THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR444/2017

In the matter between:

ADWIN ADRIAAN BEYERS **Applicant**

and

ANGLO AMERICAN PLATINUM LTD
MOGALAKWENA SECTION **First Respondent**

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION **Second Respondent**

IRENE TSHIFHIWA NYATHELA *N.O* **Third Respondent**

Heard: **4 September 2019**

Delivered: **11 October 2019**

Summary: Review of the disciplinary sanction by employer – not codified but supported by practice – when there are no exceptional circumstances, the employer is bound by the election to issue a final written warning – the *volte face* was patently unjust to the employee – objection sustained – dismissal substantively unfair.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an application in terms of section 145(1) of the Labour Relations Act[1] (LRA) by the applicant, Mr Edwin Andriaan Beyers (Mr Beyers), to review and set aside the arbitration award dated 9 February 2017 with case number LP6075-16, issued under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The third respondent (commissioner) found that the dismissal of Mr Beyers was both procedurally and substantively fair.

[2] The first respondent, Anglo American Platinum Limited: Mogalakwena Section (Anglo American) is the only respondent opposing the application.

Background facts

[3] Mr Beyers was employed by Anglo American on 1 June 2015 as an Electrical Foreman at its Mogalakwena Business Area. On 21 April 2017, Mr Beyers was served with a suspension letter pending an investigation into an alleged breach of the Isolation and Lockout Operational Procedure (lock-out procedure) which provides:

> 'All equipment associated with that machine must be locked out:
>
> - The tandem conveyor drive-both drives must be locked out as well as the electrical counterweight must be lowered into the position to remove stored energy.

[1] Act 66 of 1995, as Amended. Section 145(1) of the LRA provides:
'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award─

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20, or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.'

- Crushers-all conveyors feeding in ore as well as auxiliaries' associated with the crusher must be locked out.
- It is important that equipment is isolated and locked out in order to prevent personnel from starting such equipment while it being worked on.
- It is the responsibility of each person that works on equipment to do his lockout.
- No person will work under someone else's lockout.'

[4] Mr Le Roux Esterhuyse (Mr Esterhuyse), Anglo American's Section Engineer for the Dry Section and Mr Beyers' immediate supervisor, made a statement of compliant, stating:

> 'I, Le Roux Esterhuyse, Sectional Engineer for the Dry Section at Mogalakwena North Concentrator hereby declare the following:
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> On Wednesday, 20 April 2016 at approximately 11:00 I had been informed about the potential lock-out violation at the 102-CV-01 conveyer belt.
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> Upon investigation, I determined that the Electrical Foreman for the Dry Section, Mr Edwin Beyers, had commenced work, removing bolts on the conveyer belt drive motor guard, without him physically applying lock-out or signing the lock-out register.
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> Mr Peet Slippers has at the time of the incident correctly applied his lock-out log and signed the register.
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> Mr Tommie Pienaar was also observed having signed on behalf of Mr Edwin Beyers the lock-out register and applying a lock-out on behalf of Beyers. The lock-out and isolation for Mr Tommie Pienaar was correctly done at the time that this incident was reported to me.
>
> I hereby wish to proceed with the disciplinary action against Mr Edwin Beyers on a charge of "Failure to comply with code of good practice" related to lock-out and Isolation COP and procedure.'

[5] On 3 May 2016, Mr Beyer was served with a notice to attend a disciplinary enquiry on a charge of 'failure to comply with the Code of Good Practice'. On 10 May 2016, the disciplinary enquiry sat under the chairpersonship of Mr Ferreira. Mr Beyers entered a plea of guilty. Mr Ferreira allowed the parties to address him in mitigation and aggravation of the sanction.

[6] Mr Esterhuyse, the complainant and Anglo American's representative, presented a written submission stating:

> 'After my investigation I found that the workplace was safe and no one was ever put in harms' way. This was a breach in procedure only. This is also the first offence of Mr Edwin Beyers and the relationship is still healthy.'

[7] Mr Ferreira consulted with Mr R Hlokwe (Mr Hlokwe), the Employee Relations Manager, regarding the appropriate sanction and subsequently rendered the following outcome in writing:

> 'The following sanction will apply to the code in question based on the following information gathered during the cause charged: "Failure to comply with code of good practice".
>
> 1. The complainant is of the view that the action did not endanger any personnel working with Mr Beyers.
>
> 2. Mr Beyers admitted guilt and gave evidence as per one (1) above.
>
> 3. Mr Beyers has a clearer record.
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> The chairperson is, however, of the opinion that this is a serious offence and in light of the above the appropriate sanction, after consultation with the ER Manager, is a Final Written Warning with none additional sanctions.
>
> 1. The accused have to be re-trained on the Lock-out Procedure before commencing duty.
>
> 2. The accused shall for as long as the sanction is valid on a daily basis do planned Task Observations on his sub-ordinates on the safe application of lock-outs as per procedure.'

[8] Subsequently, Mr Beyers was sent for re-training as per the outcome of the disciplinary enquiry and accordingly reported for duty.

[9] According to Mr Hlokwe, the National Union of Mineworkers (NUM) lodged a complaint regarding Mr Beyers' final written warning, accusing Anglo American of inconsistent application of discipline as its members who had

been found guilty of the same transgression in the past were dismissed. Consequently, Anglo American resolved to review the chairperson's verdict.

[10] On 23 May 2016, Mr Beyers was served with a letter suspending him with immediate effect pending the outcome of the review enquiry on a charge of failure to comply with the Code of Good Practice.

[11] Mr Hlokwe drafted the terms of reference for the review committee that was appointed to review the sanction imposed by the chairperson of the disciplinary enquiry on 10 May 2016 and the objective thereof being to:

> '…conduct a review of the hearing in order to determine the appropriateness of the outcome which emanates from such disciplinary hearing in terms of which the chairperson of the disciplinary hearing arrived at an unacceptable decision of final written warning on a serious safety transgression.'

[12] The review enquiry was held on 3 June 2016. At the end of the sitting, the review committee requested Mr Hlokwe to provide it with the following information: The valid lock-out tags; Mr Esterhuyse's investigation outcome; and the past similar decided cases either within Mogalakwena or elsewhere in the group.

[13] It is not clear whether the above information was ever provided as requested. Nonetheless, on 9 June 2016, the review committee presented a written outcome which concluded as follows:

> 'Based on the points above and the Behavioural Code of the Company, it is the recommendation from the review of the disciplinary hearing that the sanction imposed on the Employee be amended from "Final Written Warning" to "Dismissal".'

[14] Mr Beyers was summarily dismissed on 10 June 2016. He was earning a gross salary of R57 257.97 at that time. As a result, Mr Beyers challenged the fairness of his dismissal. He referred an unfair dismissal dispute to the CCMA for conciliation and later arbitration.

Review test

[15] The review test is comprehensively spelt out in *Sidumo and Another v Rustenburg Platinum Mines*[2] and subsequently expounded in various *dicta* of both the Supreme Court of Appeal (SCA) and the Labour Appal Court (LAC).[3] Pertinently, in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,*[4] where the LAC underscored the fact that:

> '[15] …the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.
>
> [16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court *in Head of the Department of Education v Jonas Mohale Mofokeng and Others*, 'for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the inquiry or undertake the inquiry in a misconceived manner', as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:
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> > 'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of

[2] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.
[3] See: *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).
[4] 2014] ZALAC 81; [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at paras 15 to 16.

> material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.' (Emphasis added)

Arbitration proceedings

[16] The issues that the commissioner had to decide can be summarised as follows:

16.1 Whether the employer was allowed to review its own disciplinary sanctions;

16.2 Whether the review enquiry was fair as Mr Beyers was not allowed an opportunity to cross examine the witnesses of Anglo American;

16.3 Whether the rule was consistently applied as Mr Pienaar was not dismissed; and

16.4 Whether the sanction of dismissal was appropriate in the circumstances of this matter.

[17] The commissioner found that the dismissal of Mr Beyers was both procedurally and substantively fair. As a result, the commissioner's findings in relation to the above issues are Mr Beyers' grounds of review. Primarily, his impugned is that the commissioner failed to apply her mind to the evidence that was before her, misconceived the enquiry and arrived at an unreasonable outcome.

Was the practice established?

[18] It is common cause that the Disciplinary Code did not confer Anglo American with powers to review a chairperson's decision. Therefore, the onus was on

Anglo American to prove, on balance of probabilities, that it was entitled to review its own sanction. In this regard, Mr Hlokwe testified that it was Anglo American's practice to review the sanctions imposed by disciplinary enquiry chairpersons. Anglo American handed up the documentary evidence to show that the practice did indeed exist. However, the said documentation went up to 2010.

[19] In 2011, Anglo American amended the Disciplinary Code but did not codify the practice. Mr Hlokwe referred to two previous review cases which were conducted after the adoption of the Disciplinary Code but did not provide copies of the said cases.

[20] The Commissioner concluded that Anglo American was entitled to review its own sanction based on evidence of Mr Hlokwe. She stated:

> '5.2.3 Mr Hlokwe referred to previous review cases which were conducted at the workplace although the misconduct committed were different from the misconduct committed in the current case and the fact that the review process can be initiated by any of the parties. He also referred to an arbitration award wherein Commissioner P Kekana under case no: GAJB34949 dated 1 September 2011 involving the same employer wherein he found at paragraph 39 that the "The practice was fair because it could be initiated by both parties. Evidence before me is that some decisions favoured the employer and employees…" Mr Hlokwe also referred to two recent review cases which were conducted after the adoption of the disciplinary code but had not attached copies of those cases in his bundle of documents. The employee argued that the employer is not entitled to review its own sanction as that has not been provided for by the disciplinary procedure, but the employer in this case was able to show an established practice of review of disciplinary sanctions and therefore I find that the employer was entitled to review its own sanction.
>
> 5.2.4 Furthermore, there was no evidence that at some point the employer's practice to review disciplinary sanction was dealt away with save to argue that since 2010 the employer did not review any case. The employer, on the other hand, testified about two cases which were

> reviewed recently but did not have copies of the said cases. I am of the view that the fact that the employer has not brought copies of the recent two cases does not mean that it has abandoned the review process. I am satisfied that the employer has on the balance of probabilities shown that that the employer has an established practice to review its own disciplinary sanctions in case the sanction is not in line with the disciplinary code and procedure.'

[21] In these proceedings, Mr Goosen who appeared for Mr Beyers submitted that Anglo American failed to provide an explanation for relying on documentary proof to show that the practice existed until 2010 but failed to provide any similar documentary proof for the period post 2010. Therefore, the commissioner unreasonably accepted the secondary evidence with reference to two other cases which were reviewed post 2010 in the absence of any documentary proof of the said cases and in circumstances where the alleged practice was specifically challenged, so his submission went further.

[22] On the other hand, Mr Nhlapho, who appeared for Anglo American, submitted that the commissioner correctly accepted the evidence of Mr Hlokwe and found that Anglo American had an established practice to review its own disciplinary sanctions.

[23] It is clear from the award that the commissioner had due regard to the award issued by commissioner Kekana in 2011 which confirmed the existence of the review practice by Anglo American and the fairness thereof. Also, Mr Hlokwe's evidence that there were two other instances that took place post 2010 where he was personally involved was not seriously challenged. As such, the failure to produce documentary proof of those instances is inconsequential. In my view, the finding by the commissioner that the practice of reviewing disciplinary sanctions was well established and had never been renounced is unassailable.

Was the review enquiry fair or justified by exceptional circumstances?

[24] The other ground of review is that the commissioner unreasonably failed to determine whether the review of the chairperson by Anglo American was, in

all circumstances, fair. It was submitted that such failure rendered the ultimate decision that Anglo American was entitled to review Mr Beyers' sanction unreasonable.

[25] The essence of Mr Beyers impugn in this regard was that he had not been afforded an opportunity to cross examine the witnesses of Anglo American. Mr Hlokwe was, however, clear in his evidence during cross-examination that there was no evidence led during the review enquiry but parties presented their oral submissions in relation to the appropriateness of the sanction. As such, there was no need for any cross-examination. Therefore, there is no merit in this ground.

[26] However, Mr Goosen dealt with Mr Beyers' broad argument by contending that given the circumstances that led to the review enquiry, it follows, therefore, that once the senior management had decided that Mr Beyers ought to have been dismissed, consequent to NUM's compliant, his fate was sealed. The whole process was designed and executed to ensure that Mr Beyers was in fact dismissed, so he further submitted. The essence of these submissions is that there were no exceptional circumstances to justify the review enquiry.

[27] In *Samson v Commission for Conciliation, Mediation and Arbitration and Others,*[5] this Court, as per Van Niekerk J, stated:

> '[12] …the law as it presently stands is that an employer is entitled, when it is fair to do so (subject to the qualification that it is only in exceptional circumstances that it will be fair) to revisit a penalty already imposed and substitute it with a more severe sanction.' (Emphasis added)

[28] The dictum in *Samson*[6] encapsulates the principles set out in *BMW (South Africa) (Pty) Ltd v Van der* Walt,[7] which was referred to with approval in

[5] (2010) 31 ILJ 170 (LC); [2009] 11 BLLR 1119 (LC) at para 11.
[6] Ibid.
[7] [2000] 2 BLLR 121 (LAC) at para 12.

Country Fair Foods (Pty) Ltd v The Commission for Conciliation, Mediation and Arbitration *and Others*,[8] where it was stated:

> '[22] In *BMW SA (Pty) Ltd v Van der Walt* (2001) 21 *ILJ* 113 (LAC) Conradie JA cautioned against the importation of the principles of *autrefois acquit* into labour law. He then made two cautionary remarks:
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> > "It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code (*Strydom v Usko Ltd* [1997] 3 BLLR 343 (CCMA) at 350F–G). That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances" (at paragraph 12).
>
> [23] In the present case appellant acted without recourse to the express provision of its disciplinary code and on the basis of no precedent. Second respondent decided that the evidence put up by appellant did not justify interference with the Kemp enquiry. In my view, there is no basis for concluding that the decision of second respondent was unjustifiable, in terms of the evidence which was presented at the arbitration hearing.'[9]

[29] Turning to the present case, even though Anglo American acted in terms of an estabilised practice, it was incumbent upon it to prove the exeptional cricmustances that justified its decision to review and change Mr Beyers' final written warning.

[30] Anglo American sought to rely on inconsistency in the application of discipline as a *bona fide* reason for its intervention. However, it failed to adduce proof that the sanction of final written warning was, in the circumstances of the present case, inconsistent with sanctions issued on similar circumstances in

[8] (2003) 24 ILJ 355 (LAC) at paras 22 to 23.

[9] See also: *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (Kruger) [2016] 3 BLLR 297 ([2015] ZALAC 52; (2016) 37 ILJ 655) (LAC)* at para 31. Even though this decision was reversed at appeal, the Constitutional Court only pronounced on the appropriateness of reinstatement as a remedy in the light of the seriousness of the transgression and the fact that circumstances surrounding the dismissal were such that a continued employment relationship would have been intolerable.

the past. This is so despite being specifically placed in dispute that similar cases in the past necessarily resulted in dismissal.

[31] On the contrary, Anglo American's case during the arbitration was that the transgression was serious enough to justify the review of the sanction of a final written warning and substitution with a sanction of dismissal. No new evidence was placed before the commissioner in this regard, at least to justify the drastic intervention. Particularly, since Mr Ferreira had duly addressed himself on distinctive circumstances of this case. Whilst being alive to the seriousness of the transgression, Mr Ferreira took into consideration, *inter alia*, the remorse showed by Mr Beyers; and the submission by Mr Esterhuyse that the transgression was only procedural, no one was put in danger and that the relationship was still intact. Notwithstanding, Mr Ferreira exercised caution by going an extra mile and sought advised from Mr Hlokwe on the appropriateness of the sanction which he, Mr Hlokwe, duly endorsed.

[32] Mr Hlokwe did not dispute the fact that he had sanctioned the final written warning even though he sought to blame it on some confusion on the seriousness of the transgression at that time. Nonetheless, he could not dispute Mr Ferreira's which addressed the seriousness of the offence and the mitigating circumstances adequately.

[33] Also, Mr Beyers' evidence that Mr Pienaar did perform the lock-out for him and gave him his key back was not disputed. Conversely, Mr Esterhuyse conceded during cross-examination that the transgression would amount to a procedural breach in relation to failure by Mr Beyers to sign the register if Mr Beyers did, indeed, perform a lock-out using his own key. Mr Esterhuyse also conceded that the allegations recorded in his statement of complaint dated 26 April 2016, six days after the incident, corroborate Mr Beyers version of events that indeed his lock-out was attended to by Mr Pienaar but he, Mr Beyers, did not sign the register. Therefore, it is clear that Mr Esterhuyse was disingenuous in his evidence in chief when he testified that the statement he submitted in mitigation of the sanction was made in error.

[34] In the absence of exceptional circumstances to justify the review enquiry, it is my view that such conduct is impermissible in terms of the doctrine of the right of election which is fundamental in our law and espoused in labour matters as well. This Court dealt with this doctrine in *Rabie v Department of Trade and Industry and Another*[10] and stated:

'[27] Another reason why abandoning the pre-dismissal arbitration is unlawful is that it is impermissible in terms of the doctrine of the right of election which has since been endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.[11] The Constitutional Court referred with approval to *Chamber of Mines of South Africa v National Union of Mineworkers and Another*[12] where it was stated that:

'One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 786:

'It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant… He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. *Quod semel placuit in electionibus amplius displicere non potes*t (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.'

[10] *Rabie v Department of Trade and Industry and Another* (LC), unreported case no J515/18 (5 March 20180 at para 27.
[11] 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC); [2008] 29 ILJ 2507 (CC) at para 54.
[12] 1987 (1) SA 668 (AD) at 690 D-G.

> The above statement of the principle may require amplification in the following respect indicated by Spencer Bower *Estoppel by Representation* (1923) para 244 at 224 - 5:
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> 'It is not... quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: *quod semel in electionibus placuit amplius displicere non potest*, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none.' (Emphasis added)

[35] Anglo American exercised an election to issue Mr Beyers with a final written warning, final disciplinary discretion it had delegated to a person *qua* chair of a disciplinary enquiry. Put differently, Mr Ferreira was clothed with the *persona* of Anglo American and as such his decision was definitely that of Anglo American.[13] Accordingly, having exercised its election, Anglo American was barred from blowing hot and cold.

[36] It follows that, in the absence of exceptional circumstances, Anglo American's *volte face* was patently unjust to Mr Beyers; hence his objection. The dictates of modest fairness between employer and employee demand that his objection should be sustained.

Conclusion

[37] In all the circumstances, I am satisfied that the commissioner clearly misconceived the enquiry and as a result rendered an unreasonable outcome. As a result, the award on substantive fairness stands to be reviewed and set aside. However, the findings of the arbitrator on the procedural fairness cannot be impugned and must stand.

[38] I deem it expedient not remit this matter back to the CCMA in the interest of justice. The issues were properly ventilated during the arbitration proceedings

[13] See: *Kruger* above n 9 at para 41.

and the adequacy of the record of those proceedings is not placed in issue. I am, accordingly, in a position to deal with the matter to its finality.

Appropriate remedy

[39] In the light of the findings I have arrived at on the substantive fairness above, it is clear that the dismissal of Mr Beyers was substantively unfair. The only issue outstanding is the remedy.

[40] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (Kruger),*[14] the LAC held that:

> '[42] Thus, in my view, it must follow that if the substitution of a sanction is invalid, as found in Chatrooghoon, that invalidity vitiates the act completely; ie it cannot be made. Invalidity is more than procedural unfairness, it denotes an unlawful act; ie one the law will not acknowledge. Accordingly, in my view Pillay J was correct to hold that an invalid substitution of a sanction was not merely an instance of procedural unfairness that might leave open a space for a parallel enquiry into the appropriateness of a remedy for such a "procedural" mishap and, in turn, allow space to address the gravamen of the misconduct per se. Similarly, the contention that the judgment of Ndlovu JA, in Chatrooghoon, has application only to procedural unfairness cannot succeed because the force of those dicta by Ndlovu JA is that a substitution of a sanction without a lawful foundation, is not merely unfair for want of a procedural authorisation, but is invalid.' (Emphasis added)

[41] In the present case, it is common cause that the Anglo American's Disciplinary Code and the breach of health and safety rules are not automatically sanctioned by dismissal. The appropriate sanction is required to be determined with reference to all the relevant circumstances at the time or, as expressly stated, depending on the facts and circumstances of each case.

[42] As state above, Anglo American failed to lead evidence to prove inconsistency in the application of discipline as a result of Mr Beyers final written warning.

[14] *Kruger* above n 9 at para 42.

Mr Esterhuyse, the complainant and Mr Beyers supervisor, supported a corrective sanction after he conducted an investigation on the circumstances that led to the transgression and was happy that the relationship with Mr Beyers was still healthy.

[43] Most importantly, the Ferreira verdict also directed Mr Beyers as follows:

> '1. The accused have to be re-trained on the Lock-out Procedure before commencing duty.
>
> 2. The accused shall for as long as the sanction is valid on a daily basis do planned Task Observations on his sub-ordinates on the safe application of lock-outs as per procedure.' (Emphasis added)

[44] Mr Ferreira was clearly convinced that Mr Beyers is not incorrigible hence a sanction of a final written warning. However, he also addressed the safety concerns through the above directive. Therefore, Mr Hlokwe's evidence that training would not correct Mr Beyers' conduct as it amounted to 'behavioural issue' stands to be rejected as it is devoid of reality and in dissonance with the Disciplinary Code which supports 'progressive behaviour management'.

[45] I am, accordingly satisfied that there are no compelling reasons tendered by Anglo American to debar Mr Beyers the primary remedy of reinstatement in terms of the LRA.[15] When it comes to the amount of the back pay, I have considered the circumstances of this case and the fact that Mr Beyers was almost a year in the employ of Anglo American at the time of his dismissal. I deem it just and equitable to order reinstatement with a back pay equivalent to 12 months' salary (R57 257.97 per month x 12 = R687 095.64).

Costs

[46] Since each party has been considerably successful, it accords with the requirements of the law and fairness that each party carry its own costs.

[47] In the circumstances, I make the following order.

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[15] The present case is distinguishable from the dictum in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC).

Order

1. The arbitration award dated 9 February 2017, under case number LP6075-16, is reviewed and set aside, only to the extent that the commissioner found that the dismissal of the applicant, Mr Beyers, was substantively fair, and substituted with the following order:

   1.1 The dismissal of Mr Beyers is substantively unfair.

   1.2 The first respondent, Anglo American Platinum Limited: Mogalakwena Section, is to reinstate Mr Beyers retrospectively with a back pay of R687 095.64 to be paid within two weeks from the date of this order.

   1.3 The disciplinary enquiry verdict by Mr Ferreira is reinstated and shall be valid for a period of 12 months.

2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate C Goosen

Instructed by: Parsons Attorneys

For the Respondents: Mr B Nhlapho of Cliffe Deker Hofmetr Inc