



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 725-15

Not Reportable

In the matter between:

SHANDUKA COAL (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION ("CCMA")

First Respondent

COMMISSIONER ABEL VENTER N.O

Second Respondent

THE NATONAL UNION OF MINEWORKERS ("NUM")

Third Respondent

N GAMA

Fourth Respondent

F KHUMALO

Fifth Respondent

P KHUMALO

Sixth Respondent

S NETSHIAVHA

Seventh Respondent

Heard: 24 August 2017

Delivered: 30 January 2018

JUDGMENT

WHITCHER, J:

Introduction

- [1] The applicant seeks to have reviewed and set aside Commissioner Venter's award that the dismissal of the fourth to seventh respondents ("the employees") was substantively fair and the applicant must re-employ them with effect from 1 April 2015.

Evidence led at the arbitration

- [2] The employees were charged as follows:

"Non-adherence to safety rules, or procedure in that on 12 November 2014, you offloaded coal from C2 conveyor belt, no risk assessment, no lock-out was done before commencement of the work and no permit to work heights was granted, as well as failure to put on safety harness"..

- [3] The charges were preferred in accordance with clause 4.1.7 of the internal disciplinary code which stipulates that any *"failure to wear protective clothing or to use safety equipment or non-adherence to safety rules or procedures"* attracts a sanction of dismissal even for the first offence.
- [4] Following disciplinary enquiries, the employees were found guilty of the charge and dismissed on 5 December 2014.
- [5] The applicant, *via* its Mine Safety Superintendent, M Allen and its Safety Officer, Helen Malindisa, led evidence to the effect that when employees are required to work on conveyor belts, they are required to undertake, *inter alia*, the following:

- (i) Carry out a risk assessment on the work to be done. The risk assessment is to be in the possession of the employees working on the conveyor belt at all times.
- (ii) The employees are then to lock out the conveyor belt by placing their locks in a designated area and recording the correct information on the lockout tags.
- (iii) Ensure the field isolator is turned into the *off* position.
- (iv) Wear safety harnesses when working at heights.

[6] It was common cause that each of the employees was well aware of the rules and trained on the Mine's health safety procedures, including those working on conveyor belts. It was also common cause that the issue of health and safety is of paramount importance in the Mine pursuant to the stringent prescripts of the MHSA.

[7] Evidence was led that, on 12 November 2014, between 3 and 3.30pm, the employees were observed by the Mine's Safety Officer, Helen Malindisa, committing breaches of the abovementioned safety procedures whilst offloading coal and working on the C2 conveyer belt.

[8] Her first observation was that the employees were working without safety harnesses in an area which required them to utilise safety harnesses. When she approached the work site, they jumped off the conveyor belt. She told them to stop working and "follow procedure".

[9] She went to report the matter to the plant supervisor. When she did not find him in his office, she returned to the site. On her return she observed that F Khumalo was again on the conveyor belt, so she photographed the scene.

[10] She observed further breaches by the employees, which she also photographed. They had not properly locked out the conveyor belt and recorded the correct information on the lockout tags. They had further failed to ensure that the field isolator had been turned into the "off position" whilst they worked.

- [11] She confronted the foreman on site, Netshiavha regarding the breaches and asked to see the risk assessment.
- [12] Netshiavha told her that the risk assessment was with Mr Mavimbela, the team leader. She did not believe that a risk assessment had been done because he could not produce it on site, so she asked him to radio the team leader to bring the risk assessment.
- [13] He told her the store was closed and he had been unable to get safety harnesses.
- [14] She asked him why “they” had not locked out, but he did not respond. She then asked the employees for their lock and tags. They were unable to produce same.
- [15] While she was inspecting the lockout breaches, Netshiavha, without any explanation, got into his bakkie and drove away.
- [16] She immediately reported the matter to the Health and Safety Superintendent, M Allan and drafted a report the following morning.
- [17] M Allan, the superintendent testified, *inter alia*, that safety harnesses are obtainable in various departments on site. The applicant had consistently dismissed employees who had been found guilty of similar offences because safety was a huge issue within the Mine. The seriousness of the employees conduct and the importance of following safety rules was borne out by the fact that two days prior to the completion of the arbitration proceedings, a sister operation of the Mine had experienced a fatality as a result of an incident involving unsafe working procedures on a conveyor belt.
- [18] Netshiavha testified on behalf of the employees as follows. He stated, *inter alia*, that:
- (i) The employees were conducting work of a dangerous nature.
 - (ii) He was aware of the rules and safety precautions (described earlier on)

- (iii) In this particular case, however, he claimed that the isolator had been locked out.
- (iv) He confirmed that the multilock had not been used on the day of the incident.
- (v) He disputed that all five employees were required to place their locks on the multilock. He conceded that when Malindisa inspected the area, the field isolator had not been locked out.
- (vi) He disputed that he had been trained to work at heights despite carrying a legal appointment.
- (vii) A risk assessment was done by F Khumalo. He left the work site to fetch it from the team leader. However, when he returned, Malindisa had already left the work site.
- (viii) The purpose of safety officers is to “nail employees” so Malindisa should not be viewed as an objective and credible witnesses.
- (ix) The photos must have been taken on another day, because they were not properly dated.
- (x) He was working under pressure on the day in question. There was a shortage of coal and the conveyor belt kept tripping.

[19] The applicant failed to bring this to my attention, but I note from the record that an internal appeal process dismissed the charges against fourth, fifth and sixth respondents in respect of the failure to use safety harnesses; ostensibly on the basis that they had asked for, but Netshiavha had failed to supply them, with safety harnesses. I did not find a similar finding in respect of Netshiavha.

The award

[20] The Commissioner found that the dismissal of the employees was substantively unfair and ordered the Mine re-employ them with effect from 1 April 2015. The extent of his reasoning is as follows:

On a balance of probabilities the version of the union is accepted.

Reasons:

The [employees] should have been charged as per Section 4.1.1 of the code: ... "Failure to comply with safety measures or engaging in any act which endangers or may endanger the safety of fellow employees"

The Foreman was under pressure with the coal burning and the belt tripping. He had a plant attendant at the switch to assist when they were trying to fix the line.

A short cut was used by the Foreman not to properly lock out the system but a dismissal of the whole team was not appropriate in these circumstances. A final written warning should have been considered as per section 4.1.1.

As the hands of the [employees] were not clean, re-instatement was not considered.

- [21] The Commissioner, in effect, found that the employees had not complied with the standard lockout procedures, but there was a justifiable basis thereto so the employees should have been issued with final warnings.
- [22] His view that the employees should have been tried under section 4.1.1 was really to accommodate his primary view - that dismissal was not appropriate in the circumstances of this case. Clause 4.1.1 provided for a sanction less than dismissal, namely a final written warning.
- [23] In arriving at his findings, the Commissioner failed to take into account a number of material rules and facts.
- [24] His function was to determine whether the employees are guilty as charge – not to decide which charge would have been more appropriate.
- [25] It was never disputed with the applicant's witnesses that there was a justifiable basis to avoid complying with the applicant's lockout procedures, despite the fact that it was obvious from their testimony that they were in a

position to be cross-examined on and to provide a response to Netshiavha's claim. Both of the applicant's witnesses testified on the technicalities of lockout procedures, working on conveyor belts and safety procedures.

[26] Netshiavha did not claim and prove that he was authorised to make such judgment calls. As submitted by the applicant, once an employee encounters a particular situation, it is not upon him to unilaterally change the rules.

[27] There was no evidence from the other employees as to why *they* had not complied with the lockout and isolator procedures. There was no evidence to the effect that they were only acting under the instruction of Netshiavha, and, for some reason, were obliged to comply with his instructions.

[28] A perusal of the risk assessment [which the employees claim was prepared prior to them commencing the job], makes it clear that the employees on their own account were acutely aware that they were about to embark on a dangerous job and that they had to use correct equipment] and safety measures. In this regard they wrote the following in the section which asked them to list measures to deal with the risks associated with the dangerous task they were about to commence: "Use the right equipment. Spider hands. Use correct PPS. Always use critical safety equipment. Lock out. Always apply lifesaving behaviours".

[29] Malindisa pertinently testified that when she approached the work site the employees jumped off the conveyor belt, thus suggesting that they were aware that they were not complying with the safety rules. They failed to dispute and/or explain their suspicious behaviour.

[30] She further testified that she told them to stop working and comply with the correct procedures, but when she returned she again found F Khumalo again on the conveyor belt, and they had still not complied with the procedures.

[31] Malindisa further testified that, in terms of the rules, a risk assessment must be completed before work commences and the assessment must be on hand at the site. The latter rule makes sense, because the assessment contains what procedures should be followed in a particular job. Although Netshiavha

claimed that a risk assessment was done, he never disputed that it must be kept on hand at the site. It is common cause that there was no risk assessment at hand on site.

[32] If the Commissioner had applied his mind to the above factors, he would have been constrained to find that:

- (i) the employees were proven guilty of a *“failure ... to use safety equipment or non-adherence to safety rules or procedures”*. In particular they were proven guilty of being in direct breach of the safety rules regarding the lockout systems, isolator and having no risk assessment at hand.
- (ii) there was no proof of a justifiable excuse for breaching same or proof that the employees were authorised to make such judgment calls.
- (iii) Netshiavha had provided no justifiable excuse for not providing safety harnesses. Allan’s evidence that safety harnesses were available at the time of the incident was not disputed.
- (iv) there was no reason to deviate from the disciplinary code which prescribes dismissal for the above offences, considering the purpose behind the rules, the fact that evidence was led on the potentially disastrous consequences that this type of misconduct could have on the lives of the Mine’s employees and the fact that other employees had been dismissed for similar offences.

[33] In the premises, the Commissioner’s conclusion on the guilt of the employees and the sanction was unreasonable – that is, it represented a decision so unfounded on the material before him that no reasonable decision-maker could have reached such a decision in the circumstances of this case.

[34] There is one final matter. I mention it for the sake of completeness because it does not impact on the above findings. It was common cause that the employees produced a risk assessment at their disciplinary hearings and claimed it had been prepared at 3.10 pm on the day in question. I agree with

the respondents that the fact that they only produced it at the disciplinary enquiry is not a sufficient basis for a finding that they did not complete it before they commenced their work on the day in question. The applicant's point in this regard is therefore rejected.

Order:

[35] In the premises, the following order is made:

1. The arbitration award issued by the second respondent is aside on review and substituted with an award that the dismissal of the individual employees was substantively fair.
2. There is no order as to costs.

B. Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Mervyn Taback Inc

For the Respondents:

Mr Makoti

Instructed by:

Mothobi Attorneys

LABOUR COURT