

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1393/07

In the matter between:

AUTOPARTS DISTRIBUTORS (PTY) LTD

Applicant

and

HLONGWANE, RAYMOND N.O.

1st Respondent

THE DISPUTE RESOLUTION CENTRE OF

THE MOTOR INDUSTRY BARGAINING COUNCIL

2nd Respondent

THE COMMISSION FOR CONCILIATION

NUMS obo A LUDIDI & 2 OTHERS

3rd Respondent

JUDGMENT

LAGRANGE, AJ

1. This is an application to review and set aside in an arbitration award in terms of section 145 of the Labour relations act, 66 of 1995 (the 'LRA'). In terms of the award issued by the first respondent on 14 May 2007, the arbitrator found the dismissal of three shop stewards, Mr A Ludidi, Mr C Matyolo and Mr A Mojela ('the shop stewards') by the applicant on 10 August 2006 to have been procedurally fair and substantively unfair. The arbitrator ordered the applicant to reinstate all three shop stewards within 48 hours of the award and pay them back pay equivalent to nine months' salary each.

2. No transcript of the arbitration proceedings was available because the taped record of the proceedings was lost. The parties agreed that the handwritten notes of the arbitrator, which had also been transcribed, would serve as a record of the proceedings. As much of the evidentiary narrative appears to be common cause between the parties, the absence of a full transcript did not preclude a review on the available record.

Factual background

3. The three shop stewards were charged and dismissed for misconduct described as follows:

“On Friday 30 June 2006, you abused your position as a shop steward by instigating and/or causing workers to perform unprocedural , unprotected and unlawful industrial action. Your conduct is unjustifiably prejudiced the operations of the business and put the companies named in a bad light.”

4. On Thursday 29 June 2006, Ludidi had requested the branch manager to make transport available for workers to attend the funeral of a colleague in Kwazulu Natal. The branch manager requested Ludidi to provide a list of names of those wanting to attend the funeral.
5. The next day, Friday 30 June 2006, the applicant issued a memorandum to its workforce stating that employees who wished to attend a funeral of a colleague, would have to make their own way to the funeral and the applicant would not assist with transport. The memorandum was handed to employees and also placed on the notice board.
6. When the memorandum came to the employees’ attention, they embarked on a work stoppage and demanded to meet with the applicant’s management.
7. According to the testimony of one of the shop stewards’ witnesses, Ms S Moloi, the workers were angry that management had, at the eleventh hour, refused to make transport available for the funeral as the applicant had always done so in the past. Her testimony was largely confirmed by Ms T Sikiti.

8. The Branch Manager of the applicant, Mr Du Toit, was not on the premises when the work stoppage commenced.
9. When the Branch Manager arrived he called the three shop stewards to his office where he issued an ultimatum to them, instructing workers to resume their duties. The shop stewards would not sign the ultimatum because it was addressed to all workers and not them alone. The shop stewards read the ultimatum to the workforce, but the workers persisted with their strike action.
10. Mr M Odayan, the applicant's branch warehouse manager, testified that he had heard the shop stewards addressing the meeting and heard the word 'management' mentioned about four times. However, he agreed he could not understand what was being said at the meeting as people spoke in their mother tongue.
11. Another of the applicant's witnesses, Mr P Mashabane, who was employed as a picker, testified that after the memorandum had been distributed, a meeting of the workers was convened with the permission of a supervisor. Mashabane also testified that Ludidi addressed the workers and advised them that what they were doing was illegal, but they had refused to return to work. He agreed that the employees had taken action collectively and were not influenced by the shop stewards. Importantly, his testimony confirmed that the employees had decided themselves to stop working after management advised it was not prepared to provide transport.
12. When Matyolo gave evidence he stated that workers had rejected the ultimatum and said they were not prepared to return to work until their demand for transport to the funeral was met.
13. Later, after workers had been addressed by a union official, whom it appears had been requested to intervene by Ludidi, they agreed to return to work.

14. Following the strike other workers who participated in the strike action were given final written warnings, but, according to the testimony of Du Toit, the shop stewards were treated differently because they had been elected as leaders of the workers.

The Arbitration Award

15. After giving a comprehensive summary of each witness's testimony, the commissioner made factual findings, which can be summarised as follows:
- 15.1. When workers became aware of the memorandum they gathered and engaged in a work stoppage, demanding to see management.
 - 15.2. When Du Toit arrived at the premises he summonsed the shop stewards to his office and issued them with the ultimatum which they refused to sign.
 - 15.3. The shop stewards then met with the workers.
 - 15.4. There was nothing odd about the fact that the shop stewards did most of the talking in a union meeting and no inference could be drawn from that fact.
 - 15.5. Odayan had conceded that he never heard the shop stewards advising employees to go on strike, and the only thing he understood of what he heard was the word 'management'. The arbitrator found he could not rely on Odayan's evidence as corroborating the alleged misconduct.
 - 15.6. Mashabane, who was present when the stoppage took place, had confirmed that it was the workers who had embarked on a strike and the shop stewards had not instigated them to do so. On the contrary, they cautioned workers about the illegal nature of their action.
16. The commissioner summed up his assessment of the evidence thus:

“The applicants and their witnesses gave corroborative and consistent evidence that workers upon receiving a memo from management, decided to engage in work stoppage. The applicants and their witnesses also gave corroborative and consistent evidence that the shop stewards (applicants) played a positive role in the situation, in that they discouraged workers from embarking on an illegal strike. This evidence is consistent with the evidence tendered by the respondent’s third witness.

The applicants conceded that they did not sign the ultimatum, and provided a satisfactory explanation for not doing so. It must be noted that shop stewards are not managers, and therefore they have no powers to instruct striking workers resume their duties. Their role as explained by them in this arbitration was to advise and guide the workers, which is what they did.” (sic)

17. The arbitrator concluded that the applicant had failed to discharge the burden of proof by failing to show on a balance of probabilities that the shop stewards had committed the misconduct, whereas the shop stewards had adduced sufficient reliable evidence that they were not guilty of the alleged misconduct.

18. Having found that there was no evidence of an irretrievable breakdown in the relationship, the arbitrator held that the shop stewards were entitled to reinstatement. The commissioner then ordered the applicant to reinstate the shop stewards, within two days of the receipt of the award, with nine months’ backpay as compensation.

Grounds of review

19. As far as can be made out from the applicant’s founding affidavit in this application, the grounds of review raised were the following:

19.1. the commissioner wrongly attributed weight to the corroborative value of the shop stewards’ witnesses’ testimony, because it was to be expected that their version would amount to a denial that they acted wrongfully and would contradict the applicant’s evidence;

- 19.2. it was ‘quite possible’ to have found that the shop stewards had instigated the industrial action, despite ‘no direct/on the spot’ evidence being presented;
- 19.3. the sequence of events showed that the work stoppage took place after the workforce had been addressed by the shop stewards and it followed that they must have incited workers;
- 19.4. the sanction of reinstatement took no account of evidence of a breakdown in the relationship and the disruptive effect of the strike action, and
- 19.5. lastly, that the applicant had attempted to subpoena certain employees who had been present but they had not complied with the subpoenas and the arbitrator still proceeded with the matter even though they had not attended.
20. The applicant submitted that the abovementioned acts of the commissioner showed that he had misapplied his mind to the evidence before him, had exceeded his powers under the LRA and had committed a gross irregularity in the conduct of the proceedings. In the founding affidavit the applicant made no attempt to match any one of the grounds of review with any of the factual assertions in the affidavit. No supplementary affidavit was filed by the applicant, so the grounds of review set out in the founding affidavit remained unaltered. On the face of it, it must be said that the factual basis of the applicant’s grounds of review summarised in paragraphs 19.1, 19.2 and 19.3 above look very much like grounds of appeal, because they essentially boil down to contentions that the commissioner’s findings were simply wrong.
21. At the hearing of the review application, the applicant only seriously pursued two grounds of review. Firstly, more flesh was added to its claim that the arbitrator failed to draw the ‘necessary’ inference that the probable cause of the unprotected strike was the incitement of the workforce by the shop stewards. Secondly, the applicant contended that the arbitrator had paid mere lip service to the criteria

determining substantive fairness when he concluded that the applicant had failed to prove its case on a balance of probabilities. This claim was not contained in the applicant's grounds of review in its founding affidavit, and was not explained at the hearing of the application. Accordingly, it falls away.

The arbitrator 's failure to conclude that the shop stewards had incited workers

22. In support of this argument, the applicant contends that when the shop stewards used the term 'management' when addressing the workforce it could only have been an endeavour to incite the workforce that management had created the situation which culminated in their unlawful action. The applicant further cites the fact that there was a considerable amount of noise and commotion generated by the workers which caused customers to leave the workplace.
23. Secondly, the applicant submits that it incontestable that the shop stewards were in a position of authority over the workforce.
24. The company's disciplinary code also imposed on shop stewards the obligation to "guide and direct the behaviour and expectations of Union membership in accordance with, agreements and the law". The code, as quoted in the applicant's heads of argument, goes on to state, "... (i)n this respect, shop stewards will be held accountable for the collective union membership. Where shop stewards... fail to guide their members to adhere to procedures and agreements (the Applicant) will count on them, as duly elected representatives of the Union on site to answer for the actions of their members and their Union."
25. The applicant submitted that the shop stewards failed to exhaust all peaceful avenues and negotiation channels between the workforce on the one hand and 'management' on the other. In parenthesis, I note that the applicant uses the term 'management' in its heads of argument to designate the employer. Presumably, the use of the term here was not seen as having the same pejorative connotation as the applicant attributes to it when it was used by the shop stewards in the course of addressing the workers.

26. The applicant further submits that the shop stewards failed to forge labour peace and thus comply with one of the fundamental objectives of the LRA. It also attributed what it called ‘the defiance and needless confrontation’ of the employees, to the shop stewards “failure to appease the workforce sufficiently”.
27. The applicant then proceeded to cite various case authorities to demonstrate that incitement to engage in an unprotected strike constitutes dismissable misconduct, that inflammatory language can lead to the dismissal of shop stewards and that intimidation of fellow employees by shop stewards is not to be tolerated.
28. As mentioned before, none of the applicant’s submissions amount to grounds of review. Moreover, even if this were an appeal, there is simply no factual basis for the applicant’s submissions. It is absurd to suggest that the commonly used noun ‘management’, which the applicant itself uses in its heads of argument, should be construed as having a pejorative connotation when used by the shop stewards. It certainly couldn’t be construed as incendiary language designed to incite the workforce.
29. The only other fact which the applicant can identify as indicative of the shop stewards’ supposed instigatory conduct is the supposed sequence of events, namely that workers went on strike only after they were addressed by the shop stewards. But this contention is not borne out by the evidence. Even the applicant admits there was a work stoppage after employees were given the memorandum. It is clear from Du Toit’s own evidence that he had been advised of the work stoppage before he arrived at work and spoke to the shop stewards.
30. Further, as the third respondent pertinently asks rhetorically in its answering affidavit, why would Du Toit have issued the shop stewards with an ultimatum telling workers to return to work if they were not already on strike when he met the shop stewards ? At that stage the shop stewards had not yet addressed the workers.
31. Further, the preponderance of evidence including evidence of one of the applicant’s own witnesses supports the shop stewards’ version of events. What

caused the stoppage was management's announcement, just before the weekend when the funeral was going to take place, that it was not going to provide transport assistance to workers to attend their former colleague's funeral. It seems that transport had been provided on a previous occasion where the funeral was local, and the same procedure of taking a list of names of those who wanted to attend the funeral had been followed.

32. Shop stewards reacted to the stoppage by trying to persuade workers that their action was unprotected. They conveyed management's ultimatum to the workers themselves, and when they were unsuccessful in persuading workers to return to work a union official was summonsed.
33. I am of the view that even if I ignore the question whether or not the applicant's grounds of review pass muster as review criteria, the evidence before the arbitrator could not reasonably support the findings the applicant believes the arbitrator should have made. Moreover, the grounds of review are actually grounds of appeal and even if this were an appeal, the applicant could not succeed, on the evidence before the arbitrator, in persuading me that he had erred in his assessment of the facts.
34. The applicant also relies on a contention that the shop stewards ought to have been held liable for the action of their members, on the assumption that shop stewards have some direct authority over union members, and that if the members are guilty of unlawful mass action, the shop stewards are directly responsible for that. Firstly, there was no evidence that the shop stewards enjoyed such influence over the union members at the workplace. On the contrary, the conduct of the workforce showed just the opposite: it was only when a union official was called in that workers could be persuaded to return to work. The evidence shows that the shop stewards did in fact attempt to persuade workers that their action was unlawful. Far from inciting the workforce, the shop stewards tried to end the unprotected strike.
35. Secondly, the notion that the shop stewards could somehow have ordered members to return to work if they had wished to, reflects a confusion on the

applicant's part between the role of a shop steward and that of a foreman or supervisor. The latter will usually have managerial authority to issue instructions which employees must comply with by virtue of their subordinate status in the employment relationship. If instructions are not obeyed, disciplinary sanctions can be invoked to ensure compliance. By contrast, shop stewards ordinarily have only their persuasive skills to convince union members to adopt a particular course of action. If the majority of members choose not to accept the advice of the shop stewards, there is little more they can lawfully do. The fact that the employer had entrenched its perception of shop stewards' obligations and liability in its code, does not make disciplinary action pursuant to that code fair. Such provisions would probably not comply with the provisions of Item 7(b)(i) of Schedule 8 to the LRA, namely that the rule or standard which has been transgressed should be valid or reasonable. To the extent that the commissioner disregarded the provision in the employer's code which purports to hold shop stewards liable for the actions of union members, he would have been entitled to do so in this instance, as such as it would be difficult to demonstrate that the rule was valid or reasonable.

The question of subpoenaed witnesses

36. The applicant makes an allegation that certain of its own employees who were present when the strike occurred, had been subpoenaed to attend the arbitration hearing as witnesses at the arbitration hearing. However, they failed to comply with the subpoenas because they were not present at the enquiry. It contends the arbitrator should not have proceeded without securing their attendance.

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37. The third respondent denies this allegation and contends that there was nothing in the record or award to suggest the arbitrator denied the Applicant and opportunity to obtain its witnesses. There is also no mention made of this issue in the heads of argument submitted by the applicant in the arbitration proceedings, which one would have expected if the applicant felt it had been prevented from presenting an adequate case. Moreover, in its founding affidavit the applicant failed to even provide the identities of the witnesses who did not attend, nor did it furnish any details as to why those witnesses were needed. Certainly, on the record of the proceedings there is no basis for accepting the applicant's contentions. The

applicant also failed to rebut any of the third respondent's allegations on this issue which were set out in the answering affidavit. This ground fails for lack of sufficient evidence to support the applicant's contentions.

The breakdown of the trust relationship

38. The applicant claims the arbitrator failed to give proper consideration to evidence of the breakdown of the employment relationship in deciding to reinstate the shop stewards. However, on the basis of the available record of the arbitration proceedings, I could not find any evidence of testimony on this issue being adduced, nor was I alerted to any other basis for reaching this conclusion at the hearing. Accordingly, this ground of review must also fail.

Conclusion

39. In the light of the analysis above, I am satisfied that there is nothing defective about the arbitrator's award, which is well reasoned and reasonable. The applicant has failed to advance any cogent grounds to set it aside on review.

40. The third respondent has also applied to have the arbitration award made an order of court and there is no reason why this ought not to be granted.

Costs

41. I was advised at the hearing of the application, that the applicant had made an offer, with prejudice, to the third respondents at some stage prior to the matter coming to court. Accordingly, the determination of the matter of costs will be deferred.

Order

Accordingly, it is ordered that:

42. The application to review and set aside the arbitrator's award issued on 14th May 2007 under case number MINT 7033 S is dismissed.
43. The arbitrator's award, issued on 14th May 2007 under case number MINT 7033 S is made an order of court.
44. The determination of an order of costs, if any, is deferred to a hearing to be held on a date to be determined by the Registrar of this Court.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 19 March 2010

Date of judgment: 14 May 2010

Appearances:

For the applicant: Mr C Ascar
Instructed by Fluxmans Attorneys

For the third respondent: Mr A Goldberg
of Nomali Tshabala Attorneys