



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2402/21

In the matter between

**SIBANYE RUSTENBURG PLATINUM MINES
(PTY) LTD**

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

HLUNGWANE, E N.O.

Second Respondent

AMCU obo MASSINQUE, JOSE

Third Respondent

Heard: 13 February 2025

Delivered: 02 April 2025

JUDGMENT

PHEHANE, J

Introduction

[1] This is an opposed application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award by the second respondent dated 22 October 2021. In his arbitration award, the second respondent ordered the applicant to reinstate the third respondent retrospectively with backpay. The second respondent also ordered the applicant to issue the third respondent with a final written warning valid for a period of 12 months.

[2] It is common cause that the third respondent pleaded guilty during the internal disciplinary inquiry and that this is a penalty review in that the applicant contends that the second respondent's decision in not upholding the sanction of dismissal is unreasonable. The applicant seeks to substitute the arbitration award with the order that the dismissal of the third respondent is substantively fair.

Background

[3] The Parties entered into a pre-arbitration minute on 12 October 2021.² In terms of the pre-arbitration minute, it was agreed that:

3.1 The third respondent was employed on 23 February 2007 and at the time of his dismissal, being 21 May 2021, he was employed as a team supervisor.

3.2 The charges levelled against the third respondent were as follows:

‘4.5 Gross negligence in that on 05.03.21 you were found working substandard in the area of your responsibility as reported by the safety officer Mr Gert Jacobz.

4.6 That the rules referred to in 4.5 [exist]

¹ Act 66 of 1995, as amended.

² Record, Vol 2 at pp 11 to 14.

- 4.7 That the [third respondent] is aware of the rules referred to in 4.5.
- 4.8 That the rules referred to in 4.5 are reasonable.
- 4.9 That the rules referred to in 4.5 are applied in a fair and consistent manner.
- 4.10 That the [third respondent] was on duty on the 05th of March 2021.
- 4.11 That the [third respondent] has received training in the use of a harness.
- 4.12 That the [third respondent] was [found] near inside [sic] the tip [area] without wearing his safety harness by Mr Gert Jacobz (safety officer) on 05 March 2021.'

[4] The second respondent records in his arbitration award that the issue to be decided is whether the third respondent's dismissal was substantively fair based on the disputed fact that dismissal was not an appropriate sanction.³ The third respondent confirms that at the arbitration proceedings, he placed in dispute the suitability of the sanction.⁴

Background facts

[5] In terms of the applicant's policies and procedures having operations on a mine, a safety harness must be worn at all times by any person who enters a tip area as this area is classified as a high-risk area. The tip area at the applicant's premises contains a large safety and warning sign which indicates that employees must wear a safety harness when entering this area.

[6] The third respondent was dismissed for misconduct on account of gross negligence in that, in essence, he failed to wear a harness when he entered the tip area.

[7] As stated above, the third respondent pleaded guilty to the charge and was subsequently dismissed.

³ See: para 5 of the arbitration award at p 15.

⁴ See: third respondent's heads of arguments at para9.2 on p 3.

[8] The third respondent thereafter referred a dispute to the first respondent which was arbitrated by the second respondent.

[9] Dissatisfied with the decision by the second respondent, the applicant launched this present application.

The grounds of review and opposition

[10] The first and second grounds of review are interrelated, that is, the second respondent committed a gross irregularity and/or misconceived the nature of the inquiry when he considered irrelevant evidence which resulted in his overall decision that dismissal was too harsh a sanction. This irrelevant evidence was that the third respondent was not working in the tip area, a safety harness is not a requirement for a local driver and operators, in particular, the harness does not form part of the applicant's equipment list and that the third respondent's job was of such a nature that a safety harness was not a requirement. In taking this evidence into consideration and ignoring the guilty plea, the second respondent considered that dismissal was not the appropriate sanction and a final written warning would have been the appropriate penalty in the circumstances.

[11] The applicant contends that in the circumstances where the second respondent held the view that the third respondent ought never to have been disciplined in the first place, he undoubtedly came to the conclusion that the dismissal was not warranted and ultimately replaced the employer's sanction with his own. The applicant contends that had the second respondent understood the nature of the inquiry, he would have disregarded any evidence pertaining to guilt. Having considered such evidence ultimately resulted in a decision that is unreasonable.

[12] After considering the third respondent's length of service, the second respondent determined that reinstatement would be appropriate. In this regard, the applicant contends that the second respondent ignored the evidence before him by Mr Jacobz to the effect that the third respondent could no longer be trusted in the workplace given that he had on more than one occasion on his own admission, failed to wear a safety harness in the area. The applicant submits that in the circumstances

of this evidence by Mr. Jacobz, reinstatement, even on the unreasonable finding that dismissal was inappropriate, is not a reasonable decision on the totality of evidence that was before the second respondent.

[13] The third ground of review, in essence, is that the second respondent failed to apply his mind in determining whether the sanction of dismissal is appropriate having regard to, amongst other factors, the misconduct committed and admitted. The applicant contends that although the second respondent's states in his arbitration award that he has considered the factors listed in item 3 of the Code of Good Conduct: Dismissal⁵ (the Code), he committed a gross irregularity by ignoring the evidence of Mr Jacobz that the purpose of the safety harness is to prevent employees from falling into the ore pass and the purpose of wearing it is to save employees' lives. In view of past safety incidents at the workplace, wearing a safety harness was critical in the mining industry in which the applicant operates.

[14] The applicant emphasizes that safety in the mining industry is paramount. In this regard, the applicant relies on the decision in *Impala Platinum v Jansen and Others*⁶ in which the Court states the following regarding safety in the mining industry:

'It is clear that the mining industry has been under tremendous scrutiny regarding safety measures due to the high risk in the nature of the work done. In order to have a safe mining environment, the regulations which were contravened by Jansen were promulgated to ensure that workers doing underground work underwent competency training, and were declared competent before being allowed to do underground work. By his actions Jansen not only undermined the regulatory framework and put in danger life and limb, he also placed his employer at risk of contravening the statutory regulations.'

⁵ Schedule 8 of the LRA.

⁶ (2017) 38 ILJ 896 (LAC) at para [17].

[15] The applicant further relies on the decision in *Sasol Mining (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,⁷ where this Court held as follows:

‘... safety of employees at the workplace is paramount. It cannot be compromised. An employer cannot be expected to wait until an employee is maimed or has lost his or her life, before taking decisive action against an employee who has exposed fellow employees.’

[16] The third respondent contends that the decision of the second respondent is reasonable, as the second respondent understood the nature of the inquiry and considered the factors in item 3 of the Code. The third respondent contends that the second respondent correctly assessed all the facts in determining whether dismissal was the appropriate sanction. In addition, the third respondent contends that the second respondent did not commit a gross irregularity in finding that the applicant did not lead any convincing evidence on the breakdown of the trust relationship and emphasises that the evidence before the second respondent is not that the trust relationship had broken down irretrievably as is required to substantiate the appropriateness of dismissal as a sanction, but that the trust relationship had been harmed.⁸

[17] The third respondent submits that it would not be appropriate to dismiss an employee for a first offence and in circumstances where an employee had a lengthy unblemished disciplinary record.

[18] In opposition to the contention by the applicant that dismissal is appropriate where there has been an infraction of safety regulations, the third respondent relies on the decision by the Labour Appeal Court (LAC) in *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others*⁹ where the LAC stated as follows:

⁷ [2015] ZALCJHB 167; ((2015) 36 ILJ 2359 (LC) at para [6].

⁸ See: third respondent's heads of arguments at para 44.

⁹ [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC) at para [.

‘But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, at “no go area” for commissioners.’

Legal framework

[19] The test to succeed in a review application is now trite and need not be restated.¹⁰

[20] A review court considering a penalty review will not lightly interfere with a decision of a commissioner unless that decision is unreasonable. The question that the review Court concerns itself in a penalty review, is whether it should interfere with the commissioner's finding that dismissal was an inappropriate sanction.

[21] In *Ikwezi Municipality v South African Local Government and Others*¹¹ (*Ikwezi*), this Court set out what a review Court should take into consideration in adjudicating a penalty review and it is this: whether the commissioner's assessment of the sanction was reasonable; the gravity of the misconduct, the reason the rule was put into place, mitigating factors and balancing of the parties' interests. The ultimate test is whether the commissioner applied his or her mind in determining whether the sanction is appropriate having regard to, amongst other factors, the misconduct committed.

[22] The Court stated as follows in *Ikwezi*, quoting from the decisions in *Sidumo*¹² and *Fidelity*:¹³

¹⁰ *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) (*Sidumo*); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 3 BLLR 197 (LAC) (*Fidelity*); *Head of Department of Education v Mofokeng and Others* [2014] ZALAC 50; [2015] 11 BLLR 50 (LAC) (*Mofokeng*).

¹¹ [2011] ZALCPE 16; [2012] 4 BLLR 403 (LC).

¹² fn 10 *supra*.

¹³ *Ibid*.

'[16] In *Sidumo*, in giving clear direction to Commissioners on their duties Navsa J held:

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal. There are other factors that will require consideration. For example, 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 his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

[17] In *Fidelity Cash Management Services v CCMA and others* Zondo JP, (as he then was) applied this test, setting out a detailed list of what Commissioners are required to do. The Court held:

"Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was, in all the circumstances, a fair sanction in such a case. In answering that question, he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of the dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable."

[18] The arbitrator was required, therefore, to determine whether dismissal is an appropriate sanction in this context and was required to apply his mind to all relevant and material facts and circumstances in doing so. *Sidumo* also requires a balancing of interests...'

[23] Item 3 the Code,¹⁴ makes provision for what a commissioner is to consider when determining the appropriate sanction.

[24] Item 3(4) provides:

'Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.'

[25] Item 3(5) provides:

'When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.'

Evaluation

[26] Although it is not always appropriate to dismiss an employee for a first offence, the Code provides that it would be permissible to dismiss a person for a first offence where the misconduct is serious, and specifically includes the wilful endangering of the lives of others and it follows, including their own lives. This was

¹⁴ Schedule 8 of the LRA.

emphasised by the LAC in *Samancor Limited (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration (Limpopo) and Others*¹⁵, where the LAC held as follows:

‘While generally it is not appropriate to dismiss an employee for a first offence, this default position does not have to be followed if the misconduct is serious, which includes the wilful endangering of the safety of others. Where the conduct of employees carries a high risk of potential danger to the safety of others which is certainly the case when there is manifest disregard for safety regulations at a mine, dismissal based on the conduct of which the five employees have been found guilty is clearly justified.’

[27] In the earlier LAC judgment of *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal & Engineering Industries Bargaining Council & Others*,¹⁶ the Court has also stated the following:

‘In my view, having regarded the material before the commissioner and his reasoning with regard to the fairness of the sanction, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. It is evident from the evidence that there are considerable risks associated with the appellant’s operations at the smeltery. It carries a high risk of potential danger to the safety of its employees which in turn may hold serious consequences for the appellant as the employer. The issue of safety and the rules pertaining thereto are accordingly of considerable importance to both the appellant and its employees. At the arbitration hearing, the appellant’s representative explained that: “...at Samancor eighty percent of the fatalities of people who die at work is related to (inaudible) or mobile machinery. In other words this is one of the areas where most of the people who die at work (inaudible) and as a company we just cannot tolerate any [breach] of our rules which is designed to save peoples lives”. Accordingly, in the context of the present matter, the importance of the safety rules concerned, the reasons for their existence, and the seriousness and potentially life threatening

¹⁵ [2020] 9 BLLR 908 (LAC) at para [25].

¹⁶ (2011) 32 ILJ 1057 (LAC) at para [35].

consequences of a breach of such rules are important considerations that must be accorded due weight.'

[28] Historically, the applicant has suffered injuries and fatalities as a result of employees failing to wear a safety harness. This was the evidence of Mr Jacobz.¹⁷ It is therefore important for the applicant to manage safety risks in the workplace. As the LAC said in *De Beer Consolidated Mines Limited v Commission for Conciliation, Mediation and Arbitration and others*:¹⁸

'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed.'

[29] As a team leader and supervisor, the third respondent occupied a senior and managerial role and therefore there was an expectation that he would set an example for other employees. The third respondent provided no reasonable explanation as to why he was not wearing a safety harness. Instead of taking responsibility for his wrongdoing, the third respondent tried to shift the blame to the applicant claiming that there was no safety equipment or apparel (PPE) available at the shaft, which was denied by the applicant, and further stating that it was not a requirement for a harness to be worn.

[30] In *Eskom Holdings SOC v Commission for Conciliation, Mediation and Arbitration and others*,¹⁹ the Court was faced with a similar excuse as in the present case regarding the unavailability of PPE in a safety regulated environment and held as follows:

'It also simply cannot be ignored that the fourth respondent was fully trained in safety requirements and knew she was entitled to refuse to do the work if she was not issued with PPE. Therefore, even if it can be accepted that the fourth

¹⁷ Transcribed record at p 14.

¹⁸ (2000) 21 ILJ 1051 (LAC) at para [22].

¹⁹ (JR1372/14) [2018] ZALCJHB 110 (13 March 2018) at para.[47].

respondent at the time had not been issued with PPE, the fact that she elected to do the work and not insist on compliance with her right to safety as she was entitled to do, must mean that this cannot serve as an excuse or defence to the charge.'

[31] It is common cause in the present case that the third respondent was familiar with the safety procedure and rule he breached and was trained in that regard.²⁰

[32] In light of the afore-going, on the totality of evidence before him, the second respondent failed to apply his mind in determining whether the sanction of dismissal is appropriate having regard to amongst others, the misconduct committed. The second respondent's assessment of the sanction was unreasonable. Despite the guilty plea, the second respondent downplayed the gravity of the misconduct in the mining industry where safety compliance is paramount for employees and employers alike. The circumstances of the infringement are that the third respondent's gross negligence in failing to wear a safety harness in the tip area is that he could have fallen into the ore pass – this posed a serious safety risk. He admitted guilt.

[33] The second respondent committed an irregularity in considering the evidence on guilt afresh and substituting the sanction of the applicant for his own as opposed to determining whether the sanction imposed by the applicant was appropriate taking all the relevant factors and circumstances into account. It is not the role of a commissioner to state what he would have done in the circumstances and to replace the employer's decision with his or her own. The role of the commissioner is to make an assessment on the totality of evidence before him and to reach a reasonable decision on whether or not the conduct of the employer was fair.²¹

[34] The second respondent quotes all the relevant authorities and correct legal principles in his arbitration award which guide the enquiry he was to undertake. However, he misapplies these principles, fails to apply his mind to relevant evidence and commits irregularities as set out above which have a distorting effect on the

²⁰ Transcribed record at pp 9 to 10.

²¹ *Sidumo Ibid.*

outcome of his decision. His decision is therefore unreasonable and falls to be reviewed and set aside.

[35] In view of the afore-going, the following order is made:

Order

1. The arbitration award by the second respondent dated 22 October 2021 under case number NWRB1361-21 is reviewed and set aside and is substituted with the following order:

1.1 The dismissal of the third respondent, Massingue Jose is substantively fair.

2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv Victor Mndebele

Instructed by: Solomonholmes Attorneys Incorporated

For the Third Respondent: Adv Ashley Cook

Instructed by: LDA Incorporated Attorneys