IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR628/12

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

PETLELE & 11 OTHERS **Second to Further Applicants**

And

RUSTENBURG PLATINUM MINES **First Respondent**

CCMA **Second Respondent**

COMMISSIONER K ERASMUS *N.O.* **Third Respondent**

Date heard: 15 October 2015

Delivered: 1 February 2016

JUDGMENT

RABKIN-NAICKER J

[1] The applicants seek condonation for the late filing of a review application and to set aside and substitute the arbitration award in question.

[2] The review application was launched four months out of time, a delay the applicants concede was lengthy. The founding affidavit in the condonation application is deposed to by the national legal officer of the first applicant (NUM), Nica Rakau (Rakau). He avers as follows:

2.1 The union's Rustenburg office received the award on the 27 September 2011. In mid- October 2011 the union's regional office bearer in Rustenburg, (Dokolwane), was advised that the second to further applicants wanted the award to be reviewed.

2.2 The award was faxed to him during the third week of October 2011 but he <u>did not actually see it</u> as he often works out of the office. A few days after it was faxed, he got a call from Dokolwane. Rakau states as follows:

> "Dokolwane telephoned me a few days later and asked me if I had seen the "Petlele" arbitration award and he asked me whether I agreed that the award should be reviewed. Dokolwane informed me that the affected workers were putting him under enormous pressure and that I must take a decision soon. When I heard Dokolwane refer to the "Petlele award" I recalled that the union had had referred an arbitration award concerning Mr. Petlele to Cheadle Thompson & Haysom (CTH) for review. I mistook the award in this matter for that matter and informed Dokolwane that the workers need not worry because CTH had already been instructed to bring an application to review and set aside the Petlele award".

2.3 In mid-November Dokolwane met the workers and told them that CTH was dealing with the matter. Rakau avers further that: "Both Dokolwane and I were extremely busy at the end of the year and we therefore did (sic) have an opportunity to think about this matter again. In fact I was so busy that I could not take leave until 29 December 2011. I remained on leave until 23 January 2012."

2.4 On about 7 February 2012 he was advised by Dokolwane that the affected workers wanted an update and they were concerned that they had never consulted with CTH. He avers: "They had asked him how CTH could represent them without having spoken to them. I agreed that this sounded strange. At this time it occurred to both Dokolwane and I that we may have confused this matter with another matter where a different applicant, also named Mr Petlele was involved. In investigating, I discovered that I had indeed mistaken this matter with another."

[3] What is clear from the above is that on his version from mid October 2011 up until 7 February 2012, Rakau did not look at the arbitration award. Although he was told that the workers wanted to review it shortly after the award was faxed to him, he purportedly mistook the award for one in respect of which CTH had already been instructed when the matter was raised with him. He simply had no time to think about the matter between that time, i.e. mid October 2011, until the first week of February when the union's members raised questions again.

[4] Rakau contextualises the delay in launching the matter by emphasising the breadth and volume of legal work he is responsible for overseeing. In particular he states that NUM is one of the largest trade unions in South Africa with approximately 300,000 members spread across the country.

[5] His explanation for the delay from the 7 February 2012 to date of the launching of the application on the 15 March 2012 is as follows:

5.1 On 7 February, he immediately phoned attorney Reynauld Daniels of CTH and asked for an urgent opinion on the prospects of successfully reviewing the award. The opinion was drafted without input from the affected workers because it was needed urgently and they were in Rustenburg.

5.2 The opinion reached him on the 14 February. He saw it 2 days later and only managed to contact Dokolwane on 21 February to discuss the opinion with him. He was told the workers were unhappy with the opinion because they had not consulted with CTH before it was drafted and wanted NUM to arrange a consultation. He contacted Daniels 2 days later and the consultation was held in Johannesburg on 29 February. At the consultation, the workers referred to a bundle of documents which had not been brought to the consultation and which the attorneys needed. He states that on 5 March the bundle of documents was located and delivered to CTH by NUM. He met with Daniels on 7 March and on obtaining his advice instructed him to launch the review application.

5.3 Further averments are made in an attempt to deal with the delay in February/ March by reference to the fact that he and Dokolwane were managing the process of a dispute involving many thousands of members of NUM at Impala Platinum mine during those months.

[6] It is submitted on behalf of the applicants that the above amounts to a reasonable and acceptable explanation for the lengthy delay in launching the application. I cannot agree. In essence the union is offering an explanation that boils down to the fact that those charged with the responsibility for looking after the legal interests of its members simply did not 'have time' to do so. In 2011, in ***National Education Health & Allied Workers Union & others v Vanderbijlpark Society for the Aged***[1] my brother Le Grange J had this to say:

> "[9] The LRA has been in existence for more than 15 years, and the time-limits governing referrals, not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to accommodate those time-limits, not vice versa. The scale of an organization cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organizations, be they trade unions or businesses, ought to be able to see to it that they are organized to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time-limits in the LRA. Where handling such disputes is a core function of the organization, this should go without saying."

[1] (2011) 32 ILJ 1959 (LC)

[7] In my view the NUM were negligent in dealing with this matter and their explanation for the delay in launching the application is the very antithesis of reasonable. However in exercising a judicial discretion in this application, I find it necessary to consider whether in the circumstances of this matter, the affected workers should be penalised for the lack of diligence of their union representatives. The papers as deposed to by NUM set out the following regarding the steps taken by the affected workers after the issuing of the award on 27 September 2011:

7.1 In mid- October 2011 the affected workers told their union representative that they wanted the award to be reviewed.

7.2 They put pressure on the union during the last weeks of October regarding the matter.

7.3 In mid-November they were assured by Dokolwane that CTH were dealing with the matter.

7.4 By 7 February 2012 they wanted a status update and were questioning how they were being represented without any consultation with their attorney. This then led NUM to arrange same.

[8] Given the above, which reflects that the second to further applicants were the driving force behind getting this matter to court, I am of the view that the court should consider the merits of the review application.

[9] The second to further applicants were employed in various positions until they were dismissed for "gross negligence and disregard of the general health and safety rules of the company" following an underground mine accident at the first respondent's Rustenburg operation. The accident led to a fellow employee being permanently paralysed after 'a fall of ground' incident. At the arbitration the following issues were common cause:

9.1 There were substandard working conditions at the workplace on the day in question;

9.2 An Early Entry Examination (EEE) must be done before entering a workplace and all risks identified must be fixed, and declared safe before the crew is allowed to enter the workplace for their assigned work.

[10] The two issues in dispute at the arbitration were as follows:-

10.1 whether the applicants breach a rule i.e. whether a rule exists that the crew is not entitled to enter the workplace where substandard conditions are present (and before the area is declared safe) even if such entry was for the purpose of fixing the identified problems during the course of the EEE; and

10.2 whether the first respondent had been inconsistent in the application of discipline (because the night shift crew the safety officer and the mine overseer were not charged).

[11] The applicants submit that the arbitrator came to a decision that no reasonable decision-maker could reach on the following grounds:

11.1 First because the arbitrator failed to properly consider whether the mine had consistently applied discipline;

11.2 Secondly, because the arbitrator ignored the evidence presented to him of the long standing practice of the company that an early entry examination may be conducted by the entire shift before the safety declaration form is complete.

[12] A considerable portion of the Award deals with the Commissioner's understanding that the whole team should not be allowed to conduct the EEE and fix the hazards detected before they begin their normal duties. It was conceded by the company's witness in the proceedings that while best practice is for only a 5 person group to do the EEE, the number of people in the team may differ. In submission on behalf of the First Respondent, it was argued that even if the Commissioner was incorrect in finding that the applicants breached a rule (in that they all entered the workplace to conduct the EEE) this was not the sole basis for his finding that the entire team entered the area before it had been declared safe, and then disregarded the prescribed EEE process. The applicants were dismissed for gross

negligence and failure to follow safety rules. At best for the applicants, it iwas submitted the finding on the rule was wrong, but the outcome of the award cannot be considered outside of the bounds of reasonableness.

[13] The arbitrator found as follows regarding the failure to observe safety rules:

> "[28] I therefore agree with the incident investigation and findings of the Respondent's witnesses, that the Miner and team leader's actions were the main cause of the said injury to one of the employees and that it was indeed fortunate that no other employee was injured as a result of being subjected to these unsafe conditions. The actions of the Miner and Team Leader (Competent A Person) amounted to gross negligence and a total disregard of the general health and safety rules of the company.
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> [29] The next question is whether the other Applicants (employees) were also grossly negligent and disregarded the general health and safety rules of the company. The Respondent's case was that employees had a duty to refuse to work under unsafe conditions and furthermore had a duty to look out for the safety of the co-workers. They argued that by working under these unsafe conditions and by allowing the injured worker to work on his own, they neglected their duty and therefore disregarded the general safety rules of the company…..
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> [31] <u>The Applicants were allowed by their seniors (the Miner & Team Leader) to enter the unsafe working area and were instructed by them to assist with the early entry examination. No evidence was presented that they were also made aware of the fact that where were a huge problem with missing support, which made the area particularly unsafe.</u> There was also no evidence presented that the Applicant' persistently or continuously made themselves guilty of being negligent. I'm therefore of the opinion that although they at that stage could have foreseen the possibility of harm to them (and could have refused to enter the unsafe area), they did not grasp or understand the exact extent of the situation. As such I find that they have not made themselves guilty of gross negligence but do find that they were indeed negligent in the execution of their duties. (*my emphasis*)

[14] The next paragraph of the Award is key to the Commissioners finding in respect of the applicants (excluding their leaders) and relies heavily on his understanding that they should not have entered the workplace at all until it was declared safe:

> "[32] ……Evidence was led that that all employees were regularly trained on all the standards expected from them as well as on safety in the mine. While being aware of the necessary safety standards and procedures (particularly the early entry investigation procedure); the Applicants still entered the workplace on the 1st March 2011. They should have known that they may not enter any workplace until such time as the area was declared safe by the early entry investigation team. Once they became aware of the unsafe conditions they also had the right to leave the unsafe workplace. By entering (and remaining under the unsafe conditions) they had in fact disregarded the general health and safety rules of the company, thereby exposing themselves to a possible injury/death. I therefore find that they have also contravened a further rule by disregarding the general health and safety rules of the company."

[15] I must agree that the Commissioner's findings against this group are premised on his understanding that the whole crew was not permitted to participate in the EEE. However this is contrary to the evidence given by the company at the proceedings which the record reflects – essentially that while it may be best practice to choose a handful of employees, the whole crew may do the EEE on a working panel (ie working place they are assigned to) as happened in *casu*.

[16] The applicable regulation at issue in the arbitration proceedings was Regulation14.1 entitled: "Entering of working places" which reads in relevant part:

"**At every underground mine where a risk of rock bursts, rock falls or roof falls exists, and at every other mine where a significant risk of rock bursts, rock falls or roof falls exists, the employer-**

(1) may not permit any person, other than those persons examining and making safe, to enter any of the following areas at the mine until such areas are declared safe by competent persons:

(a) the area between the face and the nearest line of permanent support; and

(b) access ways, travelling ways or places where persons need to travel or work;

(2) must ensure that the examinations for purposes of regulation 14.1(1) are carried out as often as may be required, in terms of the mine's risk assessment, to maintain a safe working environment;

(3) must ensure that a record of declarations contemplated in regulations 14.1(1) and 14.1(5) is kept for a period of at least three months;

(4) must ensure that where areas contemplated in regulation 14.1(1) have not been examined, made and declared safe, persons are prevented from inadvertently entering such areas;

(5) must ensure, if at any time a working place or part thereof becomes unsafe during a shift, that all persons, other than those examining and making safe, are removed from such unsafe area and are not permitted to return thereto until declared safe by a competent person;

(6) must ensure that a quality, assurance system is in place, which ensures that the support units used at the mine provide the required performance characteristics for the loading conditions expected;

(7) must ensure that only competent persons install, maintain and remove any support unit;

(8) must ensure that the input of a competent person is properly and timeously considered and integrated into mine design, planning and operations.

No person, other than those persons examining and making safe, may enter any of the areas contemplated in regulation 14.1(1) until such areas have been declared safe as contemplated in regulations 14.1(1) and 14.1(5)…..”

[17] A proper reading of the above makes clear that the prohibition on entering the work place is in respect of persons not involved in the EEE process. Given that the Commissioner found that the applicants (other than their leaders) were instructed to assist with the EEE, and had no knowledge of the problem of the missing support, his finding that their dismissal was substantively fair is one that a reasonable decision maker could not make. The decision in respect to these applicants thus stands to be reviewed and set aside. I see no reason why the

primary remedy of reinstatement should not be the applicable remedy in the circumstances of this matter.

[18] In respect of their leaders, Petlele and Goja, it was accepted on submission on behalf of the applicants, that the Commissioner could reasonably have come to the decision that they acted grossly negligently and with disregard to the Company's health and safety rules, given the failings in the manner in which the EEE was conducted and the leading role these two employees played in the process. The attack on review against the decision to uphold their dismissals boils down to the allegation that the Commissioner ignored the consistency issue in that the Mine Safety Officer who accompanied Petlele during the course of the EEE was not disciplined.

[19] In ***Absa Bank Ltd v Naidu & others***[2] the LAC revisited the authorities on the parity principle and had this to say:

> [42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss."

[20] The Commissioner recorded that the Mine Safety Officer had not been present on that day to assist with the EEE but to do an audit and to inform staff of certain general safety information. He also states that the declaring of the area as safe was not the responsibility of that officer. In my view, and taking into consideration the jurisprudence of the LAC as set out above, the Commissioner considered the issue of parity and came to a decision in respect of Petlele and Goja that was well within the bounds of reasonableness.

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[2] (2015) 36 ILJ 602 (LAC)

[21] I see no purpose in remitting the award and consider it equitable that each party pay their own costs. In all the above circumstances, the review application has been partially successful and I make the following order:

<u>Order:</u>

1. The application for condonation is granted.

2. The award under case number NWRB1561-11 is set aside and substituted as follows:

   ‘2.1 The dismissal of Joaba Petlele and Zolele Goja was substantively fair.

   2.2 The dismissal of the remaining ten (10) applicants was substantively unfair.

   2.3 The first respondent is to reinstate the following applicants with no loss of benefits as of the date of their dismissal:

   a. Mr Siphumzie Ntlantlana

   b. Mr Maphuthi Bham

   c. Mr Tholang Thulo

   d. Mr Victor Mhlaba

   e. Mr Jongilindi Mbedle

   f. Mr Joseph Mohasisa

   g. Mr Festos Rikhotso

   h. Mr Aaron Mtshazi

   i. Mr Mgcineni Sipika

   j. Mr Kgosi Tabane.’

3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Adv C Orr

Instructed by: Cheadle Thompson & Haysom Attorneys

First Respondent: Mr D Masher of ENSAfrica