



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR03/2023

In the matter between:

ASSMANG (PTY) LTD (BRMO)

Applicant

and

JONA HEINING MARTIN

First Respondent

DAVID PIETERSEN N.O.

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 26 November 2024

Delivered: 06 June 2025

JUDGMENT

BALOYI, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant seeks that the arbitration award of the second respondent dated 21 November 2022, issued under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration, case number NC537-22, be reviewed and set aside. The second respondent found that the dismissal of the first respondent, Jona Heining Martin, is unfair and ordered reinstatement.

[2] Mr Martin was dismissed from employment following a disciplinary hearing in which he was charged with and found guilty of misconduct of - (i) serious breach of safety procedure – in that he drove in an unsafe manner, driving at high speed and not observing stop signs whilst driving (a) getaway car; and (ii) dishonesty in that he created a conducive environment for theft of company property and further provided a getaway car. For convenience, I refer to the charges as charge 1 and charge 2, respectively.

[3] Dissatisfied with the decision to dismiss him, Mr Martin referred a dispute of unfair dismissal to the CCMA, and the second respondent is the commissioner appointed to arbitrate the dispute after conciliation failed.

[4] The application is opposed by the first respondent. Save to file the record, the second and third respondents did not partake in the application.

[5] The applicant operates a manganese mine in the Northern Cape province. Mr Martin was employed by the applicant as a drill rig operator from 6 August 2012 until his dismissal, according to Mr Martin, on 4 May 2021 (the arbitration award records that he was informed of the outcome of the disciplinary hearing by registered mail on 19 April 2021).

[6] The applicant seeks the review and setting aside of the finding of procedural and substantive unfairness and the order of reinstatement on the ground that the commissioner committed gross irregularities and rendered a decision which a

¹ Act 66 of 1995, as amended.

reasonable commissioner could not make.

The evidence

[7] The evidence before the Commissioner comprised oral evidence of 3 witnesses, Ms Maggy Seakameng, a security guard on duty on the night in question, and Mr Molelekwa Simon Moopi, an employee of the applicant who conducted an investigation which culminated in the charges of misconduct against Mr Martin, including video evidence. Mr Martin also testified on his own behalf.

[8] The evidence before the commissioner is overwhelmingly, if not entirely, common cause, and that which is not common cause is not of much controversy between the parties and, in my view, not decisive of any issue between the parties. The following is a fair summary of the evidence.

[9] On 25 November 2020, Mr Martin worked the 'late shift'. He arrived at work around 05:30, and his supervisor gave him permission to leave work early. He gave 2 colleagues a lift in his vehicle when he left at about 13:00 – 13:30. When he finished his shift, he left through the turnstiles guarded by security guards, and employees are required to submit to a search before they exit. He cooperated with the security guard at the turnstiles. He exited the turnstiles alone and went to collect his motor vehicle from the designated staff parking area and drove to the main gate, also called the boom gate in evidence, where he waited for the 2 colleagues he had agreed to give a lift. The main or boom gate where he waited for his 2 colleagues is not an authorised parking area for staff. The 2 employees that he offered a lift to came and joined him in his bakkie, after which they drove off. The two employees refused to be searched by security at the turnstiles and were not properly searched when they exited to join Mr Martin at his car. It is further common cause that Mr Martin drove from the mine premises at a speed above the lawful speed limit and did not stop at the stop sign at the entrance of the mine. His explanation that he did so because of a family emergency of a family bereavement was not accepted by the commissioner to excuse him from the charge of serious breach of a safety procedure. I therefore need not say more about the breach of safety complaint.

[10] Mr Moopi explained that it was not the applicant's case that Mr Martin was aware that the 2 employees had refused to be properly searched by the security guards when they exited the turnstiles. He explained that the case of dishonesty against Mr Martin is that he drove the getaway car for employees who refused to be searched properly. In answer to this question in cross examination "... where do you get the issue of Jona Martin facilitating any of whatever that had to do with the stealing of things on the mine?", Mr Moopi answered that "Because in the first place, Mr Jona Martin went out of the mine premises and went to the car park, removed the vehicle from a dedicated parking area, parked at a non-designated parking area while waiting for people who were not properly searched when the security officer instructed them to wait so that he may call the room".

[11] Mr Moopi testified that it was not the employer's case that Mr Martin was aware that the two employees whom he offered a lift were not properly searched. He also explained that security did not chase after Mr Martin's vehicle after it refused to stop for security because "For us, it was not the vehicle that was carrying stolen item from the mine. For us, it was a vehicle that moved away from the mine premises with people who were not properly searched when they went out of the mine". Mr Moopi admitted in his evidence that the employer had no evidence that the 2 employees who drove with Mr Martin in his car had stolen items on them, but only had a suspicion from their refusal to be searched at the turnstiles. From this evidence, Mr Martin's sin, according to the employer, is the mere fact of driving away in his car with 2 people who refused to be properly searched at the turnstiles when they exited the shaft.

[12] The evidence relating to the procedural unfairness claim is that Mr Moopi did not interview Mr Martin during the investigation. It is also common cause that Mr Martin was not invited to make submissions in mitigation of sanction and that the applicant did not consider his appeal.

Is the award liable to be reviewed and set aside?

[13] The commissioner identified the following as issues to be decided – (i) whether the applicant's failure to interview Mr Martin during the internal investigation

is fair and whether its failure to allow the applicant to submit mitigating factors as well as its denial to conduct an internal appeal hearing is fair (procedural fairness); and (ii) whether Mr Martin was correctly found guilty of having breached safety procedures and dishonesty and if so, whether the sanction of dismissal is appropriate.

[14] The commissioner found that the following constitute procedural unfairness and accordingly held that Mr Martin's dismissal was procedurally unfair – failure to interview Mr Martin before instituting the disciplinary process against him; failure to afford Mr Martin the opportunity to make submissions on mitigating factors before imposing the sanction of dismissal; and failure to afford him a right to appeal. The commissioner further found that a charge that Mr Martin was dishonest relating to giving a lift to his 2 fellow employees was not supported by the evidence of Ms Seakameng who conceded that there was no dishonesty of the part of Mr Martin, and Mr Moopi's testimony that no theft occurred during the night shift from which Mr Martin left early.

[15] The employer seeks that the award be reviewed and set aside on the ground that the commissioner committed a gross irregularity in finding that Mr Martin's dismissal was procedural and substantively unfair, and for ordering his reinstatement.

[16] The test for review in terms of section 145 of the LRA has become settled. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*², the Constitutional Court set the following threshold test for the reasonableness of an award "*is the decision reached by the commissioner one that a reasonable decision maker could not reach?*"³. If the decision is one which a reasonable decision-maker could not reach, the decision is unreasonable and therefore reviewable and could be set aside. The converse holds – see *Commercial Workers Union of SA v Tao Ying Metal Industries & others*⁴. The Labour Appeal Court in *Gold Fields Mining South Africa*

² (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

³ Ibid at para 110.

⁴ (2008) 29 ILJ 2461 (CC); 2009 (2) SA 204 (CC).

(Pty) Ltd (*Kloof Gold Mine*) v CCMA and others⁵ (*Gold Fields*) has provided the following clarification:

[14] ... in a case ..., where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come to on the available material.'

[17] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*⁶, the LAC said,

[103] ... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[18] The evidence of Mr Martin that he gave his 2 colleagues a lift because they were leaving work early like him is not disputed by the employer. It must therefore be accepted. The applicant did not contend that Mr Martin was aware that his two passengers had refused to be searched or were otherwise not properly searched when they exited the turnstiles. On the contrary, Mr Moopi disavowed any such contention. It is further so that Mr Moopi testified that no property of the employer was stolen on the night or shift in question. It must be so, then, that there was no evidence before the commissioner that Mr Martin assisted, let alone knowingly, his passengers to get away with the stolen property of the employer. It seems, therefore, that the charge of dishonesty – creating a conducive environment for theft of company property and further providing a getaway car could not be sustained. Whilst

⁵ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

⁶ (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC).

the refusal of Mr Martin's 2 passengers to be properly searched, and Mr Martin's conduct to drive off at high speed may be fertile and even justifiable ground for suspicion of mischief, the decision of the commissioner that it does not prove the charge of dishonesty - creating a conducive environment for theft of company property and providing a getaway car to that end cannot be faulted. The commissioner accordingly did not commit a gross irregularity in concluding that the applicant did not prove that Mr Martin is guilty of charge 2. It follows that charge 1, too, cannot be sustained in so far as it is alleged that Mr Martin provided a getaway car. To do so, he would have to have known that his 2 passengers had refused to be searched. It follows that the decision of the commissioner cannot be said to be one which a reasonable commissioner could not make.

[19] On the appropriate relief, the commissioner found that there was no evidence before him why Mr Martin's claim for reinstatement should not be granted. It is so that no evidence was presented by the applicant that reinstatement would be inappropriate in the circumstances.

[20] Section 193(1) of the LRA sets out the remedies available to the court in the event that it finds that a dismissal is unfair. Reinstatement with retrospective effect is permitted by section 193(1)(a).

[21] Section 193(2) prescribes that:

'(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless-

- (a) the employee does not wish to be re-instated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[22] Thus, and it is settled law that reinstatement is the primary remedy in the event of a substantively unfair dismissal. The applicant bore the *onus* to show that

reinstatement is not appropriate. This it failed to do. Accordingly, the commissioner cannot be faulted for his order that Mr Martin be reinstated with retrospective effect.

Conclusion

[23] Having found that the decision that the dismissal of Mr Martin is substantively unfair, it is not necessary that I consider the grounds for review relating to the finding of procedural unfairness.

[24] In the premises, the applicant must fail in the application.

[25] Accordingly, the following order is made.

Order

1. The application to review and set aside the award of the second respondent is dismissed.
2. There is no order as to costs.

MS Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv MJ Van As

Instructed by: Cliffe Dekker Hofmeyer Inc

For the Third: Adv X Nyoka

Instructed by: Fortuin Attorneys Inc