IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Reportable

CASE NO: JR 1869/2011

In the matter between:

ANGLO OPERATIONS LIMITED (KRIEL COLLIERY) Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION First Respondent

MASHIKA J *N.O.* Second Respondent

NTSELE G Third Respondent

NATIONAL UNION OF MINEWORKERS Fourth Respondent

Heard: **15 November 2013**

Delivered: **10 December 2013**

Summary: (Review- duty of arbitrator to assist a party – lay representatives – no duty existed on the facts – application dismissed)

JUDGMENT

LAGRANGE, J

Introduction

[1] The third respondent in this matter, Mr G Ntsele ('Ntsele') was dismissed for failing to comply with safe working procedures namely (a) failing to support a machine he was working on; (b) failing to 'lock out' power at the source; (c) failing to provide support according to standards and (d) changing a shuttle car or wheel without assistance. As a result of failing to comply with the safe key procedures, an accident took place injuring Ntsele.

[2] The arbitrator agreed that Ntsele was guilty as charged but found that the sanction of dismissal was inconsistent with the employer sanctions for similar misconduct. He therefore replaced the sanction of dismissal with a final written warning and reinstated Ntsele retrospectively.

[3] It was only on the issue of the inconsistent application of discipline by the employer that the arbitrator found the dismissal was substantively unfair. In this regard, the arbitrator stated:

> *"The third issue related to consistent application of discipline in the workplace. Evidence was provided that there are some of the Respondent's employees who committed as similar transgression but are still working. In fact the respondent's witness, Wanga, confirmed this fact. When this fact was raised by the applicant, I asked the respondent whether this is going to be denied, and the response was no. Consistent application of discipline in the workplace cannot be over emphasised."*

[4] The applicant raises two grounds of review. Firstly, it claims that the Commissioner committed a reviewable irregularity and arrived at an unreasonable conclusion in finding that it had inconsistently applied discipline in dismissing Ntsele. Secondly, it claims the arbitrator committed a gross

irregularity by not advising its representative that he needed to rebut the allegation of inconsistent discipline.

First ground of review

[5] In arriving at the conclusion that the applicant had acted inconsistently, the applicant claims that the arbitrator ignored the following evidence:

5.1 that it had dismissed a supervisor, J Gapula, for the same misconduct;

5.2 a statement by the union representative at the start of the arbitration proceedings that the CCMA had reinstated another employee whom it had dismissed for a similar offence;

5.3 Ntsele's failure to show any appreciation of his wrongdoing or any regret during the arbitration proceedings, and

5.4 the seriousness of the breach of the rule which had resulted in Ntsele's own hospitalisation.

[6] The applicant submits that these failures on the part of the arbitrator led him to reach conclusions that no reasonable arbitrator could have reached.

[7] If one has regard to the cross-examination of Ntsele, it is not unreasonable to infer from his evidence that at least three people who were found to have contravened so-called golden rules relating to safety were still working for the applicant. Under cross-examination, Mr Nkosi conceded in addition that its section manager and a mine captain who had been found guilty of breaching one of the golden rules had also returned to work. Consequently, the union laid a clear basis for a challenge of inconsistent treatment, which called for rebuttal evidence by the employer. It might be true that Ntsele's breach of a golden rule may have been a more serious infraction, or that the employees who were back at work had expressed some contrition or regret for breaking the rule, which might have distinguished those examples from Ntsele's case, but it was for the employer to lead such evidence to distinguish those cases, which it did not do.

[8] Also, it is by no means clear that because the employer dismissed Gapula for a similar offence, that this offered unequivocal evidence of the employer's consistent practice, if that employee was subsequently reinstated. It is difficult to see how a dismissal which was essentially revoked can be held up as an

example of the consistent application of discipline, without evidence being led to explain why that revocation did not detract from the principle of consistent application of discipline. This is tantamount to arguing that a dismissal which should not have occurred may still be relied upon as a precedent to demonstrate consistency on the part of the employer.

[9] In the circumstances, I cannot agree that the arbitrator reached a conclusion which no reasonable arbitrator could have reached, taking account of the evidence highlighted by the applicant in support of this ground of review.

Second ground of review

[10] The applicant argues that since it was apparent from the opening address of the union representative and from his cross-examination of the witness Magqabi that the union was advancing a claim of inconsistency, the Commissioner should have warned the applicant's representative in the arbitration hearing that he was required to lead evidence to rebut the prima facie allegations of inconsistent disciplinary treatment, and that his failure to do so was a gross irregularity. The applicant points out that Mr F Shabangu who represented it in the arbitration hearing was an employee relations officer with no legal qualifications and limited experience in CCMA arbitration proceedings.

[11] The question of when an arbitrator ought to lend a hand to a party in the course of arbitration proceedings, will generally be decided on a number of considerations and the respective weight attached to each consideration will vary according to the factual circumstances of each case.[1].

[12] In ***DB Thermal (Pty) Ltd v CCMA & others*** **[2000] 10 BLLR 1163 (LC)**, Gamble AJ found that the arbitrator had committed a gross irregularity in failing to point out to the parties, all of whom were laypersons, that they had an obligation to adduce evidence as set out in section 138 (2) of the LRA. In that case the employees represented themselves and the employer was represented by its human resources manager. The circumstances in which the Court concluded that the arbitrator had acted irregularly in that case were

[1] See the extract from the LAC decision in ***Bafokeng Rasimone Platinum Mine v Commission for Conciliation, Mediation & Arbitration & others*** **(2006) 27** ***ILJ*** **1499 (LC)**, in paragraph [17] below.

somewhat unusual as the employer had simply placed the record of the internal enquiry before the arbitrator and presented argument on the basis of that record, without calling any witnesses. Similarly, the employees called no witnesses even though there was no agreement that the record of the disciplinary enquiry would serve as the evidence before the arbitrator.

[13] In ***Char Technology (Pty) Ltd v Mnisi & others*** **[2000] 7 BLLR 778 (LC)**, Pillay AJ, stated:

> *"[1] Commissioners of the CCMA are instructed during their training to conduct arbitration proceedings. They are aware, therefore, that after they introduce themselves to the parties at an arbitration they should outline the process to them. The detail of the outline will depend on the level of experience of the parties. The commissioner should, therefore, ascertain the experience of the parties at the outset. In their training arbitrators are briefed to ensure that the parties are aware inter alia of the format of the proceedings and of their rights to call and cross-examine witnesses. The commissioners should also make the parties aware of the consequences of their failure to do and ensure that they are aware of how documentary evidence should be dealt with. Lay people often assume that documents are automatically admissible as evidence of the truth of their contents. By making these introductory remarks, the commissioner absolves himself or herself from intervening or failing to intervene in the course of the arbitration to remind the parties of their obligations. If such intervention is made when the proceedings are under way it could lead to the commissioner being perceived as favouring one or other party."*[2]

[14] The learned judge also held:

> *"[5] From the record it would appear that Mr Steyn and Mr Mashegana, the representative for the third respondent, were knowledgeable about the disciplinary proceedings. It is not evident that they were au fait with the rules of evidence in arbitration proceedings. As a general rule the Act does not permit legal representation in misconduct and incapacity*

[2] At 778-9.

dismissal arbitrations. The commissioners must anticipate that the parties appearing before them would not all be competent to the same degree to present their cases. It does not necessarily follow that because a company has a large turnover or that a union has a large membership that their representatives would be capable of presenting their cases without guidance from the commissioner."

[15] In ***Dimbaza Foundaries Ltd v Commission for Conciliation, Mediation & Arbitration & others*** **(1999) 20 *ILJ* 1763 (LC)**, Gon AJ found that the arbitrator had acted irregularly by not postponing further proceedings, when it was obvious that because of a change of plea by the dismissed employees, the employer representative, who had explained his inability to deal with the evidence on the question of the employees' guilt, was ill-equipped to proceed with cross-examination. In that matter, because the employees had changed their previous plea of guilty to not guilty, the arbitrator decided they should give evidence first, but only postponed proceedings after the employer's representative had conducted his cross-examination of them. The court's reasoning on this issue ran as follows:

"[104] The respondents state that the applicant's concern about not being able to address the issue of innocence or guilt was adequately addressed by having the matter postponed after the respondents had closed their case. There is a supporting affidavit by Rhode, who it must be remembered it was admitted was an experienced labour law litigator and admitted attorney. He further goes on to say that there was no basis in law or fact that the matter ought not to have continued. I do not accept this argument for reasons set out below.

[105] In the circumstances where the applicant is represented by a layman, it is careless to assume that a postponement is going to be requested at an 'appropriate' time. In my view it is the arbitrator's function to be sensitive and alert to the fact that he is there to guide the process particularly as s 138 of the Act provides, and I repeat this:

'(1) The commissioner may conduct the arbitration in the manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly , but must deal with the substantial merits of the dispute with the minimum of legal formality.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.' (Emphasis added.)

[106] More specifically the second respondent should not have allowed cross-examination by a layman, who had not done what he (the second respondent) thought was logical, namely, to ask for a postponement. Such logic he cannot simply impute to someone not legally trained. The power of the process is in the arbitrator's hands. One cannot assume that a layman would instinctively make the correct legal assumptions that the second respondent (or Rhode) would make.

[107] Section 138 specifically provides that the arbitrator alone shall determine procedure. An inexperienced layman may well feel constrained not to challenge the arbitrator's way of proceeding nor be aware of his entitlement to do so nor be aware of what it is he should do.

[108] This is one of the problems with the informality assumed under the Act, namely, that one can more or less do away with any form of process or ignore the processes that would normally be used by legal practitioners in a litigation context.

[109] The discipline of the presenting and arguing evidence is not to be lightly imputed to laymen.

[110] It is one of the fundamental explanations for the distinction between the bar and the side bar. Those who choose to go to the bar largely do so because they wish to pursue a career which revolves around a development and honing of the skills of analysing, representing and challenging evidence in adjudication. While many

attorneys have good advocacy skills, many attorneys choose not to pursue a career with an emphasis on advocacy because they do not feel comfortable with the skills of advocacy. The range of concepts and the jurisprudence and authorities which have developed over the law of evidence and the attendant complexity are a challenge for every lawyer in authority. Certainly layman cannot be assumed to know the issues he is faced with at arbitration nor how to deal with them.

[111] In the context of the CCMA where laymen are required to represent themselves, in circumstances where legal representation is specifically excluded, as in this case, the failure of a layman representing a party to take the logical step in the evidentiary process cannot be ignored on the basis that the party should have taken that step as if he were a trained legal practitioner.

[112] In my view the second respondent is duty bound, as is the person in control of the process, to have mero motu granted a postponement immediately after the closing statements. Once the opening statements were made by the parties and it became patently obvious, also to the second respondent, that the individual respondents' version had changed and that the applicant was unprepared (sic). This would only have been fair. The second respondent should not have made assumptions and waited for a postponement to be requested"[3]

[16] The LAC has sounded a cautionary note about too readily imputing a duty on arbitrator's to intervene. In the *Bafokeng Rasimone Platinum Mine* case, the LAC pointed out the facts which distinguished the *Dimbaza* case:

"[10] In Dimbaza Foundries ... Gon AJ remarked ... that a human resources manager who regularly represents his/her company in arbitration proceedings would normally be aware of the procedures and the logical steps to be taken in the process. However, in that case,

[3] At 1781-2.

unlike in the instant case, the human resources manager was appearing for the first time and clearly needed guidance. One must also bear in mind that, unlike the employee, the applicant was a large corporation and it is expected to be able to equip its representatives with enough resources to enable them to conduct its arbitrations properly or to ensure that it is represented by people who are sufficiently competent to do so."[4]

(emphasis added)

[17] The LAC decided that, in the matter before it, the arbitrator had not committed a reviewable irregularity by failing to advise the employer's representative of the need to call additional witnesses, and held that the question of deciding when an arbitrator was under a duty to intervene was a matter to be determined on the circumstances of each case:

"[17] In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an E irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise we would be opening the floodgates allowing every lay representative who has bungled his/her case to seek its reopening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of s 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole rather than 'nitpicking through every shrapnel of evidence that was considered or not considered', as was

[4] At 1502-3.

stated in Coin Security Group (Pty) Ltd v Machago(2000) 5 LLD 283 (LC).”[5]

(emphasis added)

[18] Turning to the facts in this matter, the following considerations are pertinent:

18.1 The employer’s representative never complained that he was not familiar with the arbitration process;

18.2 He represented a major corporation which ought to have ample resources to ensure it sent adequately trained representatives to arbitration proceedings;

18.3 The issue of consistency in disciplinary action is one of the fundamental factors that an arbitrator is required to consider if it arises[6], and one that any person who deals with unfair dismissals as part of their work ought to be aware of;

18.4 The matter was raised at the commencement of proceedings as an issue the union intended to rely on in arguing that the dismissal was unfair. Moreover, it was not simply a single reference to the issue that was made, but it came up more than once even before the process of leading evidence commenced.

18.5 Any representative reasonably familiar with the test of substantive fairness in dismissal for misconduct would have realised the need to lead additional evidence on the consistency of disciplinary action, particularly once it had been raised with the employer’s witnesses in cross-examination. Moreover, this was not a case where the case of inconsistency was only given an evidentiary foundation when the employee’s witnesses testified.

[5] At 1505.

[6] See s 188(2) read with item 7(b)(iii) of the Code of Good Practice on Dismissals, Schedule 8 to the LRA.

18.6 Further, when the employer's representative objected to the relevance of certain evidence, he was reminded that it was relevant to the issue of consistency.

18.7 The failure to present more evidence to defend itself against the charge of inconsistency lay principally with the applicant and there was no reason for the arbitrator to have realised that it's representative needed reminding of the necessity to defend the applicant on this issue.

18.8 Had the arbitrator invited the applicant's representative to bolster his evidence on consistency, he might well have been perceived as partial.

[19] In the circumstances, I do not think that the arbitrator ought to have assisted the applicant's representative, by pointing out to him that he might wish to lead additional evidence on the issue of consistency before closing the applicant's case. Consequently, the arbitrator did not commit a reviewable irregularity in the conduct of proceedings by failing to advise the applicant's representative of the need to lead evidence to rebut the claim of inconsistent disciplinary action.

Order

[20] The review application is dismissed with costs.

R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant: A Snider instructed by Cliffe Dekker Attorneys

For the third and fourth Respondents: S Tilly instructed by Molebaloa Attorneys