



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR1288/12

In the matter between:

EXXARO COAL MPUMALANGA (PTY) LTD MATLA COAL

Applicant

And

NUM obo STIGLING & ANOTHER

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER LESLIE NTULI N.O

Third Respondent

Heard: 18 July 2018

Delivered: 15 August 2018

Summary: Review application – award not one that another reasonable decision maker could reach based on evidence – award reviewed and set aside

JUDGMENT

BESTER, AJIntroduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (the LRA), to review and set aside an arbitration award (“the award”) made by the third respondent (the commissioner) under the auspices of the second respondent (the Commission for Conciliation Mediation and Arbitration (CCMA)) under case number MP6727-11 on 15 April 2012. In the award the commissioner held that the dismissal of the members of the first respondent (the employees) by the applicant was substantially unfair. The commissioner reinstated the employees with limited retrospective effect. The procedural fairness of the dismissal was not challenged.
- [2] The applicant seeks that the commissioner’s award be replaced with an order that the employees’ dismissal was fair.
- [3] The employees were dismissed by the applicant following a disciplinary enquiry during which they were found guilty of misconduct. The misconduct entailed the employees’ failure to adhere to safety procedures which resulted in an accident at the workplace of the applicant, a mining company which operates in a high risk environment and is subject to strict compliance with safety legislation, - policies and - procedures. The incident occurred whilst the employees were performing maintenance on a machine known as a continuous miner.
- [4] It is common cause that:
- 4.1 Ms Stigling was employed by the applicant as an Electrician;
- 4.2 Ms Sibanyoni was employed by the applicant as a Technician;

¹ 66 of 1995, as amended.

4.3 The applicant had a rule in place regarding the electrical isolation and lock-out of machinery prior to any work being conducted on such machinery;

4.4 The employees had knowledge of the rule;

4.5 The machinery was not locked when work commenced on the machine.

[5] The employees' case before the commissioner was that:-

5.1 They had only theoretical knowledge of the rule and no practical training;

5.2 The applicant acted inconsistently;

5.3 The sanction of dismissal was too harsh.

[6] The union contended that the employees received no practical training on the machines and were not given communication tools or a radio at the time of the incident.

[7] The union further contended that the applicant acted inconsistently because a driver (Mr. E Ngina), who was involved in a similar incident, had not been charged with misconduct. In addition, another employee (Mr. J Makula), who was present at the time of the accident, had the padlock but did not lock out the machine however was not dismissed for misconduct.

[8] The union lastly contended that the sanction of dismissal was too harsh. The union confirms that these were the issues which the commissioner was called upon to decide.

[9] In his award, the Commissioner held that the sanction of dismissal was too harsh in the circumstances. In coming to this conclusion, he:

9.1 Relied on the content of an internal investigation report relating to training received by the employees and based on this report found that the employees received no practical training and that no proof of practical training was presented to the team that produced the investigation report;

9.2 Held that the applicant did not lead evidence in rebuttal of the inconsistency challenge;

9.3 Held that the applicant failed to adequately address him on why dismissal was the appropriate sanction for violation of company rules, regulations and procedures in circumstances where the disciplinary code provides for a final written warning,

9.4 Held that the applicant did not establish gross negligence on the part of Lucia Sibanyoni,

9.5 Held that the applicant failed to present evidence that the trust relationship between the applicant and the employees had broken down.

[10] The applicant contends that the Commissioner committed a gross irregularity by failing to have proper regard to common cause facts and evidence led by the applicant at the arbitration which, if had considered such evidence, would have resulted in him coming to a different conclusion and finding that the employees was fairly dismissed.

[11] The facts and evidence in relation to practical training are as follows:

11.1 The common cause fact that the Employees had knowledge of the rule that machinery must be locked out and electrically isolated before being worked on and was fully trained on the existence of the rule.

11.2 The evidence of Mr. Greyvenstein that:

11.2.1 Ms. Stigling received on the job training on the lock-out procedure, was qualified and declared competent;

11.2.2 Only qualified and competent persons who are artisans and electricians by trade could do electrical isolation.

11.3 The evidence of Mr Van Jaarsveld that:

11.3.1 Ms. Sibanyoni is a qualified artisan trained to do work on the continuous miner and had worked on this machine long before she joined his department;

11.3.2 The duty to isolate machines was that of the electrical technician and/or the conditioning monitoring artisan. Ms Sibanyoni was the conditioning monitoring artisan on the day of the incident and would have been responsible for the isolation of the machine;

11.3.3 Ms. Sibanyoni attended and required an induction program for which she received 98%. She also received practical training on the job and various on-site training courses as well as some courses outside the mine;

11.3.4 he had personally provided her with training underground to show her how the machine works and she had worked in the central department where the machines were assembled;

11.3.5 Ms. Sibanyoni received and signed for receipt of the relevant Engineering procedures.

11.4 The evidence of Mr. Roberts that:

11.4.1 He issued Ms. Stigling with her competency certificate which indicates that she was conversant with the lock-out procedure and which certificate Ms. Stigling has signed;

11.4.2 A competency certificate is only issued when it has been ascertained that the person it is issued to is a qualified artisan and, for the lock out procedure, a competent person means a person who is a qualified artisan who has been trained to work on the equipment he/she is required to maintain.

11.5 The employees' own evidence:

11.5.1 Ms. Sibanyoni confirmed that she had previously performed a lock-out procedure on the continuous miner during vibration testing and oil sampling;

11.5.2 Ms. Stigling testified expressly that she knew how to conduct a lock-out procedure;

[12] The facts and evidence in relation to inconsistency are as follows:

12.1 The evidence that Mr. Makola was disciplined for his role in the matter in that he received a final warning;

12.2 Mr. Van Jaarsveld's evidence that:

12.2.1 Mr. Makola was in the role of an assistant for Ms. Sibanyoni on the day and that he did not carry the direct responsibility for the lock-out procedure as was the case with the employees;

12.2.2 Mr. Makola was only responsible to lock out the machine when he was changing oil samples, which Ms. Stiglingh confirmed that he did;

12.2.3 Mr. Makola was still new in the department and the Presiding Officer of his disciplinary enquiry believed he was "*a victim of the situation*".

12.3 Mr. Mgcina evidence that:

12.3.1 The evidence that Mr. Mgcina had no involvement in the incident that led to another employee's dismissal in similar circumstances and was therefore not charged.

12.4 The evidence that other employees in other incidents have been dismissed for similar misconduct in similar circumstances.

[13] The facts and evidence in relation to the trust relationship are as follows:

- 13.1 the evidence of Mr. Van Jaarsveld that he does “*not know how he can trust*” and that he regards dismissal as the appropriate sanction to be fair and consistent with previous incidents.

Evaluation

- [14] I am of the view that the evidence set out hereinabove is material and should have been given due consideration, more so in light of the specific issues that the commissioner had to decide. It is clear from the arbitration award that the commissioner did not apply his mind to the said evidence and in fact apparently completely disregarded same. The commissioner’s failure hereto constitutes a gross irregularity which resulted in a finding that is unreasonable and not one that another reasonable decision maker would make.
- [15] Had the commissioner applied his mind properly to the evidence presented by the applicant, he would have held that the employees knew that they had to lock-out the machine and that they knew how to do it. Even if they were not trained, they knew how to lock-out and conceded to having done it before. In those circumstances, it becomes irrelevant whether they received practical training or not, however, it is clear from the applicant’s evidence that they did indeed receive such training.
- [16] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*², Van Niekerk J, held that inconsistency claims, more particularly within the context of similarity of circumstances will fail where the employer is able to differentiate between employees who committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of any other material factor. The applicant in this matter gave a sound explanation for the alleged inconsistencies which were challenged by the employees.

² [2009] 11 BLLR 1128 (LC).

- [17] The commissioner questioned the fact that the applicant did not address him adequately in respect of the applicant's disciplinary code which provides for a final warning and not dismissal in respect of non-compliance with company rules and procedures. It is clear that non-compliance covers a range of rules and procedures and that transgression will not be equally serious in all cases.
- [18] It is clear from the evidence of the applicant that safety and adherence to safety procedures are a huge priority for the applicant and that non-compliance with such measures are regarded as extremely serious. The applicant gave evidence that non-compliance with safety measures in the past has resulted in dismissal.
- [19] An arbitrator is required to determine whether the sanction imposed by the employer is fair and not to impose a sanction afresh. In *African Bank v Magashima and Others*³ Tlhotlhemaje AJ (as he then was), held that:

"In determining whether an employer had acted fairly in dismissing an employee, an arbitrator should also consider the factors outlined in *Sidumo*⁴. Other than these factors, where an employee claims inconsistency, further factors inclusive of those outlined in *Sidumo* to be considered include the following:

- a) The circumstances surrounding the act of misconduct committed by individual employees;
- b) The personal circumstances of the employees, including their length of service, and the employees' disciplinary records;
- c) The positions they occupied at the time of the commission of the misconduct, the nature of the duties they performed and hierarchy within the organisation;

³ [2014] ZALCJHB 298 at para 24.

⁴ 2008 (2) SA 24 (CC) at Paras 78 – 79. These include the totality of the circumstances of the matter; whether what the employer did was fair; the importance of the rule that the employee breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; 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 the long service record of the employee.

- d) The severity of the misconduct or its impact on the employer and its operations;
- e) The consequences of the misconduct vis-à-vis the sustainability of the employment relationship between the employer and the employee, and also as between co-employees;
- f) Whether the employees have shown genuine contrition. Genuine contrition implies that an employee owned up to the misconduct as soon as it took place, and showed remorse from that moment. This should be distinguished from the charade of showing remorse at disciplinary proceedings, purely for the purposes of pleading in mitigation of sanction.”

[20] It is evident that the arbitrator failed to appreciate the nature and importance of the rule that the employees did not comply with; the potential consequences of non-adherence to the rule; the fact that the employees were well aware of the rule and had elected not to comply with it, the nature of the employees’ duties as well as the fact that the employees did not show any contrition but instead defended their conduct by claiming that they did not receive practical training.

[21] Taken into account all of the circumstances in this matter the commissioner’s award is not one that a reasonable decision maker could have reached based on the evidence before him and therefore should be set aside.

[22] In the premises the following order is made:

Order

1. The arbitration award is set aside and substituted with an order that the dismissal of the employees was substantively fair;
2. There is no order as to costs.

E Bester

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the applicant: Mr. M.G Maeso from Shepstone and Wylie Attorneys

For the respondent: Adv. S.M. Malatji

Instructed by: M.S. Molebaloa Inc.

LABOUR COURT