



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no :JR 3354/2010

In the matter between:

ULLMANN BROS (PTY) LTD

Applicant

and

**NATIONAL BARGAINING COUNCIL OF THE
ROAD FREIGHT INDUSTRY**

First Respondent

K DRISCOLL NO

Second Respondent

SATAWU on behalf of PETER MASHIGO

Third Respondent

Heard: 11 JULY 2012

Delivered: 28 MAY 2013

JUDGMENT

VAN GRAAN AJ

Introduction

[1] This is a review application in terms of section 145 (1) of the Labour Relations Act, No 66 of 1995 (as amended) ("the LRA") against the

written arbitration award by Commissioner K Driscoll, the second respondent, dated 23 November 2010. The award concerned the dismissal by the applicant, the employer, of Mr Peter Mashigo, a former employee ("the employee"). The employee is a member of the third respondent. The third respondent, on behalf of the employee, is opposing the review application.

Background facts

- [2] The employee together with a fellow employee, Mr Themba Thutuka, were charged with misconduct by the applicant. The applicant alleged in the disciplinary notice dated 26 January 2010 that the employee, in terms of charge 1, was "throwing stones at vehicles and/or persons entering and/or leaving company premises" and, in terms of charge 2, was guilty of assault and/or intimidation. According to the particulars supplied in the disciplinary notice the employee, on 21 January 2010, engaged in shooting catapults and throwing stones and/or other missiles at vehicles and/or persons entering or leaving the applicant's premises. (The alleged incidents occurred during a strike by the applicant's employees.) According to the disciplinary notice the alleged conduct was calculated to cause damage to such vehicles and/or persons, and intimidate persons from entering or leaving the premises.
- [3] The disciplinary hearing commenced on 22 March 2010. The employee pleaded not guilty.
- [4] On 26 March 2010, the chairperson, Mr Pieter Strydom, after having considered oral evidence on behalf of applicant and the employee and video footage, depicting the conduct of the employee, found the employee guilty in respect of charge 1 and charge 2. The chairperson, however, qualified his "finding of guilty on the second charge in that (he) could not find the employees to have been guilty of assault". According to the minutes of the pre-arbitration meeting, preceding the arbitration which

followed after the employee's dismissal, the parties agreed that the employee was not guilty on charge 2. The employee was dismissed on 26 March 2010.

- [5] The third respondent, SATAWU, on behalf of the employee, referred the dispute in terms of the provisions of section 191 of the LRA to the National Bargaining Council of the Freight Industry, first respondent, for the purpose of conciliation. The parties were unable to resolve the dispute. The first respondent was requested to hold an arbitration.

- [6] The arbitration proceedings between the employee and the applicant commenced on 19 October 2010. Commissioner Driscoll, the second respondent, acted as the arbitrator. The applicant and the third respondent agreed that the procedural fairness of the disciplinary hearing was not in dispute. The Commissioner, determined, as reflected in her award, that the dismissal of the employee was substantively unfair. The Commissioner further ruled that the employee be reinstated in his previous position from the date of his dismissal without any loss of benefits. The employer was ordered to pay the employee for the intervening period. The employee had to report for duty on 1 December 2010. No order as to costs was made.

Review application and review grounds

- [7] On 10 January 2011, the applicant filed a review application as contemplated in the provisions of section 145(1) of the LRA. The human resources manager of the applicant alleged in the founding affidavit that the Commissioner Driscoll's conclusion was not reasonable and justifiable given the evidence presented to her. He alleged in the supplementary affidavit that the Commissioner, second respondent, failed to consider the evidence which had been adduced before her.

The issue

- [8] The main issue in this matter is whether the Commissioner's finding that the dismissal of the employee was substantially unfair, was one which a reasonable decision maker could have reached.

The evidence before the disciplinary chairperson

- [9] Peet Botes testified during the disciplinary hearing on behalf of the applicant. He was a warehouse controller. On 21 January 2010, between 09h00 and 10h00, he saw Thutuka and the employee behind a wall. Thutuka threw a stone and the employee was shooting a catapult. Although he did not see a vehicle leaving the applicant's premises, vehicle LFB 799 GP was leaving the applicant's premises at the time when the employee threw a stone in the vehicle's direction. Botes could not see where the stone landed, but he heard it when it hit the vehicle "between the steelwork of the trailer and the sail on the left side". Botes took video footage of the events. It was shown to the chairperson. Still photographs showing Thutuka and the employee throwing stones were obtained from the video footage.
- [10] The employee, who denied that there were trucks in the vicinity during 09h00 to 10h00, conceded that he was throwing stones. They were singing, got bored and he and Thutuka decided to throw stones at the birds – "... they were sitting on this wire... just above the lawn". Under cross-examination he admitted to have used a "kettie" and a stone. He said he was throwing the stones 'towards the cable... because (his) hand went up...'. He also admitted that after police officials shot two rounds of live ammunition, he and others threw stones at the police.
- [11] Thutuka, a fellow employee, who also appears on the video footage, testified that he was carrying 'a stone because (he) wanted to hit a bird'. The birds, he said, 'were sitting on the electric fence'. He missed the birds. Some birds were sitting on the electric fence and some on the power lines. The employee was also throwing stones. He did not see any trucks

leaving the premises. He also admitted that they threw stones at the police.

- [12] Pasha, a witness on behalf of the employee, testified that he had seen the employee throwing a stone. He also saw Thutuka throwing stones. According to him a 'couple of birds (were) on the grass some on the bottom and some on the bottom wire ... (t)he wire for electric ...'. He also said one guy was 'throwing a stone to the birds on the wire there'. The other person said: 'I want to hit the one on the grass'.
- [13] Shabalala testified that the birds were sitting 'on the grass it was so full there – birds were sitting there', Themba Thukuta was throwing a stone. He also said that he heard two shots from the police, when the employees threw stones.
- [14] The video footage shows that Thukuta threw a stone, the employee used a catapult and thereafter threw a stone. Still photographs (obtained from the video footage) depicting the employee using a catapult and throwing a stone also served before the disciplinary chairperson.

The proceedings before the commissioner

- [15] Documentary evidence (including the transcription of the disciplinary hearing) and the video footage served before the Commissioner. Botes and the employee testified before the Commissioner, but there is no recording of their evidence.
- [16] The dispute and litigation manager of the bargaining council stated in an affidavit that it appeared, after downloading the mechanical recording of the arbitration, that the recording was blank. There is no transcription of the arbitration proceedings. The applicant, however, prepared a reconstruction of the arbitration hearing held on 19 October 2010. The second respondent, Commissioner Driscoll, I was told, did not object to the correctness of the reconstruction of the employee's evidence.

[17] The Commissioner noted certain admissions by the employee. The employee admitted that, on 21 January 2010, he was outside the applicant's premises, that he threw a stone and that he can be seen on the video footage of 21 January 2010.

[18] The Commissioner minuted the employee's evidence as follows in her handwritten notes. :

'... I picked up stones; ... it up high, birds not on grass, but at birds on the street light cable was about 8 to 10 m. Before birds flew away ...'

[19] The reconstruction of the evidence of the employee contained the following description of his conduct :

'Nobody was doing any funny things – they were just sitting and doing toyi toyi. They were just standing there and he and Thuthukani decided to have a competition and compete to hit the birds. We wanted to see how far we can hit or shoot a bird. Some birds were on the grass and some on the powerline. Thuthukani threw the first stone, but could not hit the bird. He picked up a stone at the birds which were high 'I hit the birds on the cable – the street lights'. The light cable pole was lower on the side where he had been throwing.'

[19] In the written award, the Commissioner minuted the employee's evidence as follows:

'The Applicant (the employee Mr Peter Mashigo) testified further. That they had stood there for a long time and as they were bored the Applicant and Themba Thuthuka decided to play a game to see which of them could hit the birds on the opposite pavement (See 'E' on sketch). Applicant stated that the game was usually played using catapults, but that Mr Thuthuka had suggested they use stones. The applicant stated further that Mr Thuthuka had thrown the first stone, but missed and when the applicant had thrown his stone, the birds had flown from the grass to the street light cable, which was about 8 to 10 metres away. The

applicant stated that the pole was lower on the side of the street to which he had been throwing the stone.'

- [20] The Commissioner, found, *inter alia*, that the applicant failed 'to make the crucial connection between the (employee) throwing the stone and the (applicant's) vehicle being hit by the stone on 21 January 2010'. The second respondent found that she cannot 'conclude that the (the employee's version) that he was throwing the stone at some birds is entirely implausible'. She stated that she was not persuaded that the applicant, on a balance of probability, discharged its onus. Thus the benefit of the doubt, she said, must be given to the employee.

Applicant's argument

- [21] Ms M Chenia, applicant's attorney, submitted that, the probabilities indicate, considering the evidence adduced before the second respondent, but more particularly the video footage, the employee was throwing stones at a vehicle, wherefore the finding by the Commissioner was unreasonable.
- [22] She gave reasons in paragraph 7 of the applicant's heads of argument why the employee's defence in terms of the first charge cannot be accepted:

'7. The defence of Mashigo should have been rejected outright for the following reasons:

7.1 Botes testified that Mashigo could not have been throwing stones at birds given the height he was throwing the stones.

7.2 Mashigo claimed that he had been throwing stones at birds on the street light cable about 8 - 10 meters away but then later said that the street light poles were lower on the side where he was throwing stones. The Applicant challenged

his evidence in this regard.

- 7.3 In reference to a diagram submitted, Botes further testified that he (Botes) was at Area "C" when he was filming the incidence of stone throwing. The area marked "B" is where Mashigo was standing and throwing stones when he was recorded on the video footage. The area marked "E" is where the birds allegedly were.
- 7.4 In between the area marked "B" and "E" is where the trucks had to pass through in order to exit or enter the premises of the Applicant. Botes testified that if you looked at the direction in which the stones were being thrown in area "E" is directly on the other side of the area where the trucks had to pass.
- 7.5 From the area where Botes was filming ("C"), the impact of the stone on the truck cannot be seen. However, on the video footage the sound that can be heard after the stones are being thrown is clearly that of a stone hitting a truck. The Second Respondent ignored such evidence.
- 7.6 The Second Respondent relied on the evidence of Mashigo that the throwing of stones was in fact a game despite the fact that the facial expression of Mashigo was not that of a laughing or a smiling face.
- 7.7 The images which were produced of Mashigo throwing stones showed a different posture from somebody throwing stones at birds.
- 7.8 The Second Respondent wrongly inferred from other circumstantial evidence that Mashigo was throwing stones at birds and not at the trucks.
- 7.9 Another fellow employee of Mashigo, Mr Thuthuka, was also filmed committing the same offence during the same

industrial action on 21 January 2010. The evidence presented at Mr Thuthuka's arbitration was the same as above. In this arbitration the arbitrator ruled in favour of the Applicant and rejected the version of Mr Thuthuka that they were throwing stones at birds. The arbitration award was presented to the Second Respondent.

- 7.10 The Commissioner in Mr Thuthuka's matter concluded that he could hear the impact of the stone when it hit the truck in the video recording, the posture of Mr Thuthuka and his colleague (Mashigo) suggested that the target of their actions was not birds but in fact another object, that they were not looking at the power lines and that their facial expression did not resemble people who were having fun. The relevant Commissioner upheld the dismissal of Mr Thuthuka as fair. The Second Respondent disagreed with the findings thereof.
- 7.11 The evidence of Mashego is highly improbable and the Second Respondent's reliance on same is not reasonable or justifiable.'

Employee's argument.

- [23] Mr K F Mphepya, who appeared on behalf of the third respondent and the employee, argued that the employee's version is reconcilable with the photographs. The photographs show that the employee was not throwing stones at eye-level, but upwards in the direction of birds. He said that the test for a review application is reasonableness set out in *Sedumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. The Commissioner's failure to mention some of the facts does not amount to gross irregularity.

Applicant's reply

¹ [2007] 12 BLLR 1097 (CC)

- [24] Ms Chenia argued in reply, referring to the video footage, that one should bear in mind that Botes filmed the employee throwing a stone when the first vehicle was about to leave applicant's premises. At that stage he heard the sound of an object striking the vehicle. The sound is audible on the video footage. Botes' conclusion that the employee was throwing a stone at a vehicle is not based on an assumption, Ms Chenia said, but it is a reasonable inference from all the circumstances.

Evaluation

- [25] The Commissioner was not sure where to place the birds at which the employee was throwing stones. In her handwritten notes, on the evidence of the employee, at the time when the employee picked up the stone, they were not on the grass, but sitting on the street light cable (paragraph 18 above). According to the reconstructed record, some of the birds were on the grass, and some were on the powerline. However, when the employee picked up a stone the birds were high on the cable (see paragraph 19 above). In the written award, the Commissioner found that, when the employee had thrown the stone, the birds flew from the grass to the street light cables (see paragraph 20 above).
- [26] The crucial issue in this matter is, however, whether Commissioner Driscoll's finding that it is not entirely implausible that the employee was throwing stones at birds during the strike at the applicant's premises, is finding which a reasonable decision maker could have made.
- [27] According to me, the employee's account is highly improbable.
- [28] First, the employee's evidence before the disciplinary chairperson was that after the singing had stopped, he got bored and he and Thutuka decided to throw stones at birds. However, the circumstances which prevailed, all from the employee's evidence, left little room for boredom. During the strike, the striking employees were toyi toying and singing. The police officials shot two rounds of live ammunition. After the shots with live

ammunition had been fired, the employee and his fellow employees threw stones at the police. My inference from the employee's evidence is that a dangerous confrontation between the striking employees and the police erupted. Boredom under such circumstances, is highly improbable.

- [29] Secondly, on the employee's evidence, the police shot two rounds with live ammunition whereafter the employee and others threw stones at the police. It is improbable that a striking employee, during such circumstances, would throw stones at birds.
- [30] Thirdly, the grim facial expressions of the employee and his colleague, visible on the video footage, while they were throwing stones does not give the impression of two men participating in a game throwing stones at birds.

Conclusion

- [31] After considering the evidence, after viewing the video footage, together with the attorneys of the parties and the considerations in paragraphs 29 to 31 above, I have come to the conclusion that the Commissioner's finding that it was not entirely implausible that the employee was throwing stones at birds, is not one which a reasonable decision maker could have reached. In the premises the second respondent in making her finding committed a gross irregularity.
- [32] In the premises, the Commissioner's findings in items 1 to 4 (on page 6 of her award) are reviewed and set aside. Her finding is substituted with a finding that the dismissal of the employee, Mr P Mashigo, was substantively fair. In my view it is appropriate, after considering Ms Chenia's and Mr Mphepya's arguments, to make a cost order against the third respondent. There is no reason why the rule that cost should follow the result, should not be applied in this matter.

Order

[33] In the circumstances, I make the following order:

33.1 Items 1 to 4 (on page 6) of the second respondent's written award dated 23 November 2010 are reviewed and set aside;

33.2 Items 1 to 4 of the aforesaid award is substituted with the following finding :

The dismissal of Mr Peter Mashigo by the employer is substantively fair.

33.3 Item 5 of the aforesaid award is left unaltered.

[34] The third respondent is to pay the costs of this application.

Van Graan, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Adv Chenia, instructed by Glyn Marain Attorneys

For the 1st & 2nd Respondents: Tricker Inc.

For the 3rd Respondent: Mabaso Attorneys