

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JR 315/06

In matter between:

RUSTENBURG PLATINUM MINES

APPLICANT

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

HLOKKWE, R. N.O

SECOND RESPONDENT

NATIONAL UNION OF MINeworkERS

THIRD RESPONDENT

MODISAKENG

Fourth RESPONDENT

SELEME, M

FIFTH RESPONDENT

MNQAYI, A

SIXTH RESPONDENT

MOTLHAGA, E

SEVENTH RESPONDENT

KGOSI, K. A

EIGHT RESPONDENT

JUDGEMENT

MOLAHLEHI AJ

Introduction

- [1] This is an opposed application in terms of s145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside the arbitration award issued on the 21 December 2005, by the second respondent in terms of

which he found the sanction of dismissal of the fourth to the eighth respondents (the employees) by the applicant to have been “harsh.” He substituted the dismissal with reinstatement and a final written warning of 12 months for each of the respondents.

Background facts

- [2] The applicant carries on the business of platinum mining in the Thabazimbi region. The employees were before their dismissal employed in the laboratory in the metallurgical plant where they were involved in assessing metallurgical samples. They also operated a fusion furnace and for this reason were issued personal safety equipments which amongst others included the protective face shields.
- [3] It is apparent that some time prior to the conflict escalating into a dismissal dispute, the employees used what is referred to as a type “A” face shields for the purposes of safety when working in the furnace.
- [4] During August 2004, the employees complained about the type A face shields. Management took their complaint on board and agreed that the type “B” face shields be ordered and it be put to test. The testimony of the applicant reveals that up until the delivery of the type B face shields, the employees used the type A face shields as a safety approved equipment. Soon after the arrival and during the process of testing the type B face shields, the employee expressed their preference to it over the type A face shields.
- [5] The type B face shields stock which was delivered during August 2004, dwindle, and another order was placed on 19 November 2004. The above order was delivered on the 26 January 2005, by which time the type B face shields had run out of stock and everybody had reverted back to using type A face shields, according to the applicant.

- [6] As a result of the shortage of the type B face shields, the employees lodged a complaint with their supervisor, Mr Mabula (Mabula) on the 24 January 2005. They expressed their dissatisfaction in having to revert back to using the type A face shields and refused to work.
- [7] With the view to resolving the matter, the applicant's management team convened a meeting with the employees during the course of the 24 January 2005. The meeting was attended by Mrs Jansen (Jansen), Mrs Theron (Theron) and Mabula. The management team was unsuccessful in persuading the employees to return to work. It was after the intervention of Mr Peter Ngobeni, the full time shop steward and management having added two extra strips to the type A face shields, that the employees agreed to resume their duties.
- [8] It is common cause that the employees refused to work again on the 25 January 2005. In an attempt to resolve the problem, Jansen enlisted the services of Mr Kemsley (Kemsley), the chief safety officer.
- [9] The applicant's version is that after inspecting both A and B face shields, Kemsley, explained to the employees that the two types of the face shields were approved and that the type A face shields were used in the interim pending the arrival of the type B face shields. He further informed them that the type B which they preferred would be delivered the following day. The explanation given by Kemsley did not change the position of the employees. They continued with their refusal to work.
- [10] Thereafter, both Kemsley and Theron issued an instruction ordering the employees to return to their work station. Failure to heed the instruction led to their suspension, discipline and finally dismissal. Thereafter the matter was referred to the CCMA for conciliation, but conciliation having

failed, the matter was arbitrated upon. It is the outcome of this arbitration which is subject of this review.

- [11] The third respondent arbitrated the matter over a period of two days and the only issue before him in terms of the agreement reached between the parties was to determine the substantive fairness of the dismissal. The third respondent, found the employees guilty as charged but found that the sanction of dismissal was inappropriate and ordered reinstatement with a final written warning valid for 12 months.

The case of the respondent

- [12] In their answering affidavits the respondents disputed the applicant's version that the type A face shields were approved, complied with the Mine Health and Safety Act 29 of 1966 (the MHSA), and was previously used as a standard stock.
- [13] The employees contended that an agreement was concluded that the type A face shields would no longer be used, and whatever stock remained will be kept in the store room. According to Mr Modisakeng (Modisakeng) the only witness called by the respondents, management promised them on the 24 January 2005, that the type B face shields would be delivered over night and be ready for use the following day. This seems to be the reason why they agreed to use the type A face shields on that day.
- [14] When the new stock did not arrive on the 25 January 2004, the employee refused to work and according to the testimony of Modisakeng, they requested that they wait for the type B face shield to arrive.
- [15] Mabula who had earlier discussed the issue of the availability of the type B face shields came back soon thereafter accompanied by Jansen. Both told the employees that the type B face shields had not arrived and that they should continue work using the type A face shields.

- [16] A meeting was convened with the employees in the “balance room” where they were told by Jansen and Kemsley that they should continue using the type A face shields, otherwise action would be taken against them.
- [17] Modisakeng contended that the reason for their refusal to obey the instruction was that they were concerned that the continued use of the type A face shields was endangering their safety.

Commissioner’s reasons

- [18] The commissioner’s reasons are contained in paragraph 5.6 to 5.9 of the arbitration award where she stated:

“Considering the merits of the case, the respondent should have given the applicants the benefit of the doubt. The applicants could also have handled the matter better than they had done. But the fact that their supervisor, Mr Mabula, incited them could have affected their judgement negatively. His involvement exacerbated the problem.

The fact that Mabula incited the applicants does not mean that the behaviour of the applicants should be condoned. But the dismissal is certainly not an appropriate decision the respondent could effect circumstances of this case.

In fact Mr Mabula’s conduct was more serious than that of the applicants because he was put in a position of trust and was custodian of the respondent’s rules and procedures. He may have instructed the applicants to work but the instruction had mixed messages because he had also told them not to give up the fight for their preferred face shields. He got away with a final warning.” (the record pages 215-216)”

[19] It is apparent from the above that the commissioner came to the respondents' relief for the following two reasons:

- a) Mabula had incited the employees not to work or to refuse to obey lawful instructions.
- b) Inconsistent application of discipline in that Mabula who had committed a serious offence was but given only a final written warning.

Evaluation

[20] It is apparent that Mabula had some discussion with the employees on the morning of the 25 January 2005, regarding the availability of the type B face shields. Mabula informed them that the face shields had not yet arrived and that he would check with Jansen what progress was made in ordering the new face shields.

[21] Both Mabula and Jansen met with the respondents and advised them to continue using the type A face shields. Thereafter, Jansen left and Mabula who remained and continued the discussion with the employees.

[22] Modisakeng's testimony indicates that even after the departure of Jansen, Mabula again requested them to continue using the type A face shields whilst waiting for the B shields order to arrive. In fact the record at page 191, line 10 reflects that Mabula repeated the request twice after the departure of Jansen. It is at the end of the second request where it is alleged that, Mabula told the respondents that the type B face shields would not be delivered because the employees were already using the type A face shields.

[23] During cross-examination, Modisakeng conceded that he was aware that the type B face shields had already been ordered. He also conceded that he

was aware by the 24 January 2005, that the order had not yet arrived and that the delay in the deliver was due to the Christmas break.

Issue of incitement

[24] In assessing whether the issue of incitement was an issue before the commissioner and needed his consideration, it is important to note that when asked why did they not comply with the lawful instruction, Modisakeng stated; *“the reason is we did not have equipment, [sic] protective equipment”* (at page 205 of the record). This is far from attributing their work stoppage to the alleged comment or involvement of Mabula in their refusal to work. He further conceded that the reason they did not want to work with type A face shields was because the type *“B was more comfortable for us.”*

[25] In my view it is clear from the above analysis that the issue of *“incitement”* was never put as an issue before the commissioner. This view is further supported by how the respondents formulated the issue for consideration by the commissioner in their heads of argument during the arbitration proceedings before the CCMA. The issue was formulated at paragraph 2.3 as follows:

“Applicant’s defence is that instruction [sic] given to them was not reasonable as the equipment was not adequate to be used in the area they worked.”

[26] In their answering affidavit the respondents pointed out that Mabula had “hinted” that if they continued using the type A face shields the type B shields might not arrive.

[27] In the light of the above, it is my view that the conclusion by the commissioner that Mabula incited the employees and this was an issue for consideration before her, was unjustifiable because there was no evidence

before her which pointed towards *incitement*.” It is also unjustifiable in that there was no evidence as to how his involvement “*could have affected their judgement negatively*.”

[28] In essence the conclusion of the commissioner amounted to a defence of “*incitement*” on the part of the respondents. It is unjustified and in a technical sense the commissioner committed a gross misconduct in relying on a defence that was not pleaded nor articulated by Modisakeng in his testimony. It is a defence which was never brought to the attention of applicant and accordingly the applicant was denied the opportunity to respond to the defence. Reliance on this defence gave the employees an unfair advantage.

[29] In *Matla Coal Ltd v Commissioner for Mediation and Arbitration and others* case No JA 33/04 Nicholson JA said:

“Where a defence is not pleaded and not articulated in evidence it is not a defence and a Court errs when that “defence” is made a reason for its conclusion. The essence of our procedure is to give each party to a dispute a fair opportunity to put his or her case and meet the allegation made by the other party. To this end there are pleadings which define and therefore give fair warning of the issues in dispute.”

Inconsistency of discipline

[30] The commissioner found that the applicant had applied discipline inconsistently in imposing a dismissal punishment on the employees and only a suspension on Mabula who according to him had committed an offence of a “more serious nature” than that of the employees.

[31] As a general principle, it is unfair to apply discipline in an inconsistent manner as there is an expectation on the part of employees that like cases will be dealt with in the same way. Consistency is an inherent requirement

of fairness. However, an employer may be justified in differentiating between employees, guilty of the same offences on the basis of the differences in the personal circumstances of each of the employee. See *Early Bird Farms (Pty) Ltd v Mlambo* (1997) 5 BLLR 541 (LAC) at 545 H-I.

[32] In *Gwencha v CCMA & Others* (2006) 3 BLLR 234 (LAC) the court held:

“Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards.”

The Court went further to say that:

“... when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the disciplinary record of the two employees compared”

[33] In general it is the comparison between the circumstances, history of discipline and showing remorse that influence the determination of the differentiated sanction on the employees involved in the same offence.

[34] It therefore, does not necessarily follow that the outcome of a disciplinary hearing of the employees charged with the same offence will automatically be the same. It needs also to be emphasised that the principles of consistency apply in a case where employees are charged with the same offence.

[35] In the present case the finding of inconsistency is unjustified in that while there was mention of Mabula having incited the employees during the cross-examination of Jansen and Theron and the heads of argument submitted during the arbitration proceedings, this was not substantiated.

The only witness of the respondents, Modisakeng, gave no evidence to this effect.

- [36] The evidence of the chairperson of the appeal hearing did not take the employees' case any further in as far as the issue of the alleged inconsistent application of discipline was concerned. All what the chairperson of the appeal hearing did was to recommend that an investigation be conducted into the involvement of Mabula in the matter. He did not pronounce any guilt finding on Mabula neither did he play any role in his disciplinary hearing.
- [37] Except for the indication that Mabula was issued with a warning, there is no evidence as to what happened during the disciplinary hearing. There was no evidence before the commissioner indicating the reasons why and the basis upon which the disciplinary hearing imposed a suspension on Mabula. There is nothing in Modisakeng's version that points to misconduct on the part of Mabula.
- [38] The finding would still be unjustifiable even if it was to be inferred from the evidence that Mabula had committed an offence. The commissioner found Mabula to have committed a serious offence of inciting the employees to refuse to work. The respondents were charged and found guilty of refusal to obey a lawful instruction. If this inference was to be sustained, Mabula would have been guilty of incitement and not of refusal to obey a lawful instruction. The finding of inconsistency is unjustified in that the conduct was manifestly different and incomparable of giving rise to a conclusion that discipline was applied inconsistently.

Interfering with the sanction

- [39] In dealing with the sanction the commissioner found the dismissal to be unfair. In this regard he stated:

“The respondent should have given the applicants each a final written warning. Dismissal, in the context of this circumstances of the case, was too harsh.”

[40] There is authority that the discretion to determine a sanction in a disciplinary hearing lies with the employer and not the arbitrators. The arbitrators have the duty to determine the fairness of the sanction. The criterion is not whether an arbitrator would have imposed a different sanction or he/she did not like the sanction. The question is not whether the sanction is correct, or the commissioner agrees with it. The question is, whether the sanction is fair or not.

[41] In dealing with the issue concerning the powers of commissioners to interfere with the sanction of an employer, Cameron JA in *Rustenburg Platinum Mines LTD (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021(SCA) had this to say:

“... a CCMA commissioner is not vested with a discretion to impose a sanction in the case of work place incapacity or misconduct. The discretion belongs in the first instance to the employer. The commissioner enjoys no discretion in relation to the sanction, but bears the duty of determining whether the employer’s sanction is fair.”

[42] After analysing the decisions of the Labour Appeal Court, Cameron JA, (at p10379-1040) held that the above approach is based on (a) the textual, (b) conceptual, and (c) institutional frame of the LRA and the Code for Good Practice.

[43] With regard to the textual basis, the court found that s 188(2) of the LRA requires that any person considering whether or not the

dismissal was for a fair reason, should take into account the Code of Good Practice on dismissal.

- [44] Conceptually, the criterion of fairness denotes a range of possible responses all of which could be described as fair. This approach in my view extends the discretion of the employer to the level that it is almost unlimited and very wide. The range of possible responses is so wide that in essence all what the commissioner can do at best is to observe and note the sanction imposed by the employer.
- [45] This court is bound by the Rustenburg Platinum Mines Judgment. However in my view the appropriate approach in dealing with this issue is that which was adopted in Toyota SA Motors (PTY) LTD v Radebe & Others (2000) 21 ILJ 340 (LAC) where the court held that, it would interfere with the sanction imposed by a commissioner if the sanction is so egregious that it shocks and alarms the court. Another significant aspect of this judgement is that it held that the reasonable employer test was not part of our law.
- [46] The SCA finally explained that the institutional basis “*lies in pointing to commissioners firmly to the limits the statute places upon their powers.*” In this regard quoted with approval the decision, in County Fair Foods v CCMA (1999) 20 ILJ 1701(LAC) also reported at (1999) 11 BLLR 1117 (LAC), was quoted with approval, where Ngcobo AJP had this to say:

“If commissioners could substitute their judgement and discretion for the judgement and discretion fairly exercised by the employers, then the function of management would have been abdicated- employees would take every case to the CCMA. This result would not be fair to the employers.”

- [47] It is clear that in finding the dismissal to be harsh, the commissioner committed a reviewable irregularity. What the commissioner was required to consider in terms of Schedule 8 Item 7(b) (iv) of the Code of good Practice was whether the sanction imposed by applicant was an appropriate sanction for the contravention of the workplace rule.
- [48] Conceptually, in terms of the Rustenburg Platinum Mines, the commissioner, in this matter failed to appreciate that the criterion for fairness denotes a range of possible responses which may be described as fair. The sanction may well be harsh but that does not necessarily mean that it is unfair. In essence the commissioner in arriving at the decision as he did, substituted the applicant's decision for what he considered not to be a harsh sanction. In arriving at this decision he failed to appreciate that fairness is a relative concept and in assessing its presence in a dismissal sanction, account should be taken of the fact that it is the employer who has the power to determine the workplace rules and consequently the sanction in the event of breach of such rules by employees. It follows from this that it is the employer who has the discretion to determine a fair sanction.
- [49] In the light of the above the arbitration issued by the commissioner stand to be reviewed and set aside. There is no need to deal with failure by the commissioner to consider remorse.

Conclusion

- [50] I accordingly make the following order:
1. The arbitration award dated 21 December 2005 issued under case No LP793-05 is reviewed and set-aside.

2. This matter is referred back to the CCMA for arbitration *de novo*, before a commissioner other than the second respondent.
3. Cost to follow the course.

MOLAHLEHI AJ

DATE OF HEARING : 12 DECEMBER 2006

DATE OF JUDGMENT : 08 FEBRUARY 2007

Appearances

For the Applicant : LEPPAN BEECH INCORPORATED

Instructed by : ADV A MYBURGH

For the Respondent: GUMBO ATTORNEYS

Instructed by : K M MOKATE