Secondly, the court *a quo* held that even if the respondent had not raised the issue of inconsistent treatment at the start of the arbitration proceedings and during the cross-examination of the appellant's witnesses, this could not be held against the respondent who was a lay person and he should have been assisted by the arbitrator in how to conduct cross-examination. The court *a quo* concluded that the common law rule that a party who wishes to lead evidence to contradict an opposing witness should first cross-examine the witness on the facts he intends contradicting so as to enable the opposing witness to explain his version on the potential contradiction) was not inflexible.

[16] Overall, the court *a quo* found that the award was one a reasonable arbitrator would have made.

Appeal

[17] The appellant's grounds of appeal are the following:

17.1 that the Labour Court erred in finding that the respondent's dismissal was substantively unfair in that the appellant failed to show that there was a fair reason for the dismissal;

17.2 that the Labour Court erred in finding that the arbitrator had not committed a reviewable irregularity in finding that the dismissal of the respondent is substantively unfair because the appellant had inconsistently applied discipline in dismissing the respondent; and

17.3 that the Labour Court erred in finding that the arbitrator had not committed a reviewable irregularity in determining the issue of inconsistent application of discipline without advising the appellant of the need to adduce evidence to rebut the respondent's claim of inconsistent treatment in his dismissal.

[18] At the hearing of the appeal, the parties correctly pointed out that the issue of the guilt of the respondent for the misconduct he was charged with was not before the court *a quo* as the arbitrator did not conclude that the respondent's dismissal was substantively unfair because he was not grossly negligent. I am therefore of the view that the appellant ought to succeed on the first ground of appeal.

[19] The issues to be determined in this appeal are the following:

19.1 whether the arbitrator's decision that dismissal was substantively unfair because appellant had applied discipline inconsistently was reviewable; and

19.2 whether the arbitrator had committed an irregularity in not advising the appellant and respondent's representatives to adduce evidence on the alleged differential application of discipline by the appellant.

[20] In *Herholdt v Nedbank Ltd*,² the Supreme Court of Appeal clarified the test in *Sidumo*³ as follows:

'[25] For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one a reasonable arbitrator could not reach on all the material before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁴

[21] In terms of the appellant's standard safety procedures, the respondent, as a miner and as part of his duties, was expected to check and ensure the general safety of the area where mining activities were to take place, which included the barring of unsecured areas to prevent loose rocks from falling. In terms of the appellant's Disciplinary Code, the sanction for failure to comply with safety procedures is dismissal.⁵

[22] It is common cause that the respondent had contravened a standard safety procedure, which rendered the workplace unsafe. At the arbitration hearing, the respondent did not, with conviction, dispute the fact that he had allowed the production team to enter the working environment without making sure it was safe to start drilling therein. The respondent testified that:

'When they started bolting, after barring down, they started from the safe side worked towards the bad hanging.'

[23] In his evidence in chief, the respondent testified that the working place was safe; he testified that he only visually inspected the working area to ensure that it was safe. The respondent was therefore aware of the rule or standard

² [2013] 1 BLLR 1074 (SCA) at para 25.

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC).

⁴ At para 25.

⁵ Item 9.5 of the Disciplinary Code lists 'non-compliance with safety rules' as one of the acts of misconduct warranting the sanction of a dismissal.

or should have known what was expected of him and had failed to comply. It is further common cause that at the time of the respondent's disciplinary hearing, he was on a final written warning for a safety infraction.

[24] It is the appellant's contention that the court *a quo* erred in not finding that the arbitrator's decision to reinstate the respondent was a reviewable irregularity in that it was not one a reasonable decision-maker could have made in light of the available evidence. It was argued on behalf of the appellant that the arbitrator, in concluding that the respondent's dismissal was substantively unfair failed to apply his mind to the facts by ignoring the evidence of Phahlane. It is submitted in this respect that Phahlane took into account the fact that the respondent was on a final written warning for a safety breach; the respondent had shown no remorse; the respondent's short tenure of employment with the appellant and the gravity of the respondent's misconduct. It is also the appellant's contention that the arbitrator misconducted himself in failing to advise both the appellant and the respondent of the need to provide evidence on the issue of inconsistency. It was further argued on behalf of the appellant that the arbitrator committed a reviewable irregularity in not giving the appellant an opportunity to adduce evidence on the issue of inconsistency because it was only raised for the first time during his evidence in chief. The appellant submits that the question of inconsistent application of discipline was never raised during the disciplinary hearing because of the failure by the respondent to participate. Moreover, its witnesses in the arbitration, in particular Labuschagne and Phahlane, were never confronted about the issue of inconsistency. It is the appellant's contention that, when the respondent raised the issue of inconsistent application of discipline, the arbitrator should have advised the appellant's representative of the need to adduce evidence to rebut the allegation of inconsistent application of discipline.

[25] The respondent's Counsel, whilst admitting that the respondent only mentioned the issue of inconsistency in the referral form to the CCMA, contended that the appellant was aware at the start of the arbitration hearing that inconsistency was an issue. It was further submitted that the *onus* was on

the appellant to show that there was no inconsistency in the application of discipline between the respondent on the one hand, Britz, and Havenga on the other hand. With regard to the appellant's third ground of appeal, it was submitted on behalf of the respondent that at the arbitration hearing, the appellant was in a position to deal with the issue of inconsistency even if it was not pertinently raised at the start of the proceedings because a person with experience in labour matters represented it. Respondent's counsel argued that the arbitrator's role is to assist lay persons on how to conduct themselves during proceedings but not to advise them on the evidence they should adduce in order to successfully prosecute their claim or defence.

[26] Item 7 of the Code of Good Practice: Dismissal, provides, *inter alia*, that:

'Any person who is determining whether a dismissal for misconduct is unfair should consider –

...

(b) if a rule or standard was contravened, whether or not –

...

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

[27] Item 3(6) of the Code of Good Practice: Dismissal, provides that for a fair dismissal "the employer should apply the penalty of dismissal with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration." In *SA Commercial Catering and Allied Workers Union and Other v Irvin & Johnson Ltd*,⁶ the court stated that:

⁶ (1999) 20 ILJ 2302 (LAC).

[29]Consistency is simply an element of disciplinary fairness (M S Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (*Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Union and Others* (1991) 12 ILJ 806 (LAC) at 813 H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline, which makes it unfair...'⁷

[28] It is trite that an employer bears the *onus* of proving that an employee's dismissal is fair. In the event of the employee challenging his dismissal on the ground that the employer is guilty of applying discipline inconsistently, it is incumbent on the employee to pertinently raise the issue of inconsistent treatment and present evidence showing the inconsistency. Once he does that, the employer bears *prima facie* the burden of explaining the distinction made between the employee's misconduct and that of previous infractions by other employees.

[29] Even though the respondent did make reference to "inconsistency" in his referral to the CCMA, none of the appellant's witnesses were confronted with this issue. The respondent only brought up this issue when he testified. It cannot therefore be said that the appellant was aware what facts were relied on to invoke a claim that inconsistent treatment had occurred and could not therefore have been expected to have dealt with it when it presented its case. Had the respondent participated in the disciplinary hearing, it is possible that the alleged inconsistency of the application of discipline by the appellant would have been raised, thus making the appellant aware of it and giving the opportunity to prepare and deal with it at the arbitration hearing. In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum (Rustenburg Section)*,⁸ the court stated that:

[39] Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such issue openly and unequivocally so

⁷ At para 29. See also in this regard *Hullett Aluminium (Pty) Ltd v Bargaining Council for Metal Industry* (2008) 29 ILJ 1180 (LC) the court at para 39 *National Union of Metalworkers of SA and Others v Henred Freuhauf Trailers (Pty) Ltd* (1992) 15 ILJ 1257 (A) at 1264 A-D.

⁸ (2014) 35 ILJ 2406 (LAC).

that the employer is put on proper and fair terms to address it. A generalised allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process (*SACCAWU and Others v Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at [29]; also see *Masubelele v Public Health and Social Development Bargaining Council and Others* [2013] ZALCJHB TR2008/1151 which contains an extensive survey of the case law about the idea of inconsistency in employee discipline)".

[30] In view of the fact that the respondent had not clearly made inconsistent treatment an issue, I am of the view that the arbitrator committed a reviewable irregularity in allowing the respondent's evidence on inconsistent treatment, particularly as the appellant was not given an opportunity to deal with this issue.

[31] Inconsistency is but one of the factors an arbitrator has to take into account in determining whether dismissal is an appropriate sanction under the circumstances of the case. It appears that in deciding to reinstate the respondent, the arbitrator failed to appreciate the fact that the respondent was a recidivist for similar safety related misconduct. The respondent was not a first time offender and if one takes into account the premium the mining industry places on safety and the consequences thereof in the event of an accident, the misconduct renders a continued employment relationship intolerable. In *De Beers Consolidated Mines Ltd v CCMA and Others*,⁹ this Court stated that:

'[22] Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has

⁹ [2000] 9 BLLR 995 (LAC).

little to do with society's opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'¹⁰

[32] The fact that this was the respondent's second act of misconduct for a safety breach is indicative of the respondent's nonchalant attitude towards safety issues. I am of the view that the arbitrator failed to appreciate that the respondent's second safety breach distinguishes his case from that of Britz and Havenga, as he was already on a final written warning. In *National Union of Mineworkers and Another v Amcoal Colliery t/a Arnot Colliery and Another*,¹¹ the court held that the imposition of a final written warning on an employee who was already on a final written warning would render the principle of progressive discipline nugatory. The arbitrator failed to have regard to the respondent's previous final written warning that was a material fact in the consideration of whether his dismissal was substantively fair.¹² The mining industry places a premium on safety in view of the consequences of an accident. The respondent showed no remorse and appreciation of the risk his misconduct posed on the appellant's operations. I am satisfied that, in light of the seriousness of the misconduct, the respondent's disciplinary record and the respondent's lack of remorse, the arbitrator's decision to reinstate the respondent with a final warning is a gross irregularity which is reviewable and ought to be set aside.

[33] Even if I am wrong in my conclusion with regard to the second ground of appeal, I am of the view that the arbitrator failed in his duties as an arbitrator in, firstly, not advising the appellant of the need to adduce evidence to rebut the respondent's claim of inconsistent application of discipline. Secondly, if he was aware that the respondent's defence to the charge he was convicted of was that of inconsistent application of discipline, he failed to advise the respondent of the need to cross-examine the appellant's witnesses or put his version so that that the appellant's witnesses could respond to it.

¹⁰ At para 22.

¹¹ (2000) 5 LLD 226 (LAC).

¹² *Sidumo* at para 268.

[34] In terms of the so-called “helping hand” cases, there is an obligation on arbitrators to guide and assist parties represented by lay persons in matters of procedure and evidentiary steps that need to be taken. Failure to do so, in appropriate circumstances, could render an award susceptible to review on the ground of an irregularity in the proceedings. In *Bafokeng Rasimone Platinum v CCMA and Others*,¹³ the court stated that:

‘In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party’s case at the expense of the other. Otherwise, we would be opening the flood gates allowing every lay representative who has bungled his/her case to seek its re-opening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of section 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole rather than “knitpicking through every shrapnel of evidence that was considered or not considered”, as was stated in *Coin Security Group (Pty) Ltd v Machago* (2000) 5 BLLR 283 (LC).’

[35] As indicated in paragraph 30 above, the arbitrator should have disallowed the evidence on inconsistent treatment as it was not pertinently raised for the appellant to deal with it. The fact that the appellant’s representative was from a large employers’ organisation and should have been aware that it ought to counter the claim of inconsistency has no basis in view of the fact that the issue of inconsistency only emerged after the appellant’s witnesses had testified. Since the gravamen of the arbitrator’s decision that the respondent’s dismissal was substantively unfair because the appellant had treated him differently from Britz and Havenga for the same misconduct, it was crucial for

¹³ [2006] 7 BLLR 647 (LC) at para 17.

the appellant to be given an opportunity to present evidence to contradict the respondent's claim.

[36] It is common cause that neither at the commencement of the arbitration hearing nor during the cross-examination of the appellant's witnesses did the respondent, or even the arbitrator raise inconsistency in the application of discipline, as an issue.

[37] I am therefore of the view that the arbitrator committed a reviewable irregularity in the conduct of the proceedings by failing to advise the appellant's representative and the respondent of the need to lead evidence to rebut the claim of inconsistency or to cross-examine the appellant's witnesses on the issue of the inconsistent application of discipline.

[38] I am satisfied that the arbitrator's decision that the respondent's dismissal was substantively unfair to be one a reasonable decision-maker could not have reached with the available material before him.

[39] Accordingly, the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and substituted with the following order:

'The arbitration award reference number MP165-10 issued by the second respondent is reviewed and set aside and replaced by an order that 'the dismissal of the respondent was both procedurally and substantively fair'.

3. No order as to costs is made.

**Tlaletsi DJP and Sutherland JA concur in the judgment of Mngqibisa-Thusi
AJA**

APPEARANCES:

FOR THE APPELLANT:

Adv M J Van As

Instructed by Cliffe Dekker Hofmeyr Inc

FOR THE THIRDPONDENT:

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