



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1060/13

In the matter between:

ARCELORMITTAL SOUTH AFRICA LIMITED

Applicant

and

NUMSA obo W H SHONGWE

First Respondent

DAVID LEVY NO

Second Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Third Respondent

Delivered: 29 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This matter came before this court in terms of section 145 of the Labour Relations Act¹ (the LRA). The Applicant seeks an order reviewing and setting aside the arbitration award issued by the Second Respondent (“the Arbitrator”) under case number MEKN6306 on 26 April 2013. The application is opposed.

Background:

- [2] Shongwe, the dismissed employee was employed by the Applicant as a Fitter on 1 July 2006. He was dismissed on 7 July 2012 following upon a disciplinary enquiry into allegations of misconduct pertaining to “Negligence or indifference in execution of duties. as per safety job card no 922893144”². He had thereafter on 7 November 2012 referred an alleged unfair dismissal dispute to the Third Respondent (MEIBC). When conciliation attempts failed on 21 February 2013, the dispute came before the Arbitrator on 16 March 2013.

The arbitration proceedings:

- [3] Shongwe and other employees were issued with daily instructions through job cards each morning when their shifts commenced. On 2 July 2012, Shongwe’s job card required of him to check the jacks and hydraulic pumps in the stores. The following day, Mr Bruin, the Applicant’s Superintendent, discovered from the job card that Shongwe had allocated 5 hours to performing the tasks allocated, and had thereafter reflected “DONE” on the job card. No other comments were made on the job card.
- [4] Bruin had testified that five hours was a relatively long period to spend on the tasks allocated on that day to Shongwe, and that neither he nor the Storeman had seen Shongwe on 2 July 2012 working in the stores testing the equipment. Bruin had also enquired from the Artisans on the shop-floor as to how long they thought the job allocated to Shongwe would have taken to complete, and he was informed that at most it would have taken him three hours.
- [5] According Bruin, the tasks allocated to Shongwe included the inspection of between 12 and 14 jacks, 2 to 3 hand pumps and 3 to 4 hydraulic pumps.

¹ Act 66 of 1995

² At page 125 of the record of proceedings bundle

Bruin's testimony was further that the work allocated to Shongwe involved checking for cracks and leaks on the jacks and hydraulic pumps, and the neglect of duties could have resulted in injury to persons operating the equipment in question. Shongwe according to Bruin was supposed to have made comments on the job card concerning the state of the equipment he had tested. Bruin's conclusions from discussions with the Storeman and the Artisans were that Shongwe had not done the job. He had arrived at those conclusions without interviewing Shongwe, as he was of the view that he could give his input at the enquiry once he was charged.

- [6] During cross-examination, Bruin confirmed that at the time of dismissal, Shongwe had a final written warning for misconduct and had a history of receiving warnings since 5 May 2008. Bruin's further testimony in this regard was that he had initiated disciplinary proceedings against Shongwe and was not aware at the time that he had a valid final written warning in his record. On his version, had he been aware of this fact, he would not have charged Shongwe, and would have instead had a discussion with him.
- [7] Bruin had further confirmed that there had not been any equipment failure on the jacks since Shongwe had worked on them. The jacks and the pumps were also not re-inspected after he had established that Shongwe had performed his tasks in accordance with the job card.
- [8] Mr Muir, the Storeman had also testified that he had not seen Shongwe in the stores on 2 July 2012 and he could not have worked on the jacks without being seen as the test block was some 2 to 3 metres from his workstation. Furthermore, Muir had not been aware of what tasks were allocated to Shongwe on that day.
- [9] Shongwe's testimony was that having been issued with his job card, he had performed his tasks by checking the hydraulics and had ascertained that he need not complete the log books. He was familiar with his tasks and knew what to do. He had started with the assigned tasks at about 09h10, and did the tests on 14 jacks. He could not recall the time he had completed the tasks and had

signed off the job card when he was done, and had then proceeded to perform other tasks.

The award:

- [10] The Arbitrator found that Shongwe's dismissal was substantively unfair, and had ordered his reinstatement with retrospective effect. The Arbitrator had also ordered that Shongwe must be issued with a final written warning, valid for a period of 12 months from the date of the award, and be paid an amount of one month's salary.
- [11] The Arbitrator reasoned that on the evidence the Applicant (employer) had discharged the onus of proving that Shongwe could not have been in the stores checking the jacks during the absence of the Storeman. The Arbitrator also established that Shongwe had not followed the instructions on the job card and had instead performed tests that he presumed were adequate based on his experience and training. He had nevertheless checked the jacks instead of testing them, and to that end, had not complied with the instructions given to him.
- [12] In regards to sanction, the Arbitrator concluded that Shongwe, given his experience and qualifications, had displayed a lack of professionalism in carrying out his duties. He further found that there was insufficient evidence to persuade him that the failure of Shongwe to test the equipment in accordance with the job card was a critical safety breach.
- [13] The Arbitrator further took into account Bruin's testimony to the effect that had he known that Shongwe was on a final written warning he would not have charged him. In the Arbitrator's view, Shongwe's direct supervisors had no reservations about his abilities, reliability or work performance. There also did not appear to be any problems with a working relationship between Shongwe and his supervisors.
- [14] The Arbitrator took into account that Shongwe was indeed negligent or indifferent in the performance of his duties, but however found that the Applicant had failed to discharge the onus of proving that the dismissal was the

appropriate sanction. He nevertheless stated that a sanction of dismissal was not to be applied as a punitive measure, but as a measure of the last resort, and in his view, the Applicant had adopted a mechanical approach to the issue of sanction as a dismissal was not warranted.

Grounds for review:

- [15] The Applicant did not find fault with summation of the evidence by the Arbitrator in the award. The award however is attacked on every conceivable ground including that the Arbitrator's findings were not supported by any evidence; are based on speculation; are entirely disconnected from the evidence; are supported by evidence that is insufficient to reasonably justify the decision; and were further made in ignorance of evidence that is insufficient to reasonably justify the decision.
- [16] It was further contended that the Arbitrator committed a gross irregularity; exceeded his powers; took into account irrelevant evidence and ignored relevant evidence; failed to apply his mind to the issues before him; failed to consider all the material facts presented to him; failed to examine the versions of the witnesses; and rendered an award which another Arbitrator sitting in his position could not have arrived at.
- [17] It was further argued that the decision that the Arbitrator came to was not one that a reasonable decision maker could have come to especially in light of uncontested evidence that Shongwe was already on a final written warning for similar conduct, with a history of disciplinary action having been taken against him in the past, and that his failure to properly conduct the checks posed a risk to the safety of other employees.
- [18] The Applicant further contended that the award was manifestly unreasonable as a result of Shongwe already being on a final written warning at the time of the incident and accordingly, the imposition of another final written warning on the instruction of the Arbitrator had no real effect on Shongwe thereby undermining discipline.

- [19] In opposing the application, it was submitted on behalf of Shongwe that the decision of the Arbitrator was one that reasonably could have been made having considered the evidence led during the arbitration proceedings. The crux of the submission is that the charges were incorrect leading to a substantively unfair dismissal. The credibility of the Applicant's witnesses at the arbitration proceedings was also challenged, and it was argued that they had contradicted one another. A further contention was that the review application be dismissed as it had no merit, and that the award should be made an order of Court. In regards to the last issue raised on behalf of Shongwe, the Court took notice that no substantive application was launched to make the award an order of court.

Evaluation

- [20] In determining whether an arbitrator's award is reviewable, this Court is required to ask whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her.³ In *Goldfields*⁴, Waglay JP summarised the test as follows;

"In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at."⁵

- [21] In the light of the multitude of grounds upon which the review is based in this case, we should also be reminded of what was stated in *Goldfields*, that;

'In a review conducted under s145 (2) (a) (c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then

³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC)

⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

⁵ At para [16]

decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.”⁶

- [22] Where the grounds of review as also in this case are based on the Arbitrator’s alleged failure to consider facts, the enquiry in this regard is whether the facts ignored were material, which will be the case if a consideration of them would (on the probabilities) have caused the arbitrator to come to a different result. Once it is established that the facts were indeed ignored, and that they were material, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable.⁷

The allegations against Shongwe:

- [23] It is trite that when determining the fairness of a dismissal, the Arbitrator in accordance with the provisions of section 188 (2) of the LRA must consider whether or not the reason for a dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, taking into account the guidelines set out Schedule 8 of the LRA. In this case, the charges that Shongwe was faced with at the internal disciplinary enquiry and that led to the dismissal pertained to negligence or indifference in execution of his duties.
- [24] Given the fact that Shongwe was not charged with either a failure to obey instructions or outright insubordination, I fail to appreciate the Applicant’s contentions that the Arbitrator’s findings that Shongwe had in fact performed the work is a finding that no reasonable arbitrator would have come to in the circumstances . The issue of the two different forms of misconduct was canvassed at length with Bruin during his cross-examination⁸, and it is apparent from that cross-examination that Bruin was uncertain as to what to charge Shongwe with from the beginning, and had finally settled for those charges that led to the dismissal after consulting the Applicant’s disciplinary code and procedures. It is therefore not for the Applicant after the fact to

⁶ At para at paras [18]

⁷ See *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC). See also *Shoprite Checkers v Commission for Conciliation, Mediation And Arbitration and Others* (JR2471/13) [2015] ZALCJHB 229 (31 July 2015) at para [9] to [10]

⁸ Pp 19 -26 of the record of proceedings

suggest that the Arbitrator should have found that Shongwe was correctly found guilty on a charge he did not have to answer to at the internal disciplinary enquiry.

- [25] It is trite that employers cannot justify a dismissal on grounds other than those which formed part of the initial decision to dismiss an employee⁹. In this case, Shongwe was not dismissed for failing to perform his tasks, and as is evident from the chairperson's findings, the allegations that led to the dismissal were framed as 'negligence or indifference in execution of duties...' ¹⁰. It thus cannot be said in the same breath that an employee was negligent or indifferent in the performance of his duties, and yet it should have been found that he had not performed the tasks in question. It is either the employee had performed those tasks or not and in this case, the Arbitrator's findings that he had indeed completed the tasks cannot be faulted. This finding is not even material in the light of the real charges that led to the dismissal, and it cannot be correct that it goes to the appropriateness of the sanction of dismissal.

The issue of sanction:

- [26] In the light of the specific charges against Shongwe, central to the dispute was whether he had performed the tasks in accordance with the standards required by the Applicant. In this regard, the Applicant was content with the findings made by the Arbitrator that Shongwe had not followed instructions on the job card. Having found that Shongwe had not performed the tasks in accordance with the accepted standards, the next issue for the Arbitrator was to determine whether the sanction of dismissal given the facts of the case was appropriate.
- [27] It was correctly pointed out on behalf of the Applicant that in order for negligence to warrant a dismissal, it must have been gross. Negligence denotes a failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person¹¹. The test for negligence is whether the *diligens paterfamilias* in the position of the employee would have

⁹ *Fidelity Cash Management Services v CCMA & Others* 2008 (2) BLLR 197 (LAC) at para 32

¹⁰ Page 123- Index to record of proceedings. Vol 2

¹¹ *Grogan Dismissal* at page 200

foreseen the reasonable possibility of his conduct causing harm, and would have taken reasonable steps to guard against such harm¹².

- [28] Gross negligence is to be distinguished from ordinary negligence which is a mere failure to exercise reasonable care. Gross negligence on the other hand denotes serious carelessness which is sometimes accompanied by persistence and inexcusable inattention. It can be said to constitute a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable serious harm to persons, property, or both.
- [29] Whether gross negligence if proven will result in a dismissal is dependent on the factors of each case. In *Solid Doors (Pty) Ltd v Hanekom N.O and Others*¹³ the LAC held that any gross negligence *per se* does not automatically translate to dismissal as sanction. Accordingly, it remained the duty of the Commissioner after taking all relevant factors into consideration to decide on a fair sanction. The decision of whether a dismissal as a sanction is fair or unfair should be decided by the Commissioner in accordance with his or her own sense of fairness¹⁴.
- [30] In this case, it was common cause that Shongwe was not charged with gross negligence, which is completely different from ordinary negligence or indifference. The Arbitrator concluded that Shongwe had not followed the instructions per the job card and had instead performed the tests that he presumed were adequate based on his experience and training. The Arbitrator nevertheless concluded that Shongwe had in the performance of his duties displayed a lack of professionalism.
- [31] The Arbitrator in considering the appropriateness of the sanction took into account that Bruin had not allocated anyone to perform the required tests after he had established that Shongwe had not complied with the instructions on the job card. This observation in my view cannot be faulted in that it cannot simply be alleged that there was gross negligence when nothing further was

¹² *Kruger v Coetzee* 1966 (2) SA 428 (AD) at 430 E – H:

¹³ (CA19/2012) [2014] ZALAC 19 (30 April 2014)

¹⁴ See *Sidumo* at paras [75] to [76] and also *Engen Petroleum Ltd v CCMA & others* (2007) 28 ILJ 1507 (LAC) at para [117] to [119]

done to establish what the actual or potential consequences of Shongwe's failure to complete his tasks in accordance with the instructions on the job card were. It is not sufficient for a mere allegation or statement to be made that a particular act or omission could have had certain consequences. A basis for that allegation must be laid.

[32] The Arbitrator had further concluded that there was not sufficient evidence before him that the conduct in question was a critical safety breach. These conclusions cannot be faulted in the light of Bruin's further evidence that other than further investigations not having been conducted after Shongwe had done the job, there had subsequently been no equipment failure on the jacks and further that the jack and the pumps had not been re-inspected after Shongwe had worked on them. It therefore follows that any submissions to the effect that the negligence in question was gross is not substantiated by evidence, and to the extent that the conduct in question was characterised as lack of professionalism, it can only be inferred that the negligence in question was ordinary, and not serious as made out to be by the Applicant.

[33] In determining the appropriateness of a sanction, an Arbitrator is guided by the factors set out in *Sidumo*. These were stated as follows;

"In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the LRA. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies..."¹⁵

And

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the

¹⁵ At para 72

employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list"¹⁶.

And

"To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances"¹⁷.

[34] In arriving at a conclusion that the dismissal was not an appropriate sanction, the Arbitrator had regard to the principle that a sanction of dismissal was not to be applied as a punitive measure. This approach cannot be faulted as this is what has been stated in item 3(2) of Schedule 8 - Code of Good Practice, i.e. that discipline should be viewed as a corrective measure and not as punitive. Furthermore, when considering the appropriate sanction, we are reminded of what was stated in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁸, to the effect that;

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[35] In my view, I am satisfied that in arriving at the finding in regards to the appropriateness of the sanction, the Arbitrator had properly taken all the factors into account, applied his mind to them and came to a reasonable

¹⁶ At para 78

¹⁷ At para 79

¹⁸ (2000) 21 ILJ 1051 (LAC) at para [2]

decision. He had accepted that Shongwe had not performed his tasks in accordance with accepted standards, and to that end, had appreciated the importance of the rule that had been breached. He had nevertheless concluded that the insufficient evidence was placed before him in regards to the effect of the transgression on the safety at the plant. It is accepted that proof in this regard is on a balance of probabilities. Be that as it may, as it has already been stated elsewhere in this judgment, it is not sufficient for an allegation to be made that a particular transgression had resulted in particular consequences which are not substantiated. As already indicated before, I did not understand it to be the Applicant's case that material was placed before the Arbitrator in regard to how the job was not completed or what the level of negligence was. If any real threat or effect was consequential upon the negligent completion of the tasks, such evidence should have been placed before the Arbitrator, rather than an assumption of what the effect may have been. A dismissal cannot be said to be in response to the employer's response to operational risks, when those risks are not identified or substantiated. It is easy to allege that certain potential consequences could have occurred. Nevertheless, a basis must be laid for that allegation.

- [36] The Applicant's contention was that the fact that Shongwe was on a final written warning meant that a dismissal was the appropriate sanction. In *National Union of Mine workers and Another v Amcoal Colliery and Another*¹⁹, the LAC had accepted that a dismissal of an employee on a final warning who committed the same offence would be justified. The rationale behind this principle is that such an employee is irredeemable²⁰. The emphasis nevertheless should be placed on whether 'the same offence' was committed, and it does not imply that upon any further transgression, an employee should automatically face a dismissal. Each case has to be looked at in accordance with the factors already alluded to as above, and it is trite law that a disciplinary code is a guideline and each case has to be determined based on its own merits.

¹⁹ (2000) 5 LLD 226 (LAC)

²⁰ Grogan. Dismissal at pp 100-101

- [37] It is accepted in this case that Shongwe was on a valid final written warning at the time that the transgression was committed. The charges that led to the final written warning on 25 January 2012 pertained to 'Improper feedback regarding spares on job cards'. It is not for this court to determine whether there is a distinction between the charges that led to the final written warning and those that led to the dismissal. Ultimately, it was for the Arbitrator's sense of fairness to prevail.
- [38] As already indicated elsewhere in this judgment, concerns had been raised with the nature of the charges that were laid against Shongwe, the manner with which they were formulated, and the case that the Applicant sought to pursue with this application notwithstanding the fact that Shongwe was dismissed for a different reason. Doubts have also been expressed about the seriousness of the charges in the light of Bruin's hesitation and indecision as to whether Shongwe should be charged or not and if so, what charges to pursue against him. In the light of these and other factors already alluded to in this judgment, there is no basis for a conclusion to be reached that the Arbitrator had failed to properly consider the facts surrounding the appropriateness of the sanction, and in my view, his sense of fairness had prevailed.
- [39] The Applicant had also contended that the award should be reviewed in the light of the Arbitrator's decision to order reinstatement in circumstances where Shongwe was a repeat offender, was also on a final written warning, and the Arbitrator has based his decision on Bruin's comments. It was further submitted that reinstatement of Shongwe with a written final warning was inconsistent with progressive discipline in the light of his final warning.
- [40] Flowing from the provisions of section 1 Section 193(2) of the LRA²¹, it has been said that reinstatement is the primary statutory remedy in unfair

²¹ Which provides:

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

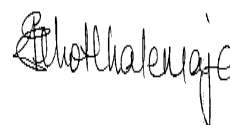
- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

dismissal disputes, as it is aimed at placing an employee in the position he or she would have been but for the unfair dismissal²². In my view, and from the facts as dealt with above by the Arbitrator, I am satisfied that he took all the relevant facts into account in deciding on a remedy of reinstatement. This is even more apposite in circumstances where the Applicant had not established that the misconduct in question was gross enough to impact on the trust relationship.

[41] On the whole, I am satisfied that the Arbitrator considered the principal issue before him; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he arrived at. Even if there may be cause to believe that the Arbitrator had ignored some material, ultimately it has not been shown in what respect this omission had a distorting effect on the outcome reached. To that end, there is no basis to interfere with his award. Furthermore, I can find no basis either in law or fairness to make a cost order.

Order:

- i. The applicant to review and set aside the award issued by the Second Respondent under case number MEKN6306 dated 26 April 2013 is dismissed.
- ii. There is no order as to costs.



Tlhotlhamajje, AJ

Acting Judge of the Labour Court of South Africa

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

²² *Equity Aviation Services (Pty) Ltd v CCMA and Others* 2009 (1) SA 390 (CC).

APPEARANCES:

On behalf of the Applicant: Mr A Patel of Cliffe Dekker Hofmeyr Inc

On behalf of the First Respondent: Mr T Manasoe of NUMSA

LABOUR COURT