

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case numbers: JR2819/11

In the matter between:

SAKHELE PETROS SIBEKO & 3 OTHERS

Applicants

and

THE CCMA

First Respondent

CARL MISCHKE N.O.

Second Respondent

DUNLOP BELTING PRODUCTS (PTY) LTD

Third Respondent

Heard: 14 January 2020

Delivered: 21 January 2020

JUDGMENT

HARDIE, AJ

Introduction

- [1] This is an application in terms of which the Applicants seek to review and set aside an arbitration award made by the Second Respondent (the Commissioner) under the auspices of the First Respondent on 27 May 2011

under case number GAJB38445-09 in which he found *inter alia* that the Applicants' dismissal was substantively and procedurally fair.

- [2] Arising from certain issues between the parties regarding *inter alia* the compilation of the record, there were certain delays in the prosecution of the review, which in the interests of justice, I condoned at the commencement of the hearing.

Grounds of review

- [3] The Applicant's three grounds of review are as follows: (1) the Third Respondent (the employer) didn't follow the procedure by not informing the employees in person to attend the disciplinary hearing on allegations against them; instead the employer contacted the union officials as other employees were not members of the unions at that time (eg. Mr Sakhele Sibeko); (2) the disciplinary hearing was only held at Caesars Palace in Kempton Park but not at the employer's premises in Benoni. It was unfair to the Applicants in that the place was too far and they had a problem of transport fees because of being on strike for so long; (3) The evidence brought by the employer does not link with the Applicants. The pictures used by the employer as evidence were not dated so that one could see which Court order was not followed by the striking employees. Even if they broke the picketing rules (or Court order), it was not prudent to dismiss the Applicants from work in jobless South Africa.

- [4] The Commissioner's findings relating to the grounds of review contained above were as follows:

"Procedural fairness

There are two aspects of this case that do, however, require more careful consideration. The first is the issue of procedural fairness. It was at no point disputed that Employer did not hold individual disciplinary enquiries in respect of the charges against the Applicants. They did not receive individual notices of the enquiries. Instead, the Employer issued a notice, reflecting the disciplinary charges, to the trade union, and invited the trade union to attend a

mass enquiry. This, as Mr van As on behalf of the Employer pointed out, is the essence of the *Modise v Steve's Spar Blackheath* approach. It needs to be established, however, whether this decision of the Labour Appeal Court finds application in this case. The facts are different: *Modise v Steve's Spar Blackheath* was decided in the context of employees' participation in an unlawful/ unprotected strike. The essence of the *Modise* decision is that the employer must observe the *audi alteram partem* rule before dismissing the strikers engaged in an unprotected strike. The following passage from the Labour Appeal Court's judgement is of some importance in this regard:

"[44] Provided that the meeting that the representatives of the workers refused to attend was a meeting whose purpose was for the employer to hear why the workers should not be dismissed, I have no quarrel with the conclusion that, in such a case, the strikers cannot be heard to complain that they were not heard before dismissal. If, however, they were invited to a meeting whose purpose did not include that, then I cannot see how they can be said to have waived their right to be heard. They may well be happy not to attend a particular meeting for whatever reason, good or bad, but they be more than keen to attend on the purpose of which is to give them an opportunity to make representations why they should not be dismissed..."

In the *Modise* case, the misconduct concerned was the employees' participation in an unprotected strike. In this case, however, there is no dispute that the strike itself was protected. Does the *Modise*- principle (holding a mass enquiry in compliance with the *audi alteram partem* principle) apply in this case? Put differently: is the *Modise* approach at the disposal of an employer in response to other forms of misconduct- in this case intimidation and damage to property?

It would be artificial in the extreme to draw a distinction, in a case such as this, where the misconduct concerned clearly has a collective dimension, between one form of misconduct (participation in an unprotected strike) and other forms of misconduct (such as intimidation and damage to property). Misconduct is misconduct- and the essence of misconduct remains the breach of a rule or standard governing conduct in or of relevance to the workplace. There is no reason, in principle, why the *Modise* approach cannot

be used by an employer in response to other forms of misconduct that have a pronounced collective aspect, such as the facts in this case indicate.

Another decision mentioned by Mr van As in his closing argument is the *Avril Elizabeth Homes* decision by the Labour Court. In this decision the Labour Court states that the core of procedural fairness is that there should be dialogue and an opportunity for reflection before a decision to dismiss is taken. The Labour Court is also at pains to emphasise a move to a more informal approach to procedural fairness.

At the very heart of procedural fairness lies the opportunity of an employee facing dismissal to state a case in response to the allegations and charges brought against him or her. **In this case, the dismissed employees were indeed given such an opportunity- off the company's premises and chaired by a neutral external chairperson. They elected (and this must be emphasised) not to attend these proceedings.**

In this case, it was clear that the Employer called upon the unions to make representations, on behalf of the workers, as to why they should not be dismissed. It is clear, from the evidence, that Mr Sibheko, and the other applicants in this case were aware of the mass disciplinary enquiry to be held at Caesar's Palace. Mr Sibheko, on behalf of the applicants, claimed that the employer was under a duty to ensure transport to the venue. It may well be the case that the applicants, as the allege, did not have enough money to travel to Caesar's Palace. But this issue was not communicated to the employer- Mr Sibheko said that he attempted to contact the Human Resources Manager on this issue, but that he could not get hold of the Manager. Why did he leave the matter there? Why did the applicants not raise the issue with the Employer after the strike had been settled? It must be borne in mind that Mr Sibheko's evidence on this point was not put to Mr Visser when he gave evidence, and therefore stands as a mere allegation.

If the applicants had taken up the issue with the Employer after the strike had been settled, they would have given the Employer the opportunity to schedule individual disciplinary enquiries if the Employer found that they indeed experienced transport problems. The applicants

did not seek to engage with the Employer about the pre- dismissal procedures at any time before the arbitration proceedings.

In light of these considerations, it is found that the Employer gave the applicants a fair opportunity to present a response before a final decision to dismiss them was taken. Their dismissal are therefore procedurally fair.”¹

[5] As can be seen from the Commissioner’s finding on procedural fairness, and more particularly the highlighted portion thereof, he dealt thoroughly with the two submissions made by the Applicants in their first two grounds of review. And weighing them together with all other material and relevant evidence, came to the conclusion that notwithstanding these two complaints about the procedural unfairness of their dismissals, that the Applicants’ dismissals were procedurally fair. I am precluded from interfering with these findings of the Commissioner, because to do so, would be tantamount to treating these proceedings as an appeal. These two complaints about the procedural fairness of the dismissal, are grounds of appeal dressed up as grounds of review, and do not pass muster and must fail.

[6] I now turn to deal with the third ground of review. Again, I quote directly from the Commissioner’s findings on substantive fairness in the award in dealing with this ground, which reads:

“The evidence presented by Mr Visser was cogent, coherent, and at all times supported by photographs and other documents. Mr Visser was clear and consistent in his version of the events, and it must also be borne in mind that he joined the Employer only a month before the strike commenced. This means that he did not know the individual applicants personally (or did not know them well), and that it can be hardly be said that he had an axe to grind with any of the individual applicants. Further **“The individual applicants in this case were clearly identified by the Employer as being part of a**

¹ Own emphasis.

group of picketers- the applicants admitted that they appeared on the photographs submitted by the Employer. Using the language of Shai AJ in the Samwu case cited above, the proven misconduct can be imported on those who the respondent identified in its evidence.”²

- [7] On a reading of the relevant portion of the transcript of the proceedings at the Commission for Conciliation, Mediation and Arbitration relating to Visser’s identification of the individual applicants, it is also instructive that his evidence was not challenged under cross- examination. It is trite also that where a credibility finding is made, as it was in relation to Visser’s evidence on the identification, it is not within this Court’s purview to interfere with that.
- [8] Given the factual finding made by the Commissioner that the Applicants were properly identified, and the fact that that finding was based upon the uncontested evidence of Visser, there is no basis for the Applicant’s contention that they were not properly identified in their third ground of review. Again, this ground of review must also fail.

Costs

- [9] Turning now to the question of costs. Whilst I believe that this review application was ill- conceived, and that in bringing it, the Applicants were clutching at straws in a last gasp effort to save their jobs, this is not an appropriate case where a costs order is appropriate.

- [10] Therefore the following order is made:

Order

1. The Applicants’ review application is dismissed.
2. There is no order as to costs.

² Own emphasis.

S B Hardie

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S P Sibeko (In person)

The Third Respondent: Advocate W Hutchinson

Instructed by: Fluxmans Inc. Attorneys