



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case number: JA 88/2014

In the matter between:

AFRICAN EXPOSIVES LIMITED

Appellant

and

PANELIST M S RAFFEE N.O.

First respondent

NATIONAL BARGAINING COUNCIL FOR THE

CHEMICAL INDUSTRY

Second respondent

CEPPWAWU

Third respondent

L LUZIPHO & 9 OTHERS

Fourth respondents

Heard: 26 November 2015

Delivered: 04 March 2016

Summary: Appellant entitled by terms of collective agreement to change shift system but required to consult regarding implementation of the change. No agreement reached regarding implementation. Employees attended at work under old shift system with intention of disrupting workforce. Unprotected strike action ensued. The respondents dismissed after disciplinary hearing. Arbitrator found dismissals substantively unfair in that no agreement to implement new shift system reached and employees disciplined selectively; and procedurally unfair given conduct of chairperson and refusal to allow

fellow employee to represent employees at hearing. Thereafter Labour Court dismissed appellant's review application. On appeal held that: award reviewable in that it fell outside the ambit of reasonableness required given that no agreement to implement shift change was required and consultation had occurred. Attack against consistent application of discipline without merit. Appeal against substantive fairness upheld. Three months' compensation awarded for procedural unfairness with no order as to costs.

Coram: Waglay JP, CJ Musi JA et Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

- [1] This is an appeal, with the leave of this Court, against the judgment of the Labour Court (Lallie J) in terms of which the appellant's application to review and set aside the arbitration award of the first respondent (the arbitrator) was dismissed with costs.
- [2] The fourth and further respondents (the respondents) were employed by the appellant, African Explosives, at its U307 explosives plant. The appellant decided to introduce a continuous shift system in order that employees work an average of 42 hours per week to limit fatigue caused by excessive overtime. The second respondent, CEPPWAWU (the union), and its members were among those who opposed the change and insisted that prior to implementing the new shift system, the issue must be negotiated at plant level. The appellant relied on schedule 3 to the Constitution of the Bargaining Council which provides that shift allowances fall within the negotiating scope of the sectoral chamber and that these had been determined. In addition, in terms of schedule 4 of the Constitution only the practicalities of workplace restructuring, such as implementing a revised shift system, fell to be negotiated at company or plant level.

- [3] In June 2009, the appellant referred a dispute to the bargaining council seeking an interpretation of the applicable collective agreements in order to clarify the way forward. On 24 October 2009, bargaining council panellist, Ms L Dreyer, determined that:

“The company is not obliged to renegotiate a shift allowance and increase in working hours every time that the company wants to move people from one shift to another. The company is correct in its interpretation of the various collective agreements to say that shift allowances and hours of work are negotiated at a centralised level and therefore that there is no reason to reengage with trade unions on this point at plant level, save to agree the time of the change, the work roster and the pattern of the continuous shift.”

- [4] No application was made by the union or its members to have the 2009 arbitration award set aside on review. On 29 October 2009, the appellant communicated the outcome of the arbitration award to employees and sought to consult regarding the roster and pattern of implementation of the continuous shift system from 30 November 2009. Following meetings held with employees on 11 and 19 November 2009, it was apparent that no agreement would be reached regarding the practicalities of implementing the new shift system given the union's stance that the new shift could not be implemented in the absence of agreement.
- [5] On 23 November 2009, team leaders presented an initial shift roster and pattern to employees. Briefings on the new system were held with employees. The shift roster was placed on the notice board, with notice of the final roster given on 26 November 2009. All employees were notified that the continuous shift system would commence on 30 November 2009. They were also informed of the date and time of their new shifts. The union persisted with its opposition to the implementation of the new shift system.
- [6] On 30 November 2009, most of the 250 employees at the appellant's U307 plant reported for work under the new shift system. The fourth and further respondents attended at work on the old shifts allocated to them. The ensuing disturbance led to all work at the plant being disrupted. Employees refused to return to their posts, gathered outside the appellant's premises and embarked on unprotected strike action. An ultimatum issued by the appellant's management calling on employees to return to work was ignored, causing the

appellant to obtain a Labour Court order on 3 December 2009 *inter alia* interdicting the strike action and ordering the employees to return to work.

[7] Thereafter the fourth and further respondents were given notice to attend a disciplinary enquiry at which they were called upon to answer two disciplinary complaints:

- “1. Admission to property and work areas” in that you arrived at work on the morning of the 30th November 2009 on the incorrectly designated shift with the purpose of disrupting the workforce.
2. “Admission to property and work areas” in that you intimidated and influenced employees to leave their place of work as the result of the U307 continuous shift dispute.”

[8] At the ensuing disciplinary enquiry, there was no dispute that the fourth and further respondents had arrived at work on 30 November 2009 on their incorrect shifts and that the ensuing disruption led to employees embarking on unprotected strike action. The employees were found to have misconducted themselves in the manner alleged by the appellant and to have caused “considerable harm” to the company through their actions. In December 2009, the appellant dismissed the fourth and further respondents from their employment.

[9] Aggrieved by their dismissals, the employees referred an unfair dismissal dispute to the bargaining council for determination.

Arbitration award

[10] At arbitration the respondents attacked the substantive and procedural fairness of the dismissals. Issue was taken with the fact that no agreement had been reached between the parties concerning the implementation of the continuous shift system in the manner required by the 2009 award. In addition, the respondents contended that the appellant had not applied workplace discipline consistently in that previous shift changes had been agreed with employees; at the appellant’s ISAP plant a similar incident had occurred yet employees were not dismissed; and many U307 plant

employees who were involved in the incident on 30 November 2009 were not disciplined or dismissed by the appellant.

[11] The appellant disputed that the dismissals of the fourth and further respondents had been unfair. It contended that the disruption at its ISAP plant in August 2009 was distinguishable from the events of 30 November 2009 in that as at August the 2009 arbitration award, which clarified the legal position, had not been received.

[12] Disciplinary hearings were held against 36 employees who attended at work on their incorrect shifts. Two arbitration hearings involving other employees of the same plant were held prior to the respondents' arbitration. At the respondents' arbitration hearing Mr Yusuf Makra, the appellant's detonator products section manager, detailed the history of consultations, notifications and briefings regarding the shift change. He stated that notice was given of the change on 29 October 2009, with consultations held thereafter on 9 and 11 November 2009. On 23 November 2009 notice of the new shifts was given and on 25 November 2009 employees were briefed by management, with discussions continuing thereafter on 27 November 2009. On 30 November 2009 the respondents attended at work at the time of their old shifts and when certain of the respondents entered the plant, they caused work to be disrupted as a result of which all employees left their posts. Management attempts to resolve the issue were unsuccessful. The respondents refused to leave the premises. With work disrupted and employees no longer at their posts unprotected strike action ensued.

[13] The respondents did not dispute in evidence that they were aware that the new shifts were to be implemented from 30 November 2009; that they attended work on the wrong shifts; and refused to work the new shifts given that no agreement was in place that the new shifts could be implemented.

[14] On 21 June 2010, the arbitrator found that the dismissals of the respondents had been substantively and procedurally unfair. The respondents were retrospectively reinstated into their employment with the appellant with back pay. In finding substantive unfairness, the arbitrator relied on paragraph 4.3 of

the 2008/9 wage agreement which had been entered into with the union and which provided that:

- ‘4.3 All employees whom the employer anticipates will be required to perform any of the types of shift work during any pay month, shall, before commencement of such month, be designated as such by the employer. All such employees shall, in addition to the salaries payable be paid a pensionable shift allowance as reflected below:
- 4.3.1 Continuous Shift Work covering 24 hours a day, 7 days a week (12% of basic salary)
- 4.3.2 Three – Shift Work: 40 Hours a week – Monday to Friday/Saturday (11% of basic salary)
- 4.3.3 Two-Shift Work: 40 Hours 5 day (10% of basic salary)
- 4.3.4 Two-Shift Work: 40 Hours 5 day week, finishing after 24h00 (11% of basic salary).’

[15] The arbitrator stated that “(i)n deciding whether or not the Applicants were designated employees” there was “...no reason for the Applicants to be served a letter on the 4th December 2009 when such a letter could have been served on the Applicants before the 30th November 2009”. The arbitrator found that there was no agreement concerning the time of the change, the work roster and the pattern of the continuous shift and that this had caused the appellant, who had anticipated “trouble on the 30th November 2009 because there was no agreement”, to bring in alternative labour on the day. In addition, the arbitrator relied on Mr Makra’s evidence that “there could be a reason why” other employees were not disciplined yet he could not recall what these were. This led the arbitrator to conclude that “(t)he quantity of evidence indicating the number of employees who were involved that were not disciplined makes attack (sic) on consistency therefore to succeed”.

[16] The dismissals were found procedurally unfair on the basis that the chairperson refused to allow Mr Lordwick Luzipho, the fourth respondent, to represent at least six of his fellow employees at the disciplinary hearing in that he was “also involved” and would be biased. In addition, procedural unfairness arose in that the chairperson was found to have had prior knowledge of the matter when he stated before the commencement of the enquiry that “management is wasting their time, they should all be dismissed”.

Labour Court review

[17] The appellant sought the review and setting aside of the arbitration award by the Labour Court. The Labour Court accepted that the fourth and further respondents had reported for duty on 30 November 2009 “in defiance of the new shift system...causing disruption as employees scheduled for those shifts had also reported for duty”. Yet, the Court stated that Mr Makra on the day had not known if he had seen the respondents and that no obligation rested on the employees to refute such evidence. The Court accepted that the arbitrator had appropriately dealt with the decision on the part of the employees not to testify and found the dismissals unfair on the basis that employers are required to treat employees who commit similar misconduct in a similar manner. No reviewable irregularity was found to have been committed in the manner in which the arbitrator had approached the consistent application of discipline. Furthermore, the decision reached on procedural fairness was found to be one that a reasonable decision-maker could reach on the material before him. On 9 January 2014, the appellant’s review application was therefore dismissed with costs.

Grounds of appeal

[18] The appellant’s application for leave to appeal against the judgment of the Labour Court was refused with leave to appeal subsequently granted on petition to this Court. Although the appellant raised 11 grounds of appeal in its notice of appeal, the essence of this appeal is whether the Labour Court erred in concluding that no reviewable irregularity was committed by the arbitrator and whether the arbitrator’s determination was one which on the material before him a reasonable decision-maker could have reached.

Evaluation

[19] This Court has emphasised that the decision in *Sidumo* does not mean “...that the grounds of review in section 145 of the Act are obliterated [but]... that they are suffused by reasonableness.”¹ The Supreme Court of Appeal in *Herholdt v*

¹ See *inter alia Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 101.

*Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*² made it clear that a review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA:

‘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. 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.’³

[20] This Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)*⁴ stated that:

‘*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of section 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.’⁵

[21] A determination as to the substantive fairness of a dismissal for misconduct requires a decision-maker to have regard to item 7 of the Code of Good Practice and to consider whether the employee was aware of the workplace rule allegedly breached or can reasonably be expected to have been aware of the rule; whether the rule has been consistently applied; whether the rule had

² 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

³ At para 25.

⁴ (2014) 35 ILJ 943 (LAC) with reference to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) (*Sidumo*).

⁵ At para 14. With reference to s145(2)(i), (ii) and (iii) of the LRA.

been breached; and whether dismissal is an appropriate sanction to be imposed for breach of the rule. *Sidumo* made it pertinently clear that:

'In terms of the LRA, a commissioner 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.'⁶

- [22] The arbitrator accepted that the 2009 arbitration award had determined that the appellant was entitled to change its shift system. From the evidence it was apparent that the appellant had engaged with the unions and employees repeatedly after receipt of the 2009 award and prior to the implementation of the new shift system regarding the practicalities of implementing the new system. There was no dispute that the union and its members opposed the shift system change, that this opposition was reiterated to the appellant on a number of occasions prior to 30 November 2009 and that, given such opposition, the practicalities of implementing the new system would not, and consequently were not, agreed.
- [23] In *Apollo Tyres South Africa (Pty) Ltd v National Union of Metal Workers of South Africa (NUMSA) and Others*,⁷ it was made clear that "...unless specifically entrenched contractually, the right to regulate shift patterns is the prerogative of the employer."⁸ The appellant's entitlement to amend the shift system had been determined and recorded in collective agreements entered into between the parties. The 2009 arbitration award confirmed as much in finding that in terms of the collective agreements there was no reason to "reengage" with unions at plant level regarding a change to the shift system, with the appellant only required to re-engage "...to agree the time of the change, the work roster and the pattern of the continuous shift". With the 2009 award not having been set aside on review, it followed that the appellant was entitled to change the shift system provided it had consulted with the union or employees regarding the practical implementation of the new system.

⁶ At para 79.

⁷ [2012] 6 BLLR 544 (LC).

⁸ At para 28.

- [24] This process of consultation envisaged that the appellant in a constructive manner addressed the issue with employees and their trade unions. It did not require that in the absence of an agreement reached on the time of the change, the work roster and the pattern of the new shifts, the new shift system could not be implemented by the appellant. For, were this to be the case, it would render the appellant's right to change the system in accordance with the applicable collective agreements meaningless.
- [25] The respondents had repeatedly indicated their opposition to the new system and had refused to agree to any aspect of its implementation. There was no dispute that the appellant had sought agreement, that it had engaged with employees and their unions on the issue over the course of a month following the receipt of the 2009 award. With the entitlement to change the shift system having been the subject of collective agreement, faced with the respondents' refusal to agree to the manner of implementation of the new system, the appellant was entitled to implement the new system even when no agreement had been reached with the union regarding the time of the change, the roster or shift pattern.
- [26] It follows for these reasons that the conclusion reached by the arbitrator that the appellant had implemented the continuous shift system in the absence of agreement having been reached with employees is one that on the material before him did not fall within the ambit of reasonableness required. The arbitrator failed to have regard to the fact that the appellant was entitled by collective agreement to change the shift system and that it had consulted in the manner required with the trade unions and employees concerning the practical implementation of the new shift system.
- [27] The absence of an agreement as to the practical implementation of the new shift system did not entitle the respondents to report for duty under the old shift system or refuse to work according to their new shifts allocated. Furthermore, when the roster had been published on notice boards and notice given to individual employees of the new shifts they were required to work, the conclusion reached by the arbitrator that the fourth and further respondents had not been "designated" in the manner contemplated in clause 4.3 of the

2008/9 wage agreement was not a finding that was sustainable on the evidence before the arbitrator. Notice of the new shifts had clearly been provided to employees. From the conduct of the respondents it was apparent that, regardless of the manner or date of such notice, they refused to work new shifts and sought to prevent other employees from working their new shifts allocated.

- [28] The claim made by the fourth respondent, Mr Lordwick Luzipho, that the reason for the attendance at work on the day was in order that the respondents be present at meetings was not a version put to the appellant's witnesses in cross-examination. On the evidence before the arbitrator, the respondents, who included shop stewards, arrived at work and entered the appellant's premises intent on causing employees who had reported for duty under the new shift system to leave their posts. The evidence indicated that this intention was realised when work was disrupted, with employees leaving their posts and engaging in unprotected strike action which was only halted when a Court order was obtained on 3 December 2009 by the appellant. While certain employees returned to their posts in response to the appellant's ultimatum that they do so, it was not disputed that the respondents failed to do so.
- [29] Turning to the issue of consistency, the arbitrator found that discipline had been applied inconsistently by the appellant in that there were other employees who had engaged in misconduct similar to that of the fourth and further respondents but who were not disciplined by the appellant. On the material before the arbitrator it was apparent that the appellant took disciplinary action against those employees who it could determine had arrived at work on the incorrectly designated shift under the old shift system with the purpose of disrupting the workforce.
- [30] Item 7 (b) (iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether "the rule or standard has been consistently applied by the employer". Disciplinary

consistency is the hallmark of progressive labour relations.⁹ While discipline should be neither capricious nor selective,¹⁰ this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with fairness remaining a value judgment.¹¹ In *SACCAWU & Others v Irvin & Johnson*¹² this Court reiterated that it “*is really the perception of bias inherent in selective discipline which makes it unfair*”, observing that the flexibility which is inherent in the exercise of a discretion will inevitably create the potential for some inconsistency:

“Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case”.¹³

- [31] The appellant was neither capricious nor selective in taking disciplinary action against the employees that it determined had committed the misconduct alleged. In finding differently, the arbitrator arrived at a decision which on the material before him was not one which fell within the ambit of reasonableness required. For these reasons, it follows that in finding that the dismissals of the respondents were substantively unfair, the arbitrator arrived at a decision which was not one that a reasonable decision-maker could have reached on the material before him.
- [32] With regards to the procedural fairness of the dismissals of the respondents, the evidence before the arbitrator was that the chairperson of the hearing had prematurely and prior to the conclusion of the disciplinary hearing expressed a view as to the course that the matter should take and had, in addition, denied the employees the right to representation by a fellow employee, namely the fourth respondent. Neither aspect was disputed at arbitration. It

⁹*Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at para 36. See too confirming the decision of *Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at para 29.

¹⁰ *Chemical Energy Paper Printing Wood & Allied Workers Union and Others v Metrofile (Pty) Limited* (2004) 25 ILJ 231 (LAC) at paras 36-37; *National Union Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) 1029G-H.

¹¹ *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264A-D; *SACCAWU and Others v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Cape Town Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) at para 14.

¹² [1999] 8 BLLR 741 (LAC) at 751B.

¹³ At 751.

follows that the finding of procedural unfairness arrived at by the arbitrator was reasonable. Given the procedural defects which arose at the disciplinary hearing, the view I take of the matter is that an amount of three months' wages as compensation, which from the record it is apparent amounts to a total of R18900,00 per respondent, for procedural unfairness is appropriate.

[33] Having regard to considerations of law and fairness, I can find no reason to justify a costs order being granted against the respondents.

Order

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

1. The appeal is upheld with no order as to costs.
2. The order of the Court *a quo* is set aside and replaced with the following order:
 - '(1) The arbitration award issued by the second respondent is reviewed and set aside; and replaced with the order that the dismissals of the fourth to further respondents were substantively fair but procedurally unfair.
 - (2) The applicant is to pay the sum of R18 900.00, being equivalent to three (3) months' wages, to each of the fourth and further respondents within fourteen (14) days of this order.
 - (3) There is no order as to costs.'

Savage AJA

Waglay JP and CJ Musi JA concur in the judgment of Savage AJA.

APPEARANCES:

FOR APPELLANT:

Mr B Masuku

Instructed by Mervyn Taback Inc.

FOR THIRD, FOURTH AND

FURTHER RESPONDENTS:

Mr Z M Navsa

Instructed by Cheadle Thompson & Haysom Inc.

LABOUR APPEAL COURT