

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA70/2017

In the matter between:

SIMON MARIPANE

Appellant

And

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD

(LION FERROCHROME)

Respondent

Heard: 26 February 2019

Delivered: 07 May 2019

Summary: Review of arbitration award – employee dismissed for insubordination having refused to return to his work station after his tenure as a health and safety representative had allegedly ended as a result of the

election of new leadership- in terms of an agreement concluded with the union, the employee was appointed as health and safety representative – subsequent to an election of the leaderships a letter the name of the elected official were sent to the employer- the employer construed the letter to mean that the employee was no longer its health and safety representative – employer instructed the employee to return to his position as Raw Material Operator – the employee refused to heed to the instruction and was consequently dismissed –

The commissioner found the employee guilty of insubordination but ordered as sanction a written, final warning and back pay – the Labour Court reviewed and set aside the award and dismissed the cross-review.

On appeal held

The evidence before the Commissioner on the point does not establish, even on a balance of probabilities, that the employee had been replaced by NUM as HSR. The letter of 26 September 2013 does not state that the employee has been replaced. What it does seem to state, at best, is that there was a newly elected leadership in a range of portfolios, including that Mr Riba was elected as Chairperson of Health and Safety and Ms Leshaba as Secretary of Health and Safety. Further that by insisting that the employee reverts to his position as RMO, and, thus, cease to be HSR, prior to the expiry of his term as HSR, the employer was acting in breach of the agreement (which could reasonably be construed as a *stipulatio alteri*) or could reasonably be perceived to have evinced an unequivocal intention not to be bound by its material terms. Consequently, like any innocent party to a contract, who finds itself in such a situation, the employee was not obliged to accept the repudiation, could resist it and insist on specific performance. The instruction, that the employee return to his position as RMO before the expiry of his term as HSR, was legally

unenforceable and clearly unreasonable. And the appellant's non-compliance cannot be said to have been unlawful, or in breach of his contract of employment, or the agreement. Appeal upheld with costs and Labour Court's judgment set aside.

Coram: Coppin JA, Savage AJA et Murphy AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the whole judgment of the Labour Court (Harper AJ) in terms of which it reviewed and set aside part of an arbitration award made by a Commissioner of the Commission for Conciliation, Mediation and Arbitration ('the CCMA'). Having found that the appellant's dismissal by the respondent, for alleged insubordination, was substantially unfair, the Commissioner reinstated the appellant retrospectively to the date of his dismissal, with seven month's backpay.

Background

- [2] The appellant was employed by the respondent since 2006 as a raw material operator ('RMO'). During April 2012, the respondent and the National Union of Mineworkers ('NUM'), of which the appellant was a member, entered into a written health and safety agreement ("the agreement") to provide for the

regulation of health and safety issues as contemplated in the Occupational Health and Safety Act¹. In terms of the agreement, *inter alia*, a full-time health and safety representative ("HSR") would be appointed at Lion Ferrochrome, one of the smelters operated by the respondent, for a three-year period, after he or she had been elected to that position by the NUM membership at the respondent.

[3] Having been so elected, the appellant was appointed as the HSR at Lion Ferrochrome in 2012. In 2013, however, a NUM Branch Committee (North East Region) held elections in which the appellant participated. Following those elections, the NUM Branch Committee submitted a letter, dated 26 September 2013, reflecting a list of their "newly elected leadership" to the respondent. The letter stated that this newly elected leadership was for the period 19 September 2013 to 19 September 2016. It then went on to list a number of individuals who had been elected to various leadership positions. The list also indicated, *inter alia*, that one, Koos Riba, had been elected as Chairperson - Health and Safety and that one, Lebo Leshaba, had been elected as Secretary - Health and Safety. The appellant's name was not on the list.

[4] Following the receipt of this letter the respondent, being of the persuasion that the letter meant that the appellant had been replaced as HSR, instructed him to resume his duties as RMO in the Raw Materials Department. The appellant did not comply with the instruction, but engaged the respondent on the issue. The appellant was, reportedly, instructed twice more to resume his position as RMO, to no avail.

[5] On 31 December 2013, the respondent charged the appellant with gross insubordination relating to his failure to resume his position as RMO. The

¹ Act 85 of 1993.

charge alleged, in essence, that the appellant was guilty of gross insubordination in that he did not report to his place of work at the Raw Materials Department “between 2 and 3 December 2013 and 11 and 30 December 2013 as notified and instructed by management...”.

- [6] It is common cause that the respondent’s representative had met with the appellant where the appellant had been informed that he was to report to the said Department with effect from 1 December 2013. At that meeting, the appellant had indicated that he would not be returning. However, there are different versions as to what the appellant precisely said at that meeting and whether he gave any particular reason for his refusal to return.
- [7] It is not an issue that another meeting between the respondent’s representative and the appellant was held on 23 December 2013 where the appellant had, *inter alia*, been informed of the consequences of his refusal to return to the Raw Materials Department. As with the first meeting, there are different versions about what was exactly said there. However, it is common cause that the appellant was still not prepared to heed the instruction to return to his position as RMO and had maintained that he was still the HSR.
- [8] On 28 January 2014, a disciplinary hearing was held. At its conclusion, the appellant was found guilty of the charge of gross insubordination and a sanction of dismissal, which was found appropriate, was imposed. The appellant was accordingly dismissed from his employment on 7 February 2014. The appellant unsuccessfully appealed against the findings and sanction of the disciplinary hearing and, consequently, referred an unfair dismissal dispute to the CCMA.

- [9] At the conclusion of the arbitration proceedings in the CCMA, the presiding commissioner issued an award in the following terms: Firstly, he found that the dismissal of the appellant was substantively unfair. Secondly, he ordered the respondent to retrospectively reinstate the appellant by no later than 7 September 2014 to the position of raw material operator on the same terms and conditions that applied as at the date of the dismissal. Thirdly, the Commissioner ordered that the respondent was, no later than 7 September 2014, “to reinstate all benefits that were applicable to the [appellant] as raw material operator”. Fourthly, the Commissioner ordered that on that same date the respondent was to give the appellant a final written warning that would be effective for a period of 12 months from the date of its issue. And lastly, the Commissioner ordered the respondent to pay the appellant backpay in the sum of R 60,296 – 04, being equivalent to the appellant’s salary for a period of seven months. The payment was to be made no later than 7 September 2014. The capital sum was declared to attract interest as contemplated in section 143(2) of the Labour Relations Act of 1995, meaning that interest, at the same rate as the legally prescribed rate applicable to a judgment debt, accrued on the sum awarded from the date of the award until payment of the amount.
- [10] In September 2014, the respondent brought an application in the Labour Court to review and set aside the award to the extent that the Commissioner had found that the appellant’s dismissal was substantively unfair, that the sanction of dismissal was inappropriate, and in respect of the relief granted consequentially. The respondent sought to have the Commissioner’s award substituted with one in terms of which the appellant’s dismissal is declared to have been substantively fair and the dismissal is found to have been appropriate in the circumstances. In the alternative, it sought to have the matter referred back to the CCMA for a fresh hearing.
- [11] It is not in dispute that on 2 February 2015, together with his answering affidavit in those proceedings, the appellant filed a cross-review, with a

condonation application, in which he only sought to review and set aside the Commissioner's finding that he was guilty of gross insubordination.

[12] The court *a quo* granted the review, and dismissed the cross-review. It held, *inter alia*, that “even if the instruction had been issued on a single occasion dismissal would be justified. The disciplinary code , *inter alia*, stipulated that possible sanctions was merely a guideline”. The court *a quo* further found that in concluding that the disciplinary code constituted a collective agreement, the Commissioner committed a reviewable irregularity as there was no evidence before him that it was indeed a collective agreement.

[13] Concerning the appellant's perceived unhappiness with the way the NUM (supposedly) dealt with him, the court *a quo* held: “38. *In these circumstances and when a collective agreement is operative, an employee who is aggrieved with the decision of a Union is not entitled to breach these conditions of employment in order to vent his opposition to the outcome of an election process conducted by the Union. He is obliged to return to his position in accordance with these conditions of employment and the collective agreement...* 39. *He can concurrently challenge the outcome of the election by seeking advice and where appropriate seeking to implement corrective measures. He however needed to address that issue with NUM in the first instance...* 40. *It was not however appropriate to disobey the instructions of his employer and he was obliged to assume his work duties while he pursued his complaint*”.

[14] The court *a quo* found that the dismissal was justified, not only because an instruction for the appellant to return to work had been issued by the employer on three occasions, or because there was a single offence, but because the appellant “*deliberately continued to disobey the instructions*”. It also found that an award of compensation (i.e. presumably the backpay) was unjustified in

the circumstances, because “*an employee should not be awarded compensation where he has repeatedly refused to assume his work duties*”.

- [15] In conclusion, the court *a quo* upheld the review application, set aside the Commissioner’s finding of substantive unfairness, and substituted the Commissioner’s award with an order dismissing the appellant from his employment with the respondent as from 7 February 2014. It also dismissed the appellant’s cross-review, awarded no compensation and made no costs orders.

The Appeal

- [16] In this Court, the appellant effectively sought to have the court *a quo*’s order set aside and substituted with an order dismissing the review and upholding his cross-review. He sought to persuade this Court to find that a reasonable Commissioner would not have found that he was guilty of insubordination, and would have found that the respondent had no authority to instruct him to resume his duties as RMO; that there was no valid reason for his dismissal; that it was substantively unfair, and consequently, reinstating him. In the alternative, the appellant contended that should it be held that he had been reasonably found guilty of insubordination, this Court should merely confirm the award of the Commissioner. On the other hand, the respondent argued that the court *a quo* was correct and, accordingly, sought dismissal of the appeal.

- [17] The salient points for consideration on appeal are accordingly, in brief: firstly, whether a reasonable Commissioner could, on the facts, have found that the appellant was guilty of insubordination; secondly, depending on the outcome of the first enquiry, whether a reasonable Commissioner would have

reinstated the appellant; thirdly, whether a reasonable Commissioner would have awarded compensation; and lastly, the question of costs. I shall deal with these issues in turn.

Proof of insubordination

[18] The main argument on behalf of the appellant was that he could not have been found guilty of insubordination, because it could not have been found on the evidence at the arbitration that the NUM Branch Committee elections of 2013 had caused the appellant to be replaced by another employee as HSR. According to this argument, the elections had nothing to do with the appellant or his position as HSR, but dealt with other positions. It was also argued that the letter from the Committee, dated 26 September 2013, advising the respondent of its “newly elected leadership”, did not advise the respondent that the NUM had replaced the appellant with someone else as full-time HSR.

[19] With reference to the contents of that letter, it was pointed out that the position held by the appellant, namely, HSR, was not referred to and that the positions for health and safety referred to in the letter were leadership positions and did not refer to the appellant’s position. This argument was buttressed by reference to the agreement, which provides for the appointment of a full-time HSR (clause 7.1), who is to be democratically elected for appointment to the position by the employees in the workplace (clause 9.5), and, significantly, specifically states that the term of the office of the HSR will be for a three-year period (clause 10.1).

[20] It was further submitted on behalf of the appellant that the HSR could only be removed from that position in terms of the agreement, particularly clause 14, and that none of the circumstances contemplated in that clause pertained in

the case of the appellant. It was also emphasised that the NUM, the respondent and the appellant were parties to the agreement and were bound by its terms and that there was no evidence that the Union had notified the appellant that his appointment as HSR had been terminated.

[21] The argument for the appellant then proceeded as follows: that insubordination is a blatant disregard for authority; that the appellant did not disregard the respondent's authority, but engaged it on his recall and his position as HSR, with the object of showing that its perception, that he had been replaced by the NUM with someone else, was wrong. It was submitted that the respondent's instruction to the appellant, being based on a misperception, was unfair and unlawful and that in those circumstances the appellant did not commit misconduct by not complying.

[22] It was also submitted on behalf of the appellant that the Commissioner and the court *a quo* erred in not carefully considering the evidence relating to alleged termination of his tenure as HSR and in concluding that he was guilty of the misconduct, because of the stance that he had adopted toward the respondent's instruction that he reverts to his position as RMO.

[23] The respondent's argument proceeded from the premise that it was indeed the appellant's position as HSR that had been affected by the 2013 NUM Branch Committee elections and that (notwithstanding the provisions of the agreement) he had been replaced by Mr Koos Riba as HSR. The evidential basis for this was the letter dated 26 September 2013 from the NUM to the respondent informing the latter of its newly elected leadership. The respondent had averred, in its answering affidavit to the appellant's cross-review application that the evidence before the Commissioner, that the appellant had been replaced as HSR, was undisputed. Elsewhere in that same affidavit, it was averred by the respondent that the evidence before the

Commissioner “demonstrated, on balance of probabilities” that the appellant’s appointment as HSR was terminated in terms of the agreement. The respondent also contended there that the Commissioner did not have to interpret the provisions of the agreement, in particular, relating to the appointment and termination of the incumbent’s tenure as HSR.

[24] At the hearing in the CCMA, the appellant was represented by an official of the NUM. His case there was that he refused to comply with the respondent’s instruction because it was unreasonable and invalid and that his refusal was in those circumstances excusable. In the alternative, his case was that if insubordination was to be found then the sanction of dismissal was inappropriate and he should merely have been given a final written warning. It is apparent from the evidence of the only witness called by the respondent, Mr Colleen Tema, for its conclusion that the appellant had been replaced as HSR, the respondent solely relied on the letter of 26 September 2013, and interpreted the letter to mean that the appellant had been replaced by Mr Riba as HSR. The NUM official, who represented the appellant at the hearing, put it to Mr Tema that by insisting that the appellant return to his position as RMO, before the expiry of his term as HSR (i.e. as per the agreement), it was the respondent who “forcefully removed [the appellant] from office”. The respondent relied on no other communication from the NUM for its inferences and conclusion that the appellant had been replaced; and showed scant regard for the terms of the agreement detracting from those inferences and conclusion, even though it relied on the provisions in the agreement that obliged the appellant to revert to his position as RMO if he was not re-elected as HSR.

[25] The appellant’s questioning by his representative at the hearing proceeded on the basis that it was the respondent that had removed him from the position of HSR. The appellant admitted participating in the elections that were held in 2013, and that the elections pertained to the position of HSR. But he

explained that he participated because he thought that if he was successful in that election his term of office as HSR, which was to end in 2015, would automatically have continued for another three-year period. He also mentioned that the elections were for the branch committee of the NUM and not for a full-time HSR. According to the appellant, both the NUM and the respondent were bound by the agreement which, according to him, "covered" him for a period of three years as HSR. For the appellant, both the NUM and the respondent had a duty to settle what had become a problem - the respondent was to call a formal meeting with the NUM and himself in order to settle the issue, but that never occurred.

[26] The Commissioner's conclusion on the reasonableness of the instruction was that, if the appellant admitted that he was told to report to the Raw Material Section and he knew that if he was not re-elected he was to return to his previous position, "his contention that the instruction was unreasonable is inconceivable". Further, according to the Commissioner, if the evidence that was led for the respondent was not disputed, then its version was probable. Accordingly, the Commissioner found that the instruction was not unreasonable. This reasoning and conclusion was attacked in the appellant's cross-review, and rightly so.

[27] The Commissioner appears to have overlooked the essential aspects of the appellant's case, namely, that the instruction was unreasonable, because he had not been replaced as HSR and that his term of office was only to have come to an end in 2015; that by insisting that the appellant returns to the position of RMO, before expiry of his term, it was the respondent who was forcing him out of that office prematurely and contrary the terms of the agreement. It also ignores the appellant's reasons for participating, in what he termed, NUM branch elections. If the appellant's entire version had been taken into account, the contention of unreasonableness would not have been "inconceivable".

- [28] There was an *onus* on the respondent to show that the dismissal, which was common cause, was fair. This would have included showing, on a balance of probabilities, that the appellant was guilty of the misconduct² with which he had been charged and for which he had been dismissed. To justify dismissal the insubordination must be gross, meaning that the insubordination “must be serious, persistent and deliberate”.³
- [29] Whether the refusal to obey an instruction amounts to insubordination also depends on various factors, including the employee’s conduct before the alleged insubordination, the wilfulness of the employee’s refusal to obey, and the reasonableness of the instruction.⁴ The reasonableness of any instruction also depends on its lawfulness and enforceability.⁵ It seems axiomatic, that any instruction to do what is unlawful, or in breach of a contractual term is not reasonable.
- [30] The evidence before the Commissioner on the point does not establish, even on a balance of probabilities, that the appellant had been replaced by the NUM as HSR. The letter of 26 September 2013 does not state that the appellant has been replaced. What it does seem to state, at best, is that there was a newly elected leadership in a range of portfolios, including that Mr Riba was elected as Chairperson of Health and Safety and Ms Leshaba as Secretary of Health and Safety. On the admitted facts the appellant was never chairperson or secretary of health and safety. He was merely elected in terms of the agreement as health and safety representative (HSR) of his workplace.

² See, *inter alia*, Schedule 8 Item 7 (a) of the Code of Good Conduct: Dismissal of the Labour Relations Act 66 of 1995.

³ John Grogan *Workplace Law* 9ed (2007) at 175 and the cases cited there.

⁴ *Workplace Law* (above) at 175 and the cases cited therein fn. 125.

⁵ Cf. *Mlaba v Masonite (Africa) Ltd and Others* [1998] 3 BLLR 291 (LC) at 296I-297G and *SACCAWU and Others v Mahawane Country Club* [2002] 1 BLLR 20 (LAC) (“Mahawane Country Club”) at para 7.

[31] Further, it is clear from the agreement that there was not only one health and safety representative, and that the appellant was one of several health and safety representatives. In terms of clauses 6.1 and 6.2 of the agreement, several work areas are contemplated, each with its own health and safety representative per shift. In terms of the agreement, one full-time HSR was to be appointed for Xstrata Merafe PSV Lion Ferrochrome (clause 7). Clauses 9.1, 9.6, 10 and 20 (*inter alia*) confirm that every workplace, or work area, had its own health and safety representative. It is further clear from the agreement that there is a Health and Safety Committee to whom the health and safety representatives are to report disputes relating to the disclosure of information (clause 18). Clause 19 prescribes the circumstances and the manner in which this committee's meetings must be held. Even though the agreement does not expressly provide for the appointment of a chairperson for that committee, it is conceivable that, for the effective and efficient functioning of the committee, such an appointment, most conceivably following an election held by and amongst its members, would be necessary. In any event, the letter of 26 September 2013 refers specifically to a NUM branch committee, and the persons designated in the letter are officers in leadership of that branch committee.

[32] Other factors that clearly militate against an interpretation of the letter to the effect that the appellant had been replaced, are the very terms of the agreement, including the term that the appellant was elected as HSR in 2011 for a three-year period. To find that the letter communicated a replacement of the appellant would of necessity mean that the NUM had acted unlawfully in (gross) breach of the agreement. Such an assumption cannot be lightly made. There is no evidence that the respondent did anything more to establish for itself the true facts from the NUM – despite the ambiguity of the letter of 26 September and the gross violation of contractual rights that one would have to assume in order to conclude that the appellant had been replaced as HSR.

[33] The test whether a contract is made for the benefit of a third party (a *stipulatio alteri*) is whether, by adopting the contract the third party can become a party to it.⁶ Because of its terms and the way in which it is structured, the agreement is capable of being construed as a contract made for the benefit of a third party(-ies), such as the health and safety representatives envisaged in it. By standing for and being elected to the position of HSR, they adopt the agreement and a *vinculum iuris* is created between the elected HSR, the NUM and the employer (i.e. the respondent). As a result they (individually and respectively) come into the agreement as a party with one of the parties to the agreement, are bound by it and may enforce its terms insofar as those terms relate to them.⁷ These would include the terms relating to their qualifications (clause 8), their appointment (clause 9), their term of office (clause 10), their conditions of employment (clause 11), including their reporting obligations (clause 11.1), their remuneration (clause 11.2), their hours of work (clause 12), their facilities (clause 13), the termination of their appointment (clause 14), and the manner in which they must perform their functions (clause 15), the obligations of the respondent, including its obligation to inform the health and safety representatives of inspections, accidents, etc. (clause 16), the obligations of secrecy (clause 17), the dispute procedures regarding disclosures of information (clause 18), and the training of health and safety representatives (clause 20).

[34] It is established that one way of breaching a contract is for a party thereto to do something expressly or impliedly forbidden by the contract, or inconsistent with the terms of the contract.⁸ It is also established that there may be repudiation of a contract if a party to the contract insists on the performance of a term that does not form part of the contract.⁹

⁶ See: GB Bradfield *Christie's Law of Contract in South Africa* 7ed. (LexisNexis 2016) ("*Christie's*") at 266 and the cases referred to there, including *Crookes v Watson* 1956 (1) SA 277 (A) at 291C; and *Joel Melamed and Horwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 172A – F.

⁷ See: *inter alia*, *McCullough v Fernwood Estates Ltd* 1920 A.D. 204 at 206, cited in *Christie's* (above) at 310.

⁸ See: *Christie's* (above) at 585.

⁹ See: *Christie's* (above) at 612 and the cases cited there in fn. 235.

- [35] By insisting that the appellant revert to his position as RMO, and, thus, cease to be HSR, prior to the expiry of his term as HSR, the respondent was acting in breach of the agreement, or could reasonably be perceived to have evinced an unequivocal intention not to be bound by its material terms. Consequently, like any innocent party to a contract, who finds itself in such a situation, the appellant was not obliged to accept the repudiation, could resist it and insist on compliance with agreement, or its specific performance.¹⁰
- [36] Even though it may be difficult to conclude that there was illegality, it is clear that by acting as it did the respondent was in contravention of the terms of the agreement. The instruction, that the appellant return to his position as RMO before the expiry of his term as HSR, was legally unenforceable and clearly unreasonable. And the appellant's non-compliance cannot be said to have been unlawful, or in breach of his contract of employment, or the agreement.¹¹
- [37] On the evidence, a reasonable Commissioner could not have found that the respondent had proven (even on a balance of probabilities) that the appellant was guilty of gross insubordination. The Commissioner's award is thus subject to correction insofar as it concluded that the appellant was guilty of the misconduct he was charged with.
- [38] The court *a quo*, similarly, appears not to have sufficiently taken into consideration the appellant's cross-review which would have necessitated a closer analysis of the facts. It erred in finding that the appellant was indeed guilty of the misconduct. The finding that the appellant was obliged to return to his position as RMO, failed to take into account the contractual implications and the real prospect of the appellant losing his remedy of enforcement of the agreement if he complied with the instruction.

¹⁰ See: *Christie's* (above) at 619 and *Farmer's Co-Op Society (Reg) v Berry* 1912 AD 343 at 350.

¹¹ See: *Mahawane Country Club* (above) at para 7.

The Sanction

[39] In light of the conclusion that the court *a quo* erred in its finding that a reasonable arbitrator would not have found that the dismissal was unfair and would not have reinstated the appellant with backpay, and in light of the conclusion above that the finding of substantive unfairness of the dismissal was reasonable, albeit for a different reason, there is no need to deal in detail with the sanction.

[40] The court *a quo*'s determination of the issue of the sanction flows from its conclusion regarding the finding of substantive unfairness of the dismissal. In terms of section 193(1) read with section 193(2) of the LRA, the Commissioner was bound to require the employer to reinstate the appellant, unless any of the circumstances identified in section 193(2)(a) to (d) were applicable. It has not been shown that the Commissioner erred in the exercise of the discretion given to him in terms of section 193(1), and, specifically, in requiring the reinstatement of the appellant and awarding him backpay.

The Costs

[41] Taking into account all facts and circumstances, including the law and fairness, there is no reason why the costs in the court *a quo* and the costs of this appeal should not follow on the result.

The Order

[42] In the result, the following is ordered:

42.1 The appeal is upheld with costs;

42.2 The entire order of the court *a quo* is set aside and is replaced with the following order:

- “1. The review application is dismissed;
2. The cross-review is upheld, and the award of the commissioner is amended by the deletion of that part of the award that suggests that the respondent (Mr Maripane) was guilty of misconduct and requiring the applicant (Glencore) to give the respondent a final written warning.
3. The applicant (Glencore) is to pay the costs of the review and the cross-review.”

42.3 The appellant is to report for duty within fourteen (14) days of this order.

P Coppin

Judge of the Labour Appeal Court

Savage and Murphy AJJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

M. E. S. Makinta of E. S. Makinta Attorneys

FOR THE RESPONDENT:

D. Masher of Edward Nathan Sonnenbergs, Inc.