

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NUMBER: JR 914/10

Not Reportable

In the matter between:

AFICAN FINE CARBON (PTY) LTD
and

Applicant

PIET VAN STADEN NO

First Respondent

CCMA

Second Respondent

NUMSA obo M MATSHONA

Third Respondent

Date of hearing : 23 August 2011

Date of judgment : 25 August 2011

Judgment

Cele J

Introduction

[1] In this application, the arbitration award dated 9 March 2010 issued by the

first respondent as a commissioner of the second respondent is sought to be reviewed and set aside in terms of section 145 (2) of the Labour Relations Act,¹ (the LRA). The fairness of dismissal, as a sanction imposed by the applicant, is at the heart of this application. The first respondent disagreed with the sanction, describing it as too harsh and not consistent and ordered the applicant to re-instate him, however without retrospective effect. The third respondent acted on behalf of its member, Mr Matshona to oppose the application.

Factual background

[2] Mr Matshona was in the employ of the applicant having commenced in 1996. He was dismissed on 14 October 2009 while working as a welder. He had been charged with an act of misconduct in that he worked on a conveyor belt while it was in operation and thus not following the applicant's health and safety regulation. He walked out at the commencement of the disciplinary hearing which continued in his absence and a guilty verdict was returned. A sanction of dismissal was imposed on him. He referred an unfair dismissal dispute for conciliation and later for arbitration. The first respondent confirmed the guilty verdict, finding also that there was no reason to doubt that a fair procedure was followed. He then found that:

1. Mr Sithole who had been assisting Mr Matshona on the day should not be dismissed but only counselled;
2. After the dismissal of Mr Matshona, three other employees were involved in similar breaches of the safety rules. They were issued with

¹ Number 66 of 1995

final written warnings;

3. The disciplinary code of the applicant suggested a process of progressive discipline in matters like the present;

4. It would be unfair that other employees would get away with it but when it happened to Mr Matshona he had to bite the bullet;

5. While the facts relating to the infractions of the other employees were not put before him, he was of the view that dismissal was a too severe sanction;

6. As serious as the infraction committed by Mr Matshona was, he (the commissioner) was not persuaded that dismissal was the appropriate sanction in the present matter. He was particularly concerned with the issue of the consistent application of the rule for which Mr Matshona was dismissed.

- [3] He ordered the applicant to re-instate Mr Matshona on terms and conditions no less favourable than those that would have governed his employment, had he not been dismissed, save that re-instatement was not to be retrospective but with effect from 29 March 2010 as he had contributed to his misfortune.

Grounds for review.

- [4] The submission was that the first respondent:

- committed a gross irregularity by misconstruing the issue of inconsistency when the exact nature of the other violations of the health and safety rules of the applicant

was not before him and thus could not assess whether those violations were as serious as the one committed by Mr Matshona;

- exceeded his powers by determining what sanction he would have imposed rather than whether the sanction imposed by the applicant was fair and
- came to a decision that a reasonable decision maker could not come to on the face of evidence that Mr Matshona was a shop steward and as such had a more onerous duty and responsibility to comply with the company rules and set an example. Further that he ignored the evidence that the disciplinary chairperson had considered the experience of the person, the circumstances of what happened, the fact that other people were involved that could be affected by the breach of safety and the training received by employees regarding safety and lock-out procedures.

[5] In opposing this application Mr Matshona denied that any legal or factual basis existed for the applicant to institute the present proceedings. He said that the first respondent had concluded that Mr Matshona worked on the moving conveyor belt and indicated that he was particularly concerned with the issue of the consistent application of the rule for which Mr Matshona was dismissed. The applicant had not changed its policy after the dismissal of Mr Matshona and therefore it did not matter whether other violations of the safety

rules of the applicant took place before or after his dismissal.

Evaluation

- [6] I do not consider it necessary to have to restate the law governing the consistent application of sanction in any particular work place. The first respondent acquitted himself well in this regard and I associate myself with the jurisprudence he referred to in his award. It is not surprising that the attack of the award was not premised on a misdirection in this regard.
- [7] Section 138 (7) of the LRA permits a commissioner to deal with the arbitration proceedings with the minimum legal complexity and to give brief reasons for the award. Implicit in this approach is the chance that not every aspect of evidence will necessarily be dealt with in an award. This leaves an opportunity for a grieving party to nit peak facts and factors as a basis for attacking the award.
- [8] The applicant contends that the first respondent committed a gross irregularity by misconstruing the issue of inconsistency when the exact nature of the other violations of the health and safety rules of the applicant was not before him and thus could not assess whether those violations were as serious as the one committed by Mr Matshona. However the applicant failed to show the existence of circumstances that were different to those under which Mr Matshona was dismissed. In page 52 of the index to the record, Mr van der Westhuizen, the Engineering Superintendant of the applicant, was asked, during his testimony, how many people had been reported to him having been

involved in the commission of the same incident. That was the opportunity given to him to dispute the commission of a similar incident if that was the case. His answer to the probe was clear as he said that he did go through the same procedure with two other employees who also worked on the machines and they were also disciplined with a final written warning. On page 53 of the record, he described the charge against Mr Matshona as “working on moving machine”. The transgression of the two employees that he referred to was therefore in his terms, the same as that committed by Mr Matshona. This was a company which held itself as practising a zero tolerance of the breach of safety rules. It was never shown why Mr Matshona was treated differently from the two employees. In the light of this evidence, the applicant has therefore failed to distinguish the case of Mr Matshona from those of the two or three employees identified to have committed a similar transgression. The first respondent was alive to the fact that he did not have the detailed factual circumstances under which the other violations of the safety rules occurred. He however had enough evidence to make the judgment call. His thinking process was accordingly alive to the important consideration of comparing similar transgressions.

- [9] The applicant knew that it had treated Mr Matshona differently than it had treated Mr Sithole. Therefore, it was open to it to show the first respondent why it chose to impose different sanctions. The record shows that Mr Matshona was a welder and a supervisor. Mr Sithole was a maintenance assistant who could have been instructed on what to do by Mr Matshona. Therein lay a difference in the ranking of the employees that could justify the

imposition of different sanctions. The first respondent accepted that Mr Sithole worked on the conveyor belt. The evidence by Mr Nkosi, who worked with the two men, was that Mr Matshona had elicited help from Mr Sithole. The first respondent owed the applicant an explanation why he rejected the explanation that it offered as to why it treated the sanctions differently between Messrs Matshona and Sithole. No such explanation appears in his award. This comparison by the first respondent therefore lacks in substance.

[10] While *prima facie* the employees are entitled to receive similar sanctions for similar transgressions, an employer may be justified in differentiating between its employees guilty of a similar offence on the basis of their different personal circumstances. (See in this regard *Early Bird Farms (Pty) Ltd v Mlambo*,² and *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*.³)

[11] In scrutinising the award, the applicant lost sight of the fact that the first respondent considered not only parity of the sanction. He considered the policy of the applicant and found that it favoured progressive discipline. This alone would have been a legitimate basis for finding that the sanction imposed was unfair. Mr van der Westhuizen testified that the company code on discipline on a first transgression provided for counselling, first written warning second written warning and dismissal. Mr Matshona was an employee whose working experience was in the region of 13 years. He must have had a clean record, otherwise the applicant would have referred to any

² [1997] 5 BLLR 541 (LAC).

³ [2000] 8 BLLR 869 (LAC).

adverse record it had against Mr Matshona. A foundation in evidence had to be laid for the applicant to decide to abandon its policy on progressive discipline. No such evidence was led. In considering this factor, the first respondent committed no defect.

[12] The applicant has not, in my view succeeded in showing that there has not been a full and fair trial of the relevant issues that the parties brought before the first respondent for his consideration, notwithstanding my findings pertaining to Mr Sithole's sanction.

[13] The submission that the first respondent exceeded his powers by determining what sanction he would have imposed rather than whether the sanction imposed by the applicant was fair is devoid of any merits. In assessing the fairness of a sanction a commissioner is entitled to make a value judgment. The first respondent considered relevant factors and concluded that the sanction imposed by the applicant was too harsh and consequently unfair. Once that point was reached, the first respondent embarked on a process to investigate a fair sanction. He found, *inter alia*, that Mr Matshona had contributed to his misfortune and did not deserve a back pay. The result was that Mr Matshona ended with a sanction which though fall short of dismissal, was harsher than of those employees who were subsequently subjected to disciplinary proceedings for a similar transgression.

[14] The attack waged against a consideration of the sanctions imposed by the applicant soon after it dismissed Mr Matshona, but before the arbitration

proceedings in this matter were held, lacks merits. There are numerous cases where the relations of the parties, as do manifest themselves during the arbitration hearing, become a consideration in determining the appropriateness of re-instatement as a sanction. Therefore events materialising after the commission of the misconduct complained of may be considered in an arbitration hearing pertaining to that misconduct. The issue turns on the relevance of such considerations.

[15] The first respondent could not defer the imposition of a sanction to the applicant. He would have acted unreasonably and contrary to the powers bestowed to a commissioner, had he retained a sanction which he had already found to be too harsh and unfair. It follows that this ground of review must similarly fail.

[16] The applicant said that the first respondent came to a decision that a reasonable decision maker could not reach, on the face of evidence that Mr Matshona was a shop steward and as such had a more onerous duty and responsibility to comply with the company rules and set an example. It is not clear if this submission is intended to mean that shop stewards deserve a harsher sanction by the very fact of being shop stewards. This is not a case where the contention was that Mr Matshona did not know the rule breached. The link between the fairness of a sanction and living an exemplary life style has not been established in these proceedings. That he failed to consider the circumstances of the breach flies on the face of what the first respondent eloquently said in paragraphs 30 to 32 of the award with particular reference

to paragraph 94 taken from the decision in *Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others*.⁴ He did not have to regurgitate the evidence of the disciplinary hearing. Accordingly, I am unable to find that the decision reached by the first respondent in this regard falls outside of the range of reasonableness. This ground stands to be dismissed.

[16] In conclusion, the following order falls to be issued:

1. The review application in this matter is dismissed.

No costs order is made.

Cele J.

⁴ [2007] 12 BLLR 1097 (CC).

APPEARANCES:

For the Applicant : Mr D. Masher

Instructed by : Bell Dewar Incorporate.

For the third respondent : Mr N Masutha

Instructed by : National Union Metal Workers
of South Africa.