Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 2416/15

In the matter between:

ASSMANG (PTY) LTD T/A KHUMANI MINE	**Applicant**
and	
COMMISSION FOR MEDIATION, ARBITRATION & CONCILIATION	**First Respondent**
MAPUTLE MOHLALA (*N.O.*)	**Second Respondent**
LEBOGANG TETEME	**Third Respondent**
NATIONAL UNION OF MINEWORKERS	**Fourth Respondent**

Heard: 17 May 2018

Delivered: 24 May 2018

Summary: (Review –dismissal – inconsistency in disciplinary action – finding of substantive unfairness based on inconsistency unreasonable on evidence before arbitrator)

JUDGMENT

LAGRANGE J

LABOUR COURT

Background

[1] This is a review application of an arbitration award in an unfair dismissal dispute. The third respondent was dismissed for failing to follow safety working procedures and legal requirements on the applicant's mind in walking across a bridge that was reserved for vehicle traffic only.

[2] The third respondent was a drill rig supervisor. His appointment as a supervisor was also made in terms of regulation 2.9.2 of the Mine Health and Safety Act, 29 of 1996 ('the MHSA'). As such there were various legislative requirements within his area of responsibility that he was required to enforce. Without going into detail, these entailed numerous health and safety obligations including ensuring adherence to health and safety regulations. It was common cause that when he was confronted by his Safety Health Environment Quality ('SHEQ') officer when he was seen crossing the bridge, that he was leading a large number of other members of his crew, who were under his supervision. The individuals who were with him were not identified either by the company or the third respondent and were not charged at all, though it is clear that had they been identified they could have faced the same charge as the third respondent.

The arbitrator's award

[3] The crux of the arbitrator's award turned on the question of consistency of treatment. The arbitrator found that the applicant had inconsistently applied the rule in that, it had disciplined the third respondent and dismissed him for an offence when it did not even charge other transgressors who had committed the same offence on the same occasion. The arbitrator did not accept the applicant's evidence that the other transgressors could not have been identified. The arbitrator was astounded that such disparity of treatment had taken place, viz:

> "36. Somerset [the third respondent's SHEQ officer] had singled out the applicant because, according to his testimony, he was the supervisor of the crew was crew on that day. It is inexplicable how when safety is responsibility of everyone that the applicant could be found to have committed a [more]

LABOUR COURT

> serious offence than the other employees. It is also inexplicable how the applicant could be singled out when safety transgression does not discriminate depending on the levels of seniority. It boggles my mind that when this offence is considered to be so serious as to may lead to dismissal that other discretions of the same offence were left out without being disciplined.
>
> …
>
> 38. The respondent has failed to bring disciplinary action against the other employees walked over the bridge. It therefore denied itself an opportunity to determine are the merits of the cases of the of the other transgressors would have been the same or different and justifies action against the applicant vis-a-vis the other cases merits. Had it taken action against the other transgressors it would have been able to distinguish the merits of the applicants' case to those of others."

[4] In essence, the arbitrator found that it was unfair not to have taken action against all potential transgressors, and that only if that had been done could a fair assessment have been made of the relative merits of the third respondent's case.

[5] Having concluded that the dismissal was substantively unfair for failing to apply the rule consistently between the applicant and other transgressors who committed the same misconduct, the arbitrator found that there was no credible evidence that reinstatement would be impractical or that the trust relationship had broken down. Consequently, the arbitrator ordered the reinstatement of the third respondent.

Grounds of review

[6] In summary, the applicant only raises two grounds of review relating to the rationality of the award, namely:

6.1 the arbitrator ignored or failed to consider that the third respondent had responsibilities as a supervisor and regulation 2.9.2 appointee which included responsibility for the safety of his subordinates. Had the arbitrator taken this into account the arbitrator could not have found his misconduct comparable with the other members of his team who

LABOUR COURT

had not been specifically identified but who had also breached the safety regulation.

6.2 In considering an appropriate remedy, the arbitrator failed to consider a number of factors about the third respondent's conduct such as: his failure at any stage to show any form of appreciation of his own wrongdoing; that he simply shrugged his shoulders and walked on when he was confronted about the infraction, and that he had a considerable disciplinary record which made it difficult to believe that his conduct would improve.

[7] In support of the arbitrator's reasoning, the third respondent argues that in deciding if the dismissal was fair, the arbitrator was rightly exercising his discretion on the basis of his own sense of fairness and not of the employer's. [1] Secondly, in exercising his discretion in this regard, the arbitrator's reasoning could not be attacked any more than one can attack the findings of chairpersons of disciplinary enquiries, who come to a different conclusions in respect of similar cases, unless such findings are capricious or mala fide. The third respondent also emphasises the value attached to disciplinary consistency and, in particular, that all employees must be measured by the same standards.[2]

[8] In a more recent restatement of the role of inconsistency in substantive fairness the LAC at this to say in ,,,,:

> [42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression

[1] See Sidumo & another v Rustenburg Platinum Mines Ltd & others [2008 (2) SA 24 (CC)] (2007) 28 *ILJ* 2405 (CC) and earlier Engen Petroleum Ltd v Commission for Conciliation, Mediation & Arbitration & others (2007) 28 *ILJ* 1507 (LAC)

[2] *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC)

LABOUR COURT

> in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they will not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each I case will be treated on the basis of its own facts and circumstances."

The arbitrator in this case clearly did consider the issue of consistency to be dispositive of the issue of substantive fairness. It is perhaps this underlying misconception coupled with his single-minded focus on the failure to initiate disciplinary action against the members of the third respondent's team which resulted in the arbitrator failing to address important factors which did distinguish why it was justified in dismissing the third respondent, even if it should not have simply failed to make an effort to also charge his subordinates.

[9] It is apparent from the arbitrator's reasoning that he equated the gravity of the breach of the safety rule committed by the third respondent with that of his subordinates. In a simplistic sense, the arbitrator cannot be criticised for saying that safety was also the responsibility of the third respondent's subordinates. However, what the arbitrator simply did not consider was whether an even greater responsibility lay on the third respondent in view of his line management position and more specifically his responsibilities under the MHSA as a regulation 2.9.2 supervisor. Had the arbitrator considered these, the arbitrator would have struggled to avoid the conclusion that third respondent's infringement of the regulation was far more serious than the same infringement by his subordinates because of his more onerous responsibilities for safety.

[10] The arbitrator's subsidiary finding that the employer made no effort to hold the third respondent's subordinates responsible for their own infractions, in circumstances under which it ought not to have been that difficult to have identified the probable perpetrators and at least charged them with the same offence, is less open to criticism on grounds of reasonableness. Nevertheless, that could not on any ground be dispositive of the question of

LABOUR COURT

the fairness of the third respondent's dismissal. At best, such selective initiation of disciplinary action might have provided a basis for a finding of a degree of inconsistency in the application of disciplinary action. What the arbitrator did was to collapse the distinction between a finding of selective initiation of disciplinary proceedings with the entire question of whether the third respondent's dismissal in any event was warranted.

[11] In doing so, the arbitrator overlooked the important issues which distinguished the third respondent's conduct from that of his subordinates and also failed to consider the third respondent's alarming indifference to use breach of the rule which he displayed in the presence of team when confronted as well as his failure even by the arbitration to acknowledge the inappropriateness of acting the way he did given his position, even if he did believe he had been unfairly singled out. The arbitrator also singularly avoided the question of the third respondent's disciplinary record, which was, and also included previous infractions of safety procedures. Had the arbitrator considered this, the arbitrator would have found it difficult to justify reinstatement of the third respondent into a responsible position as a remedy, assuming for the moment that the arbitrator's finding that inconsistency rendered the third respondent's dismissal substantively unfair could be rationally justified.

[12] In conclusion, I am satisfied that because of the arbitrator's approach, he failed to take account of material evidence both in relation to his finding that the third respondent's dismissal was substantively unfair and that reinstatement was the appropriate remedy, but if he had not discounted or ignored that evidence he could not reasonably have reached the conclusions. To the extent that the arbitrator justifiably found that there was an element of substantive unfairness in the failure to take any disciplinary steps against the third respondent's subordinates in circumstances where no effort was made to even identify any of them in circumstances where they were known to come from a well-defined group of employees and where their infraction was not trivial, that could not reasonably render the third respondent's dismissal substantively unfair.

LABOUR COURT

Order

[1] The second respondent's award dated 28 October 2015 under case number NC1589-15 is reviewed and set aside.

[2] The findings and relief in the said award are substituted with a finding that the third respondent's dismissal was substantively fair.

[3] No order is made as to costs.

_____

Lagrange J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

APPLICANT:	M Van As instructed by Cliffe Dekker Hofmeyr
THIRD RESPONDENT:	K Ramolefe instructed by Manamane Mokalane Inc.

LABOUR COURT