



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not reportable

Case no: JA62/2017

In the matter between:

SOUL MTSHWENE

Appellant

and

GLENCORE OPERATIONS SOUTH AFRICA

(PTY) LTD (LION FERROCHROME)

Respondent

Heard: 29 May 2018

Delivered: 08 November 2018

Coram: Phatshoane ADJP, Murphy and Savage AJJA

Summary: The employer lodging a review application against the finding by the CCMA that the dismissal of the employee was substantively unfair because the employer had not been consistent in applying discipline. The employee filing a cross-review, 122 days out of time, mounting an attack on the finding by the commissioner that he was guilty of the misconduct and further seeking reinstatement into employment.

The Labour Court –dismissing the application for condonation of the late filing of the cross-review and refusing to consider the cross-review – granting the main review and setting aside the award of the arbitrator- substituting same with an order that the dismissal was substantively fair.

On appeal against dismissal of the application for condonation of late filing of the cross-review- The Labour Appeal Court finding – that the explanation for the delay lacked substance – the cross-review had no reasonable prospects of success - the Labour Court could not be faulted in dismissing the application for condonation - the employee remained accountable for the work that was performed by the contractor and his subordinate - the commissioner correctly found his evidence to be improbable which conclusion was unassailable.

On the argument that the employer had purportedly been inconsistent in applying discipline - The LAC finding - that the Court a quo carefully considered the commissioner's award and his manifestly flawed assessment of the evidence pertaining to the employer's alleged inconsistent approach in applying discipline. Held that - the Labour Court correctly concluded that the commissioner's decision, on this aspect, was one that a reasonable decision-maker could not reach and accordingly set aside the award.

Appeal is dismissed with no order as to costs.

JUDGMENT

PHATSHOANE ADJP,

- [1] This is an appeal against the whole of the judgment and order of the Labour Court (*per* Kirstein AJ), dismissing the application for condonation of the late filing of the cross-review and declining to entertain the cross-review by Mr Nkeni Soul Mtshwene, the appellant ("Mr Mtshwene"); granting the review application filed by Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome), the respondent ("Glencore"); and setting aside the arbitration award (LP2351-14) dated 31 July 2014 issued by commissioner S M Rantho under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA") and substituting same with an order that the dismissal of Mr Mtshwene was substantively fair.
- [2] On 01 October 2012 Mr Mtshwene entered into employment with Glencore, a ferrochrome producer, as a refractory technologist. He was reporting to Mr Stephen Sunday Zulu, a process superintendent at the plant. His duties

included scoping the work that needed to be performed by the external contractors of Glencore; communicating with those contractors to source their quotation for the work to be performed; overseeing and monitoring the contractors' projects; providing advice during the installations of refractory lining by the contractors; making proposals whether to renew the refractories; immediately addressing deviations or problems experienced during the installation of the refractory lining with Mr Zulu; inspecting the anchors on the refractory lining to ensure that they were installed according to the quality specifications and the standards set by Glencore; conducting day to day quality checks and inspection of equipment and had a Planned Maintenance Checklist (referred to as PM01's) which he used for this purpose.

[3] In terms of Glencore's historical data the expected lifespan of a fitted refractory lining is five years. During the seven day shutdown period of 15 to 21 July 2013 Glencore engaged Cerefmet (Pty) Ltd to install a refractory lining in one of its Kiln.¹ Within a period of six months of the installation, five meters of this newly cast refractory lining collapsed whereas the remaining five meters of structure was in a bad condition. Glencore instituted an investigation to determine the probable causes of the premature kiln refractory failure. This revealed that the substandard welding of the anchors, which were supposed to keep the refractory in place, was the most probable cause of the premature failure. Mr Mtshwene and his subordinate, Mr Salmon Biljon, bore the responsibility of ensuring that the anchors were properly welded during the installation process.

[4] As a consequence of poor workmanship and inadequate on site supervision Glencore suffered financial loss which was estimated at R4 million. Mr Zulu says that the PM01 Checklist had not been completed by Mr Mtshwene because it was not available to Mr Zulu on request. He intimated that this meant that there had been negligence on the part of Mr Mtshwene for allowing the contractor to deliver poor quality of services. He went on to say that Mr Mtshwene was supposed to supervise the contractors during the installation process and correct them, as necessary.

¹ Three times in a year, Glencore had shutdown periods explained by Mr Mtshwene as a period in respect of which operations in a particular Kiln would be stopped to allow repairs to be carried out.

- [5] Insofar as Mr Mtshwene contended that Glencore was inconsistent in applying discipline, Mr Zulu explained that it was Mr Mtshwene's responsibility to take action against his subordinate and that he had ample opportunity but failed to do so. Mr Zulu further says that, in view of the collapse of the refractory lining, the relationship of trust between Glencore and Mr Mtshwene was irreparably damaged.
- [6] In his defence to the allegation of negligence on his part, Mr Mtshwene explained that he did not work a 24 hour but a 12-hour dayshift during the shutdown period of 15 to 21 July 2013 whereas Mr Biljon worked nightshift. He claimed that, in terms of a verbal agreement they had with Mr Zulu, they both reported to Mr Zulu during this period. He had six other areas of responsibility that he had to oversee, where contractors had been engaged by Glencore, and therefore it was impossible for him to be inside the kiln for the 12-hour period of his dayshift. In this case, he says, 2000 anchors were installed by Cerefmet, the contractor, therefore it was impossible for him to inspect all of them. He conducted random inspection "spot checks" and discovered that few of the anchors had not been properly installed. He then took this up with the contractor. Mr Mtshwene went on to say that he completed the PM01 Checklist and filed same in the shutdown file. Following the collapse of the structure in January 2014 he says he handed over these documents to Mr Zulu.
- [7] On 21 January 2014 Mr Mtshwene was subjected to a disciplinary hearing on a charge of negligence with aggravating circumstances in that he failed to ensure the proper installation of the refractory lining which resulted in substantial financial and production loss to Glencore. He was dismissed on 20 February 2014. Following this, he referred his alleged unfair dismissal dispute to the CCMA for conciliation and arbitration.
- [8] In his arbitration award the commissioner found that if Mr Mtshwene could not account for the whereabouts of the checklist it meant that it never existed and said "*in the first place it was never completed.*" He found Mr Mtshwene's version improbable and that "*he is to be blamed for the mishap and as such he transgressed the rule*". Although he noted in his award that Mr Mtshwene

conceded that Mr Biljon was “a *junior supervisor below him*” he went on to find that Glencore was not consistent in applying discipline for reasons recorded in his award as follows:

‘On the other hand, evidence was led for [Mr Mtshwene] that he only worked twelve (12) hours and he worked dayshift. That is from 07:00 to 19:00. When he knocked off he handed over the responsibility to Mr Salmon Biljon who was working nightshift. Together they were performing the same job. They were reporting to Mr Zulu. Their responsibilities were the same. They worked as if they were on the same grade during shutdown. During shutdown Mr Biljon was reporting to Mr Zulu. I find that this evidence was never contested. If during shutdown both [Mr Mtshwene] and Mr Biljon were accorded the same responsibilities and both of them were reporting to Mr Zulu why did [Glencore] chose to hold [Mr Mtshwene] responsible to the exclusion of Mr Biljon. Furthermore, the evidence has been led for [Glencore] that in this instance there was no disciplinary action taken against a subordinate. Mr Zulu repeated this evidence also during cross-examination. At what stage was [Mr Mtshwene] expected to take disciplinary action against Mr Biljon since the defects were uncovered after the investigation and at the same time disciplinary steps were taken against [Mr Mtshwene]. Thus he was left with no breathing space to think of the next move. Against this background, I find that the version of [Glencore] herein is improbable and I will reject it. In the premise, I find that [Glencore] was not consistent in its approach to discipline herein. Therefore, I find that the dismissal was substantively unfair.’

[9] After finding that the dismissal of Mr Mtshwene was substantively unfair the commissioner awarded him compensation in the amount of R222 000.00, equivalent to his six months’ salary, as opposed to reinstatement as he was of the view that the relationship of trust was broken down beyond repair.

[10] On 16 September 2014, within the period prescribed in the Labour Relations Act, 66 of 1995 (LRA), Glencore launched a review application in the Labour Court, challenging the arbitration award on the basis that no reasonable decision-maker could have arrived at the conclusion reached by the commissioner. Mr Mtshwene filed a cross-review on 13 January 2015 attacking the finding of the commissioner that he was guilty of the misconduct

and seeking reinstatement. The cross-review was filed 122 days (more than four months) out of time and was thus accompanied by an application for condonation of the late filing thereof.

[11] Mr Mtshwene's reasons for the delay in launching his cross-review were to the effect that his union representative informed him that he was successful and that Glencore had been ordered to pay him compensation. Being delighted, he did not read the arbitration award and trusted that his union representatives would highlight the areas of concern in relation to the award. He discovered only on 09 January 2015, during a consultation with his attorneys and subsequent to the launching of the review application by Glencore, that the commissioner had found him guilty of misconduct. He then instructed his attorneys to file a cross-review against that finding and to apply for condonation.

[12] The Court *a quo* found that the explanation offered by Mr Mtshwene for the delay, amounted to nothing. It dismissed the application for condonation for the late filing of the cross-review and refused to entertain the cross-review. It then found the commissioner's decision, that the dismissal was substantively unfair, on the basis that Glencore was inconsistent in applying discipline, to have been unreasonable. Consequently, it granted the review application by Glencore; set aside the arbitration award; and substituted it with an order that the dismissal of Mr Mtshwene was substantively fair.

[13] The grounds of appeal are a rambling repetition of the issues and at times a complete obfuscation of the evidence that served before the commissioner. In summary, it was contended before us that the Court *a quo* erred:

13.1 In considering the application for condonation on a piece-meal basis without regard to all other relevant factors and not determining the merits of the cross-review.

13.2 In finding that the decision reached by the commissioner is one that a reasonable arbitrator "would not have made" as opposed to one a reasonable arbitrator "could not have made." In so doing, it was contended, the Court applied an incorrect review test.

13.3 In not assessing the content of Messrs Mtshwene and Biljon's responsibility to monitor the contractor's work. It was contended that the Court did not address what the contractor's poor work performance entailed; when such poor work performance was tendered; and the whereabouts of Mr Mtshwene and his subordinate when the poor work was performed.

13.4 In ignoring the evidence that Messrs Mtshwene and Biljon had to monitor different projects at different Glencore sites and thus could not monitor every step of the installation of the refractory lining by the contractor. In any event, it was argued, the contractor installed the anchors and plastered them before inspection. Therefore, Messrs Mtshwene and Biljon could not inspect the quality of the installation of the anchors after casting. Furthermore, it was argued, it was impossible for Mr Mtshwene to have picked up the defective work performed during Mr Biljon's shift as the anchors were already casted. It must immediately be mentioned that this was never the evidence that served before the commissioner. It was put to Mr Zulu that: *"During his [Mr Mtshwene's] shift all the anchors were straight (properly installed) and when the casting for the cementation process took place that is where he [Mr Mtshwene] saw they were straight, they were not flat. That will be his evidence."* In other words, the anchors were purportedly properly installed before the plastering process.

13.5 In finding Mr Mtshwene guilty of the misconduct which was perpetrated by his subordinate and exonerating all Mr Mtshwene's seniors including Mr Zulu, who had an obligation to discipline Mr Biljon.

The analysis

[14] In keeping with the LRA objective to facilitate and ensure the effective resolution of labour dispute, it is trite that employment law disputes ought to be disposed of expeditiously.² The Court's power to grant condonation is

² *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (CC) at 627 para 42; *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* (2011) 32 ILJ 2861 (CC) at 2880 para 76.

discretionary. Generally, the Court will have regard to the factors relevant to the consideration of the application for condonation which includes, *inter alia*, the degree of lateness, the explanation therefor, the prospects of success on the merits and the importance of the case. These factors are interrelated.³ The *onus* is on the applicant to satisfy the Court that condonation should be granted.

- [15] The delay of 122 days in filing the cross-review was unreasonable. The nonchalant threadbare explanation for the delay certainly lacked substance. The Court *a quo* did not consider Mr Mtshwene's prospects of success in respect of his cross-review. In dismissing the application for condonation the Court relied on the decision in *NUM v Council for Mineral Technology*⁴ where it was held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.
- [16] Mr Mtshwene's cross-review had no prospects of success as I shall now demonstrate. It is important to remember that he faced a charge of negligence with aggravating circumstances in that he failed to ensure the proper installation of the refractory lining which resulted in substantial financial and production loss to Glencore. The Court *a quo* found that: "*It is clear that the employee had identified some problems with the workmanship but that he had not alerted his supervisor of them and it does not appear that, the employee took additional steps to monitor the workmanship at a closer level as a result of the existence of the problems in the workmanship that he identified.*" It also held that: "*The unavoidable conclusion of the matter is that the installation was not properly monitored for proper work performance. If this occurred on Biljon's shift then the employee should have picked it up when he was on duty as he was the supervisor and was therefore responsible for ensuring that his subordinates performed their duties as required.*"

³ See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

⁴ [1999] 3 BLLR 209 (LAC) at para 10.

- [17] The Court did not confine its determination to the narrow issues raised in the review, that is, whether the commissioner's decision was rationally and reasonably connected to the evidence before him insofar as he found that Glencore was inconsistent in the application of discipline and awarding Mr Mtshwene compensation. In holding as it did the Labour Court determined the main issue raised in the cross-review, that is, Mr Mtshwene's culpability in respect of the alleged misconduct. Understandably, it is difficult to separate Mr Mtshwene's accountability from the question of Glencore's obligation to apply discipline consistently.
- [18] What arises for determination on the merits of this appeal and has a bearing on Mr Mtshwene's prospects of success in the cross-review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. Section 145 of the LRA is suffused by the constitutional standard of reasonableness. Applying that standard will give effect not only to the constitutional right to fair labour practices, but also the right to administrative action which is lawful, reasonable and procedurally fair.⁵
- [19] The basis of Mr Mtshwene defence, to the allegation that he was negligent, is that Cerefmet was intrinsically responsible for everything that went wrong with the installation of the refractory lining. What emerges from the background, earlier sketched, is that Mr Mtshwene has attempted to make excuses for his conduct and shifted the blame to the contractor. For instance, he said: it was not his duty to see to the proper installation of the refractory; Cerefmet's supervisor had to do strict supervision of the welding and installation of the anchors; Cerefmet had to ensure that the anchors were properly installed; it was not practical for him to inspect all the 2000 or 1700 anchors that were installed; he was not in charge of the project but Cerefmet was; and furthermore, he had other areas of responsibility to attend to and could not have been at the kiln in issue for the whole 12-hour period of his shift. Whether Mr Mtshwene was overseeing other projects on the plant is not an excuse. These other projects, he said he had to oversee, according to Mr Zulu

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 para 110.

were secondary. He explained *"The most critical area is the kiln lining, we stopped because of kiln lining and the rest is just auxiliary jobs."*

- [20] One gathers from the tenor of his answers that Mr Mtshwene was an unsatisfactory witness. He contradicted himself and vacillated on the nature of his responsibilities as a refractory technologist. To demonstrate how he fared badly, during his evidence-in-chief, he said: *"while doing spot checks, yes, I did find few of the anchors that were not welded properly and then I immediately addressed it with the supervisor of the contractor to address those anchors"*. He contradicted this statement in cross-examination when he said: *"During my spot checks everything went quite well. When I tested the anchors the parts were well welded....The anchors that I tested that I checked on that day were intact."* He also said: *"In this particular instance inside the kiln when they install the anchors I will check if they have been installed according to standard..."* He acknowledged that Biljon and he were to blame for the collapse of the structure and immediately recanted this suggesting that the contractor did not do the work according to the specifications.
- [21] The evidence of Mr Zulu that Mr Mtshwene's responsibilities included, *inter alia*, providing supervision and advice to the contractor during the refractory lining installations; conducting day to day inspections and completing the Planned Maintenance Checklist; was never controverted. According to Mr Zulu, on the checklist that Mr Mtshwene was supposed to complete, he is required to state or tick that he had checked that all the anchors were properly installed. Mr Mtshwene's evidence that he merely did sporadic quality checks cannot avail him. It was not put to Mr Zulu that Mr Mtshwene had to conduct mere random spot checks. In any event, Mr Zulu denied that he was supposed to conduct spot checks. He explained that Mr Mtshwene had to ensure that the *"work is done according to quality."* The checklist, which had to show that he inspected all the anchors, was nowhere to be found. Mr Mtshwene's evidence that Mr Zulu distorted facts when he denied that he received the checklist from him was correctly rejected by the commissioner whose conclusion that the checklist did not exist cannot be criticised.

[22] Mr Mtshwene cannot extricate himself from the substandard workmanship that resulted in collapse of the structure. In his own words, he was a refractory specialist and had compiled the scope of work that was supposed to be performed by the contractor in that kiln. He also admitted knowing what was expected to be done by the contractor. He ultimately remained accountable for the work that was performed by the contractor and his subordinate. The commissioner correctly found Mr Mtshwene's evidence improbable. His conclusion that he "*is to be blamed for the mishap and as such he transgressed the rule*" is unassailable. The Court *a quo* cannot be faulted in having dismissed Mr Mtshwene's application for condonation because, as foreshadowed on the analysis above, it had no prospects of success.

[23] Turning now to the question whether Glencore was inconsistent in applying discipline, it was contended, for Mr Mtshwene, that the commissioner considered all the relevant factors when considering this aspect. It was further argued that it was unfair for Mr Biljon to continue being in employment of Glencore when he was guilty of the same conduct said to have been perpetrated by Mr Mtshwene.

[24] The following dictum in *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)*⁶ is apposite:

[27] In this case, the flaw in the argument that alleges the presence of inconsistency is the failure to recognize and digest that the appellant was alone responsible, within his area of managerial control, *to manage* the fitment programme.

[28] As regards the dereliction of duties by his subordinates, if any acts of misconduct were to be proven against any particular individual, it remains plain that they had no *managerial role* and it is illogical to draw a comparison as contemplated by the factor of inconsistency. Moreover, it would be a paradox if the appellant could legitimately invoke the failure of the very subordinates he was accountable to manage effectively to exonerate or mitigate his managerial neglect by managing them ineffectively. There is no room to contemplate the factor of inconsistency of discipline by invoking the probability that no subordinates were disciplined (or that it is unknown whether

⁶ (2014) 35 ILJ 2406 (LAC) at paras 27-28.

they were disciplined) for their infractions. The reason for this is that if it is assumed that a cogent concrete basis could be put up to identify which persons acted irresponsibly in relation to their specific functions and responsibilities, it would still not be a failure by them to manage the fitment programme and be conduct comparable to the misconduct committed by the appellant.'

- [25] To demonstrate that Glencore was inconsistent in the application of discipline, Mr Mtshwene explained Mr Biljon was his equal during the shutdown period in issue and that they both reported to Mr Zulu. The difficulty with this contention is that it was never put Mr Zulu that Mr Biljon reported to him during the shutdown nor was it put to him that he ought to have disciplined Mr Biljon. Mr Zulu was at pains to show, during his cross-examination, that if Mr Mtshwene was of the view that the shoddy workmanship was performed during his subordinate's shift, it was in Mtshwene's discretion to discipline him. In any event, Mr Zulu's evidence was clear that Mr Biljon was Mr Mtshwene's subordinate and reported to Mtshwene.
- [26] Mr Mtshwene was a senior supervisor on Band 8 whereas Mr Biljon was a junior supervisor on Band 4. There was no evidence adduced, during the arbitration, suggesting that the grading of the two employees' work changed during shutdown period or that Biljon was a refractory specialist or technologist. Furthermore, no evidence was led at the arbitration demonstrating that Mr Biljon acted in any negligent manner during the installation of the refractory lining. Mr Mtshwene attributed the negligence solely to Cerefmet and did not see anything untoward that warranted disciplinary steps being taken against Mr Biljon. In the end, Mr Biljon could never have been compared to Mr Mtshwene because they were not similarly circumstanced thus Glencore was entitled to distinguish between them. The argument that Biljon ought to have been discipline cannot be sustained. There was simply no basis for any claim that Glencore was inconsistent in applying discipline.
- [27] Mr Mtshwene failed in the execution of his duties. The misconduct he committed was of a serious nature and negatively affected the business of

Glencore including the safety and well-being of its employees. The Court *a quo* carefully considered the commissioner's award and his manifestly flawed assessment of the evidence pertaining to Glencore's purported inconsistent approach in applying discipline. It correctly concluded that the commissioner's decision, on this aspect, was one that a reasonable decision-maker could not reach and accordingly set aside the award. In my view, this conclusion is impeccable.

[28] In accordance with the requirements of law and fairness this is not a case where a costs order ought to be made because the arbitration award issued by the CCMA may have led to Mr Mtshwene's entertainment of false hopes of achieving success in pursuing this litigation. In the result, I make the following order:

Order

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

MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Murphy and Savage AJJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:

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FOR THE RESPONDENT:

Adv A Mosam

Instructed by Edward Nathan Sonnenbergs

LABOUR APPEAL COURT