REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Not of interest to other Judges

Case no: JR 2396/10

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
ALFRED DOLAMO	**Second Applicant**
JOHANNES MGABI	**Third Applicant**

and

COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
SOLOMON MALAZA N.O.	**Second Respondent**
SHANDUKA COAL (PTY) LTD [GRASPAN COLLIERY]	**Third Respondent**

Date of ruling: 09 April 2015

RULING: APPLICATION FOR LEAVE TO APPEAL

VENTER, AJ

Introduction

[1] Prior to considering the submissions made by the parties, the procedural background that gives rise to this ruling in the application for leave to appeal requires some mention.

[2] This matter was heard on 8 July 2014 where-after this Court delivered judgment on 21 November 2014. The representatives for the National Union of Mineworkers ("First Applicant"), Alfred Dolamo ("Second Applicant") and Johannes Mgabi ("Third Applicant") ["*the* Applicants"), were dissatisfied with the judgment of the Court and made application for leave to appeal. Same was filed with this Honourable Court on 1 October 2014.

[3] I thereafter considered the application for leave to appeal, absent any written submissions made by the Applicants in particular. I communicated the ruling to the Honourable Court. On 21 November 2014, I was advised that the Applicants' representative was appointed to the bench as an Acting Judge during the time I considered the application for leave to appeal. For those reasons the legal representative was unable to file submissions amplifying the leave to appeal and I was not alerted to that fact.

[4] In correspondence between my associate and the legal representative for the Third Respondent, it was agreed that as soon as the acting appointment of the Applicants' representative comes to an end that the submissions will then be made. In this regard the parties agreed that the judgment in the leave to appeal would stand over until the aforesaid has taken place. I thus exercised my discretion not to confirm and proceed with the issuing of the

aforesaid ruling. That ruling is then regarded as null and void. I subsequently received the Applicants' written submissions dated 23 January 2015 and the Third Respondent's written submissions dated 30 January 2015. I am indebted to the parties for presenting the written submissions. I had the opportunity to consider those submissions and approached the application for leave to appeal as follows:

[4.1] I do not intend to restate or traverse what has been set out in both parties' written submissions and do not need to repeat them herein.

[4.2] I shall, to the extent necessary, refer to the applicable principles when application for leave to appeal is considered.

[4.3] I shall consider the grounds raised and whether or not the application succeeds.

Summary of views set out as follows:

(I) APPLICATION FOR LEAVE TO APPEAL

[5] The Applicants contend that this Court misdirected itself as set out in paragraph 31 of the preceding judgment read with what is set out in paragraph 36 of the judgment. It is alleged that the Court misconstrued the parity principle crystalised in *SACCAWU and Others v Irwin and Johnson* Ltd (1999) 20 ILJ 2302 (LAC) at paragraph [29].

[6] It is further alleged that the Court misdirected itself and erred by not interrogating whether the circumstances and facts of the case support the value judgment made by the Commissioner on the behaviour of shop stewards in their representative capacities according to the principles articulated in the case law correctly analysed by the Court.

[7] It is further alleged that the Court misdirected itself and erred by failing to

appreciate the distinctiveness of the charges. It is submitted that the record reflects that there was an overlap in the charges to a certain degree. It is further alleged that this Court erred by failing to find that the Commissioner failed to exercise his discretion judicially when dealing with the issue of compensation. It is common cause that the Commissioner found that only the procedure followed in dismissing the Second and Third Applicants were defective. He then awarded an amount of compensation only.

[8] Lastly, it is alleged that this Court erred by not finding that the Commissioner's failure to consider the principal issue before him and to evaluate the facts presented at the hearing could have allowed the Commissioner to arrive at a reasonable conclusion. As such, the decision arrived at amounts to a reviewable irregularity. These are merely a summary of the conspectus of the grounds for appeal.

(II) SUBMISSIONS IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

[9] As already indicated, the application for leave to appeal seeks to assail the whole of the judgment and order previously made. The written submissions set out the following:

> '4. In these submissions, I accordingly deal with the following foci upon which the whole application is pegged.
>
> 4.1 Our courts' approach to the application for leave to appeal;
>
> 4.2 The parity principle as crystalised in *SACCAWU and Others v Irvine and Johnson;*
>
> 4.3 The role and behaviour of shop stewards in their representative capacity; and
>
> 4.4 The discretion when awarding compensation'.

[10] In considering the submission regarding the approach that a court should adopt in considering an application for leave to appeal, I was referred to various cases dealing therewith. Section 17 of the Superior Courts Act 10 of 2013 provides that an appeal will be granted if, amongst others, there are reasonable prospects of success or where there are some other compelling reasons that the appeal should be heard. In a similar vein the submissions then refer to the test of reasonable prospects of success, if there is a reasonable prospect that the Court of Appeal may take a different view and hold the trial judge to be wrong. The argument develops that there was some misdirection on facts and that the Court's conclusions are vitiated by a material misdirection which in light of the record constitute reasonable prospects that another court may come to a different conclusion.

[11] The argument further develops by setting out the reasoning pertaining to the well-known parity principle, alternatively also known as the principle of inconsistency. This Court was pertinently referred to the construction of the charges. It is alleged that the allegations contained in the charge sheet were couched in a broad catch all nature which lured the Commissioner to treat all charges as one. The submissions also make reference to how the Courts have considered the role and behaviour of shop stewards and how an employee in the capacity of a shop steward should act. There are balancing views emanating from our jurisprudence. This Court endorsed the principle that misconduct can never be justified by an employee where he or she performs duties as a trade union representative, whilst still in the employ of his or her employer.

[12] It is further contended that the employer herein should have instituted a more lenient approach towards disciplining the Second and Third Applicants. In returning to the construction of the charges, it is submitted that the Second Respondent ("the Commissioner"):

> '… clumped all the charges together and treated them as one. As a result, the

Commissioner muddled all evidence before him'.

[13] In further advancing their submissions, the Applicants refer this Honourable Court to the settled case law on how a commissioner should deal with the question of credibility and lastly the Applicants persist with their view relating to the manner in which the Commissioner did not fully or at all, explain how he arrived at compensation. In concluding the written submissions, it is submitted on the Applicants' behalf that given the contentions raised in the written submissions, the likelihood exists that another court considering the same facts, may reasonably reach a different conclusion.

(III) SUBMISSIONS OPPOSING THE APPLICATION FOR LEAVE TO APPEAL – THIRD RESPONDENT'S WRITTEN SUBMISSIONS

[14] In fairly concise answering submissions, the Third Respondent opposes the application for leave to appeal. In directing this Court to the manner in which the application for leave to appeal will be opposed, this Court is directed to the relevant legal principles applicable (which I do not intend to repeat) and this Court is directed to the manner in which the Labour Appeal Court has of late considered the application of the parity principle.

[15] In further advancing their opposing propositions, the Third Respondent direct this Court to various considerations in our jurisprudence which has a direct bearing in considering whether an application for leave to appeal should be granted. In further developing the argument opposing the application for leave to appeal, the Third Respondent also concerns itself with the charges put up against the Second and Third Applicants, a question which I will deal with below.

[16] Lastly the Third Respondent concludes the written submissions by referring to aspects of the reasoning set out in the judgment, now sought to be assailed by this application for leave to appeal.

THE CONSTRUCTION OF CHARGES

[17] It is necessary to take a step back and view the entire incident that played out at the workplace, the Commission for Conciliation, Mediation and Arbitration ("CCMA") and this Court. In doing so, there are two aspects to consider, namely:

(i) the strike and various allegations of misconduct that prevailed during the strike; and

(ii) more importantly – the construction of the charge sheet.

[18] I say so for the following reasons namely; it is ultimately what was set out in the charge sheet which formed the basis of this disciplinary hearing. In this case it led to the dismissal of the Second and Third Applicants. The question regarding the construction of a charge sheet has to a large degree been dealt with by various labour law fora. It is necessary to consider the manner in which the construction of a charge sheet should be seen, within the context of employment law.

[19] What flows from a charge sheet as in this case, results in what will be considered by a Commissioner. The Applicants take umbrage with the manner in which the Commissioner dealt with what was contained in the charge sheet. At the outset I state that I hold a different view. It is necessary to indicate to the parties the reason for saying so. It is necessary to consider a brief development, albeit in sparse terms of the context in which disciplinary charges have to be seen, have to be dealt with and how they should be interpreted within the context of employment law.

[20] In the matter of *Williams v Gilbey's Distillers and Vintners (Pty) Ltd*[1] the Court - constituted as it was at that stage -, held the view that it is really

[1] (1993) 2 LCD 327 (IC)

immaterial what label is given to an allegation of misconduct. The important issue is that the facts that give rise to the allegation of misconduct must be fully canvassed during the disciplinary hearing.

[21] In the same vein, the then Industrial Court in the matter of *Dywili v Brick and Clay*[2] held the view that:

> '… This Court cannot, however, expect an employer to describe offences committed by an employee with such precision that they would stand uncriticised in a criminal court. The test here is again the test of fairness and the main consideration was whether the employee knew what accusations he was called upon to face. The name given to those transgressions is of minor importance. I am satisfied that the employee was aware of the nature of the charge'.

[22] With the coming of age of the Labour Relations Act[3] this line of thinking permeated the current constitutional dispensation. The views expressed by the various employment fora and more specifically this Court relating to the construction of a charge sheet, has at all stages been the same. This Court in the matter of *Zeelie v Price Forbes (Northern Province)*[4] held as follows:

> '[36] The Code of Good Practice in dismissal cases contained in Item 4(1) of Schedule 8 to the Act, stipulates that 'the employer should notify the employee of allegations by using a form and the language the employee can reasonably understand.'…
>
> [37] In dealing with the point in limine, one should not loose sight of the purpose of the charge-sheet, namely to ensure that the dismissed employee is made aware of the allegations he is to face in the disciplinary hearing. Disciplinary charges are not intended to be a

[2] [1995] 7 BLLR 42 (IC) at 47 B-C.

[3] Act 66 of 1995 (as amended)

[4] (2001) 22 *ILJ* 2053 (LC) (1).

precise statement of the elements of an offence. The charges need only be sufficiently precise to allow the charged employee to identify the incident which forms the subject-matter of the complaint in order for him or her to prepare a suitable defence. (See *Korsten v Mac Steel (Pty) Ltd and Another* [1996] 8 BLLR 1015 (IC) at 1020; and *Dywili v Brick and Clay* [1995] 7 BLLR 42 (IC) at 47 B – C). Such right to prepare for the employee should not be rendered illusory by an inadequate charge-sheet. (See *Police and Prisons Civil Rights Union v Minister of Correctional Services and Others* (1999) 20 ILJ 2416 (LC) at 2426 C – F).

[38] This would be a highly technical approach to labour relations if such an objection were to be upheld by this court. The very purpose of the Act would be defeated….'

[23] It seems to me that the construction of the charge sheet is not the principle issue in employment law. The principle issue in employment law is that the context of the charges, alternatively the facts upon which an employer premises the allegation of misconduct, as in this case, must allow that the parties fully canvass those facts during the disciplinary enquiry. Having considered the bundle of documents that served before the Commissioner, this is what took place. However, it goes further one must now consider what a commissioner must do when he or she has to deal with arbitration proceedings arising from a referral in terms of the LRA. It is significant that the draughters of the LRA prescribed the informal manner in which a commissioner must dispose of the issues presented to him during arbitration.

[24] Section 138(1) of the LRA could not be more clear to wit:

'(1) The commissioner may conduct the arbitration in a 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 a minimum of legal formalities'.

[25] Insofar as this section applies to the manner in which the Commissioner dealt with these merits, it is apposite to consider the statutory departure namely, that the Commissioner must determine the dispute fairly and must deal with the substantial merits of the dispute.

[26] The provision of Section 138(1) has now become solidified in the Constitutional Court judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[5]

[27] In considering the current case facts and more specifically the reconstructed record that was presented when the review application was argued, a proper comparison of the versions presented to the Commissioner was set out in the judgment now sought to be set aside by the application for leave to appeal.[6] These facts emanated from the record and I do not intend repeating them herein.

[28] Given the facts as argued during the hearing of the review, and given the subsequent consideration of these facts, it is pertinent to comment that:

(a) the facts remain the same and did not change.

(b) the facts considered in the judgment are the same facts that will prevail should this matter be argued on appeal.

<u>The vexed question of consistency</u>

[29] I am indebted to both legal representatives who in a refreshing manner referred this Court to the well established jurisprudence on consistency. They have alerted the Court to the development of the parity principle in that respect. Having considered the authorities referred to, I hold the view that nothing much has changed. In the Court's view the parity principle, without

[5] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)

[6] Judgment, p 12, paragraph 31, p 13, paragraphs 32, 33 and 34, p 14, paragraphs 35 and 36

extrapolating in great detail as to what definition should be attached thereto, simply means that, in giving effect to the principle of parity as properly set out in *SACCAWU and Others v Irvine and Johnson Ltd supra*, the point of departure is that discipline must not be capricious. This means that an employer may not demonstrate, what finds application in this matter, a sudden change in its attitude or behaviour towards employees. In addition thereto, discipline must not be spiteful. There is no version that discipline was effected in such a manner towards the Second and Third Applicants. I say so by considering the facts I have already mentioned.

[30] This Court further holds the view that the all or nothing principle simply cannot be woven into the blanket of consistency. By that I mean that it can never be the intention of this Court to bring forth a considered view that indicates that either all employees who participate in a strike should be dismissed, under the banner of the common purpose doctrine or all employees irrespectively should be granted leniency of sorts and escape any form of prosecution. The facts argued before the Commissioner clearly indicated that the Third Respondent differentiated between the conduct of the Second and Third Applicants as opposed to the other strikers. On the facts argued before the Commissioner, same indicated that the Second and Third Applicants were in a position to exert influence over the striking employees.

[31] It was previously indicated that the case presented before the Commissioner did not deal with a situation where the entire shop steward's body acted in exactly the same manner, but that the Second and Third Applicants were irrespective that perception of conduct] isolated from the rest of the group and dismissed. There was no version that they were dismissed whereas the rest of the shop steward's body were handed a warning. Those facts were not presented before the Commissioner either.

[32] Given what I have ready set out above, the application of the principles set out in *SACCAWU and Others v Irvine and Johnson Ltd supra* find application in that it cannot be fair that other employees profit from a wrong decision. There was simply no evidence before the Commissioner that the Second and Third Applicants were made subject to any form of discriminatory policy concerning their dismissals. I also hold the view that no evidence was adduced to indicate that the Third Respondent took a concerted and underhanded decision to isolate the Second and Third Respondents as a result of the positions they occupied and then enforce a dismissal on them. In a nutshell, there was certainly merit and truth to the allegations contained in the charge sheet. The Second and Third Applicants were given ample opportunity both at the disciplinary hearing and at the arbitration to ventilate their concerns.

[33] It is trite that fairness encompasses a value judgment and this Court held the view that the Commissioner was intricately wound and steeped in the atmosphere of the arbitration. He was able to observe the demeanour of the parties, their performance in the witness box and was aptly positioned to consider the divergent versions before him. This Court cannot second guess that function at the time, given the fact that this Court does not sit as an armchair critic or re-evaluate the merits afresh. It is thus extremely difficult for the Court to enter the credibility fray given the record that is available and criticise the Commissioner for the value judgment he made, alternatively how he called the fairness and the law as he saw it at the time.

<u>The balance of the merits</u>

[34] Reverting to the test set up by the Applicants in their application for leave to appeal and in amplifying the approach to be adopted by this Court, it is apposite to consider the manner in which the Labour Appeal Court has more recently alerted the Labour Court on how it should consider applications for

leave to appeal.[7] In summary, the Labour Appeal Court indicated that a number of factors should be considered which include whether there is a novel point of law or whether there has been a misinterpretation of existing law. In addition thereto, when a court considers an application for leave to appeal, it has to necessarily consider whether or not there was an incorrect application to the facts and in particular the assessment of the factual justification for the dismissals or alternative sanctions.

[35] The Labour Appeal Court further guides this Court in that if there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law that is obviously a different question.

[36] With the aforesaid in mind, I shall conclude the evaluation of this application.

Conclusion

[37] In considering the application for leave to appeal and the subsequent written submissions, it is obvious that no novel question of law is raised. Insofar as contending that the parity principle was misconstrued in this instance, two aspects are commented on, to wit:

(i) the parity principle has neither changed regarding the law therein nor the application from the time of the Labour Appeal Court pronouncing on that principle in *SACCAWU and Others v Irvine and Johnson Ltd;*

(ii) the facts applicable herein, alternatively the facts which the Applicants contend were improperly considered by the Commissioner which led to a disproportionate or incorrect application of the parity principle have been commented on herein and those facts emanate directly from the bundle of documents.

[7] *Martin and East (Pty) Ltd v National Union of Mineworkers and Others* (2014) 35 *ILJ* 2399 (LAC)

[38] It is further trite law that when a commissioner writes an arbitration award, he or she does not have to prepare the award with the eloquence of a judgment emanating from this Court or any other High Court for that matter. One has to consider the manner in which a commissioner reaches his conclusion against the backdrop of all the facts and evidence presented to the Commissioner. I say so for one reason, namely that the version which was presented at the time of the disciplinary hearing is largely the same version presented at the time of the arbitration, the documents and facts were the same. The manner in which the charge sheet was framed ultimately caused all the facts relating to the dismissal of the Second and Third Applicants to be presented to the Commissioner. The Commissioner considered these facts. Despite his consideration of the facts and the version set up by the Second and Third Applicants relating to the remainder of the shop stewards' body, the Commissioner in this instance nevertheless applied his mind, in a fair manner in my view, and upheld the dismissal of the Second and Third Applicants.

[39] I hold the view that the value judgment made by the Commissioner flows from what was presented to him and is premised on the discretion he enjoys in disposing those facts. He as a commissioner has latitude and flexibility to make a value judgment. Having considered all those factors, inclusive of the contention that the six months' compensation awarded to the Second and Third Applicants was not properly explained, I hold the view that the application for leave has not advanced such a novel proposition or demonstrated such departure from the facts at hand that the application should be granted.

[40] There is no version presented by either the Applicants or the Third Respondent in their submissions that the bargaining and/or collective relationship between the First Applicant and the Third Respondent has changed. This Court readily assumes that such relationship is still in place

which is a consideration that this Court takes in determining the question of costs.

[41] With the aforesaid in mind, I make the following order:

1. The application for leave to appeal is dismissed.

2. There is no order as to costs

_____

Venter AJ

Acting Judge of the Labour Court of South Africa