



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA5/13

In the matter between:

SAMWU

First Appellant

(1st applicant in the Court a quo)

MKHUNGO SB

Second Appellant

NTAKA R

Third Appellant

(Further applicants in the Court a quo)

and

ETHEKWINI MUNICIPALITY

First Respondent

(3rd respondent in the Court a quo)

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

Second Respondent

(1st respondent in the Court a quo)

DUBAZANE NONHLANHLA, NO

Third Respondent

(2nd respondent in the Court a quo)

Delivered:

02 September 2016

Summary: Dismissal: Gross insubordination – 2 shop stewards locking the employer’s gate and threatening not to open it unless certain employees’ demand is met – Act amounting to sabotage of employer’s operations and constituting gross insubordination. Dismissal justified.

Coram: Tlaletsi DJP, Ndlovu JA et Makgoka AJA

JUDGMENT

NDLOVU JA

Introduction

- [1] This is an appeal against the judgment of the Labour Court (Gush J) handed down on 20 September 2012 whereby the Labour Court dismissed, with no order as to costs, the review application lodged by the appellants against the arbitration award issued by the third respondent (the arbitrator) on 19 April 2010, under the auspices of second respondent, the South African Local Government Bargaining Council (the ‘SALGBC’ or ‘bargaining council’). Leave to appeal was granted by the Labour Court.
- [2] In terms of the arbitration award, the arbitrator found that the dismissal of the second and third appellants, (Mr Solomon Bhekumuzi Mkhungo and Mr Mthokozisi Rich Ntaka, respectively, or collectively ‘the employees’), was procedurally unfair but substantively fair. The appeal was instituted by the South African Municipal Workers’ Union (the union), in its capacity as the collective bargaining agent of the employees and on their behalf.¹

The factual matrix

- [3] The employees were formerly employed by the first respondent, the EThekweni Municipality (the Municipality or the employer), based at the South Western depot in Chatsworth, Durban. They both served as shop stewards,

¹ Section 200 of the LRA.

affiliated to the union. During 2008, they were charged with misconduct, involving gross insubordination, for which they were eventually dismissed. This was after they were found guilty by a disciplinary enquiry, on one of the four counts with which they were charged.

- [4] The alleged misconduct against the employees was formulated in the charge sheet as follows:

'COUNT 1

[You] illegally locked the gate of South Western Depot, preventing the Electricity staff and contractors from entering and leaving the depot to perform their duties, i.e. repairs to electrical infrastructure and construction of electrical infrastructure. In doing so, you disrupted the operation of the employer, thereby contravening Clause 1.2.11.

COUNT 2

In view of the above you acted against the Organisational Rights Agreement Clause 8.6.1 and 8.6.3 thereby contravening Clause 1.1.

COUNT 3

In having locked the gates to the depot, [you] were insolent, provocative and intimidatory towards your manager, Mr N Dalton, thereby contravening Clause 1.2.9.

COUNT 4

[You] refused to open the gates when Mr Dalton told you to open the gates showing gross insubordination, thereby contravening Clause 1.2.4.

- [5] The disciplinary enquiry found both employees not guilty on counts 1, 2 and 3; but guilty on count 4. They were summarily dismissed on 13 March 2009.

- [6] The employees were not satisfied with their dismissal and referred an unfair dismissal dispute to the bargaining council. The conciliation process failed and the employees referred the dispute for arbitration. The arbitration hearing proceeded before the arbitrator.

The arbitration

- [7] It was common cause that on 15 July 2008 at about 08h30, the gate at the employer's workplace was locked by someone unauthorised to do so. As a result thereof, disruption was caused, as no one could enter or exit, including the client contractors' trucks. Consequently, Mr Noel Dalton, the employer's maintenance manager, called a meeting which included the employees, the administration officer, Mr Denzel Greeves and Mr Blackcat Mbongwa, another employee.
- [8] At the meeting, Mr Dalton pointed out that the unauthorised locking of the gate was unacceptable and instructed Mr Mkhungo and Mr Ntaka to go and open it. According to Mr Dalton, they informed him that the gate would be opened only if and when Mr Dalton went to the lecture room to address the general staff on the employees' grievances, which included a dispute over a particular training programme and the appointment of a certain employee to the position of a driver in preference over another employee who was put forward by the union as its preferred candidate for the job. Mr Dalton further testified that he had obtained information from the security guard (Mr Ndlazi) that the employees had in fact, earlier on, taken the gate keys from him and locked the gate. Thereupon Mr Dalton instructed the employees to open the gate, which they refused to do. Even when Mr Dalton had gone to the lecture room to address the employees, they still did not open the gate. It was opened some 2½ hours later. They defied Mr Dalton in front of other employees.
- [9] Mr Dalton was aware that it was not part of the employees' line of duty to operate the gate, but he said he issued the said instruction based on Mr Ndlazi's report that the employees had locked the gate and that the gate keys were still in their possession. In Mr Dalton's view, the employees' refusal to comply with his instruction constituted gross insubordination. Hence, they were charged with misconduct involving gross insubordination, which was a dismissible misconduct.
- [10] Mr Jabulani Jazzman Ndlazi, the employer's security guard who was on duty at the relevant time (the witness referred to in Mr Dalton's evidence) also

testified. According to him, on the day in question, at about 08h30, he was approached by the employees who requested to have the gate keys, saying that *“there was a discussion between themselves and the management. Then they took the key away, they took the key inside the depot. After some time, I believe they finished their discussion and they came back and gave me the key.”*²

[11] Mr Ndlazi said that he acted that way because he had previously inquired from Mr Greeves as to how he would have to react if he was confronted by a “strange or unusual” situation at the gate whereby some employees asked him to give them the keys. He said Mr Greeves had advised him, saying, *“No, you need to allow people to do whatever they want to do, as long as you are safe”*.³ However, under cross-examination, Mr Ndlazi made it clear that, in the present instance, he was neither intimidated nor forced by anyone to hand over the keys to the employees. He also conceded that after the keys were given back to him he then opened the gate and the work operations resumed normally.

[12] On the other hand, the employees vehemently denied that they ever took the gate keys from Mr Ndlazi and they further denied that they locked the gate. They averred that the gate was locked by their disgruntled colleagues who were demanding to have a meeting with Mr Dalton. Ms *Allen*, who appeared for the union and employees, submitted that the employees were all the time acting in their official capacity as shop stewards and on instructions given to them by the employees.

[13] The arbitrator found that the employees were indeed guilty of gross insubordination and that their dismissal was substantively fair. On the procedural fairness aspect, the arbitrator found that the Municipality had appointed a presiding officer who was not properly qualified, in terms of the disciplinary procedure, to preside over the disciplinary enquiry. On that basis, the arbitrator found that the employees’ dismissal was procedurally unfair. Hence, she ordered the Municipality to pay compensation to the employees in

² Arbitration record, vol 6, p557 lines 18-24.

³ Arbitration record, vol 6, p583 line 20 and p584 line 12.

varying amounts as follows: R6289.20 for Mr Mkhungo and R15866.18 for Mr Ntaka; and ancillary relief.

[14] The employees were not satisfied with the award, as they primarily sought reinstatement. Hence, they took the matter on review to the Labour Court in terms of section 145 of the Labour Relations Act (the LRA).⁴

The Labour Court

[15] The employees' grounds of review are not clearly and tersely laid out as one would have expected. However, gleaning from their founding affidavit, I can summarise their grounds of review as follows:

1. That the arbitrator's award upholding the employees' dismissal was not warranted given the employees' many years of service and clean disciplinary record;
2. That no evidence was led by the Municipality which justified the finding by the arbitrator that the employees' conduct constituted insubordination, let alone gross insubordination.

[16] Having considered the matter, the Labour Court concluded that the arbitration award was not reviewable. The learned Review Judge referred, with approval, to the findings of the arbitrator:

[30] Based on this evidence, the second respondent [the arbitrator] in the award reasonably concluded as follows:

'The question then is did the applicants open or get the gate opened on receiving the instructions? Evidence led is that this did not take place but Dalton was merely informed that the gate would only be opened if he attended the meeting with staff at the lecture room. It was also evidence that the gate was opened after Dalton said again at the lecture room that the gate must be opened before he commences the meeting as he had then heeded staff call to the meeting. His instruction to the applicants was still not carried out when he arrived at the lecture room.

Insubordination requires either disobedience or challenge to authority which is deliberate and serious. In this case I find that the instruction was reasonable and

⁴ Act 66 of 1995.

lawful. I also find that there was a challenge to authority which was deliberate and serious. I therefore in the circumstances conclude that the respondent's version that the applicants committed gross insubordination is more probable than that of the applicants that they did not.'

And:

'[45] The [arbitrator] did take into account the fact that the [appellants] were shop stewards. A shop steward is meant to lead by example and furthermore, he or she remains an employee and the employer is entitled to expect conduct appropriate of that relationship. It can never be right therefore for a shop steward to advance as an excuse the argument that what he or she did was done whilst pursuing the interests of its members.'

[17] Accordingly, the Labour Court dismissed the employees' review application, with no order as to costs. It is that judgment of the Labour Court against which the appellants now appeal to this Court.

The appeal

[18] The appellants criticised the Labour Court in upholding as reasonable the arbitrator's finding that the employees were, indeed, guilty of gross insubordination, on the evidence before her. They submitted that the arbitrator's failure to make a distinction between insubordination and gross insubordination constituted a misdirection on her part and a gross irregularity in the proceedings.

[19] Ms *Allen* argued that even if the employees were guilty of an act of misconduct, it was not so serious as to amount to gross insubordination. According to her, their transgression should not have attracted a sanction of dismissal.

[20] For an arbitration award to be reviewed and set aside under section 145 of the LRA, it must be one falling within the range of decisions, which a reasonable decision-maker could not have made, given the evidentiary material presented to the arbitrator or commissioner, as the case may be.⁵ The question to be

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

asked is whether, on the evidentiary material presented to the arbitrator, the decision of the arbitrator, as evidenced in the award, can be justified.⁶ The Supreme Court of Appeal, in *Herholdt v Nedbank Bank* (COSATU as *amicus curiae*)⁷ restated the *Sidumo* test in the following terms:

'[W]hile the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions". ...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.'⁸ [Footnote omitted]

[21] *In casu* the employment and working relationship between employer and employees is governed, *inter alia*, by a collective agreement known as the Organisational Rights Collective Agreement (the collective agreement),⁹ which includes sections on 'Disciplinary Procedure'¹⁰ and 'Conduct and Sanctions'¹¹. To the extent relevant for the present purpose, some of the provisions of the collective agreement are the following:

Shop Stewards' Obligations¹²

8.6.1 Shop stewards shall do everything reasonably necessary to ensure adherence to agreements, procedures, terms and conditions of employment, regulations and safety rules applicable to the employer.

8.6.2

⁶ *Bester v Astral Operations Ltd and Others* [2011] 3 BLLR 129 (LAC) at para 18; *SAMWU v SALGBC* [2012] 4 BLLR 334 (LAC) at para 11.

⁷ 2013 (6) SA 224 (SCA).

⁸ At paras 13 and 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 and 16.

⁹ Collective agreement, at p78-105.

¹⁰ Collective agreement, vol 2 at p106-125.

¹¹ Collective agreement, vol 2 at p126-129.

¹² Collective agreement, vol 2 at p88.

8.6.3 Except as otherwise provided for in this agreement, or any other agreement between the parties, the shop stewards will be subject to the same rules, regulations and other conditions of employment as other employees of the employer.'

Conduct and Sanctions¹³

In particular, the employee should "*obey all lawful and reasonable instructions given by a person having the authority to do so.*"¹⁴

Sanctions for Misconduct¹⁵

It is provided that as a guideline, an employee can be summarily dismissed, despite being a first offender, on conviction of any of the following misconduct charges:

'2.7.7 gross insubordination;

2.7.10 any other act of misconduct which would constitute just cause for dismissal.'

[22] In the decision of this Court in *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters and Others*,¹⁶ the distinction between insubordination and gross insubordination was restated:

'It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified.'¹⁷

[23] It was common cause that at the meeting called by Mr Dalton in his office, the employees made it clear to him that the gates would only be opened if Mr Dalton went to the lecture room to address the staff on their grievances. It was not in dispute that ordinarily the opening and closing the gate at the workplace

¹³ Collective agreement, vol 2 at 126.

¹⁴ Collective agreement, vol 2 clause 1.2.4).

¹⁵ Collective agreement, vol 2 at p127.

¹⁶ (2013) 34 ILJ 1440 (LAC); [2014] JOL 31995 (LAC).

¹⁷ At para 31.

was not part of the employees' line of duty. Mr Dalton was clearly aware of that fact. However, Mr Dalton gave the instruction he did to the employees on the basis of the information that Mr Dalton had received from Mr Ndlazi, to the effect that the gate keys were taken from him by the employees. Mr Ndlazi confirmed this position in his evidence at the disciplinary enquiry and at the arbitration hearing.

[24] Significantly, when Mr Dalton confronted the employees about them allegedly locking the gate, they did not immediately deny having locked the gate. Instead, they told Mr Dalton that the gate would be opened after he had gone to address the staff at the lecture room. Even when he arrived at the lecture room, the gate was still not opened. It was only after he had finished addressing the staff that the employees gave the keys back to Mr Ndlazi and the gate was opened.

[25] Whilst I am fully convinced that the employees did take the gate keys from Mr Ndlazi, his evidence is not without criticism. He was the security officer whose duty was to open and close the gate when required. This was corollary to his responsibility to check on the people and vehicles entering and exiting the premises. In my view, it constituted a complete and gross dereliction of duty on Mr Ndlazi's part to have simply given the gate keys to the employees under the circumstances that he did, especially without any threat or intimidation exerted on him by the employees or someone else, as it is clear from his evidence at the disciplinary enquiry. His conduct in this regard was, in my view, grossly irresponsible and could have warranted a sanction. As to what motive was behind Mr Ndlazi's irresponsible action, would be speculative and is, after all, irrelevant for the purpose of this judgment.

[26] Be that as it may, the probabilities strongly favour the conclusion that the employees took the gate keys from Mr Ndlazi and locked the gate, or cause it to be locked by someone else at their instance. In my view, whether they took the keys by force or otherwise is immaterial and irrelevant.

[27] It would appear from their actions that the employees laboured under a serious misconception that being in the position of shop stewards, as they

were, gave them the power and latitude to domineer and bully the management and as they pleased, with impunity. Being affiliated to organised labour does not detract from the fact that employees still remain subordinate to their employers and to obey and comply with lawful and reasonable instructions given by the employers. In the present instance, the employees ought to have been aware and mindful of their responsibilities and limitations in the workplace, in their capacities as shop stewards. The collective agreement made it clear, *inter alia*, that: "Except as otherwise provided for in this agreement, or any other agreement between the parties, the shop stewards will be subject to the same rules, regulations and other conditions of employment as other employees of the employer."¹⁸ One of these is that "an employee...should obey all lawful and reasonable instructions given by a person having authority to do so".¹⁹ (Emphasised)

[28] It was part of the employer's essential operational requirements that the gate be opened' and thus the instruction issued by Mr Dalton for the gate to be opened was a lawful instruction. Further, the instruction was a reasonable one - on the basis that Mr Dalton had credible information received from Mr Ndlazi that the employees had taken the gate keys; and the fact that the employees, when confronted about the matter by Mr Dalton, they did not expressly deny having taken the keys from Mr Ndlazi, but they simply told Mr Dalton that the gate would be opened only after Mr Dalton had addressed the staff on their grievances.

[29] For a period of some 2½ hours, the employer's productive operations had come to a standstill, having been sabotaged by the employees by their actions. They had no legal or moral justification to conduct themselves in that manner. They deliberately and maliciously defied a lawful and reasonable instruction given to them by Mr Dalton, their maintenance manager, who was authorised to give such instruction to them. In the circumstances, I am inclined to hold that the finding of the arbitrator, that the employees committed gross insubordination by refusing to comply with Mr Dalton's lawful and reasonable instruction, was a reasonable finding. Their dismissal was, therefore, justified.

¹⁸ Clause 8.6.3 of the collective agreement, see above.

¹⁹ Clause 1.2.4 of the collective agreement (Conduct and Sanctions), see above.

[30] The submission made on behalf of the appellants that the arbitrator did not take into account the employees' long service with the Municipality is factually incorrect. The arbitrator dealt with the issue in clear and unambiguous terms:²⁰

'5.15 In determining whether dismissal is appropriate, I have taken into account the applicants' length of service which is not less than 20 years in respect of the first applicant and not less than 8 years in respect of the second applicant and the fact that they had clean disciplinary records. The respondent led evidence relating to expired warnings of unrelated offences concerning the second applicant.'

[31] In conclusion, I am satisfied that the arbitrator's award does not constitute a decision which a reasonable decision-maker could not have reached, on the evidence presented to the arbitrator. The appeal must therefore fail.

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

The appeal is dismissed, with no order as to costs.

Ndlovu JA

Tlaletsi DJP and Makgoka AJA concur in the judgment of Ndlovu JA

APPEARANCES

For the appellants: Ms C Allen

Instructed by Tomlinson Mnguni James Attorneys

²⁰ Arbitration award para 5.15, at p48 vol 1 of the record.

For the 1st respondent: Mr V Naidu

Instructed by Hughes-Madondo Inc

LABOUR APPEAL COURT