THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1906/14

In the matter between:

GLENCORE OPERATIONS SOUTH-AFRICA (PTY) LTD (LION FERROCHROME) **Applicant**

And

NUM obo SIMON MARIPANE **First Respondent**

COMMISSION FOR CONCILIATION, **Second Respondent**

MEDIATION AND ARBITRATION

SIMON MOHUBEDU RANTHO N.O. **Third Respondent**

Heard: **6 July 2016**

Delivered: **30 September 2016**

Summary: **Review Application and Cross-Review – Collective Agreement – Full-time health and safety shop steward – Termination and replacement - Refusal or failure to assume position – instructions given – gross insubordination – Defective Record – evidence in chief of only witness of Applicant neither transcribed nor reconstructed – breach of Rules of Labour Court read with Practice Manual – test of materiality of evidence not properly dealt with – prejudice to Labour Court - unacceptable practice – discretion exercised on exceptional basis.**

JUDGMENT

HARPER AJ

Introduction:

1. The Applicant launched a review application arising from an Arbitration Award given on 1 August 2014 by Mr S M Rantho, a Commissioner ("the Arbitrator") of

the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The First Respondent lodged a cross review application against the award of the Arbitrator.

2. The Arbitrator found that the dismissal was substantively unfair, reinstated the First Respondent as from the date of the dismissal, being 7 February 2014, replaced the dismissal with a final written warning operative for 12 (twelve) months from the date of the issuing of the warning and awarded the First Respondent "back pay" in the amount of R 60, 296.04, being the equivalent of 7 (seven) months' remuneration.

3. The Applicant in the proceedings before the Labour Court (Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome) seeks to review and set aside the award of the Arbitrator and requests that the Labour Court should find that the dismissal was the appropriate sanction in the circumstances.

4. The First Respondent seeks to cross-review the award of the Arbitrator on the basis that the Third Respondent should not have found that the First Respondent was guilty of gross insubordination and accordingly the Arbitrator erred in issuing a final written warning for the gross insubordination.

5. The parties submitted written supplementary heads of argument in response to the request of the Labour Court.

6. At the Labour Court the Applicant was represented by Mr D Masher of Edward Nathan Sonnenbergs and the First Respondent by Mr E S Makinta of a firm with the same name.

<u>Significance material aspects of the record</u>

7. At the outset it is necessary to record that the legal representatives of the Applicant did not take sufficient steps to prepare a comprehensive record of the Arbitration proceedings for the Labour Court. The transcription in respect of the evidence in chief of the only witness of the Applicant, Ms Colleen Tema, at the Arbitration did not form part of the record submitted to the Labour Court. The parties sought to rely on the semi-legible notes of the Arbitrator which were also not comprehensive and which were not transcribed for the convenience of the Labour Court by the parties. The Applicant accordingly failed to comply with the provisions of Rule 7A(5) and 7A(6) of the Rules of the Labour Court read with clause 11.2.6 of the Practice Manual of the Labour Court. I also mention that the transcriber recorded in her certificate that she had to deal with a poor recording and hence some of the exchanges were inaudible. The pertinent issue is that the evidence in chief of the Applicant's only witness for the reasons stated herein was significant, material and relevant and this is incontrovertible.

8. For example no meeting was arranged with the First Respondent's representative in order to share the respective notes of their clients, no meeting was arranged with the First Respondent's legal representative in order to attempt to reconstruct the Record in respect of the testimony of the witness of the Applicant and no meeting was arranged with the Arbitrator for that purpose.

9. During the Arbitration held at the CCMA, the recording system failed and the parties agreed to record the evidence in chief of Ms Tema manually. The parties were not legally represented during the Arbitration. Both parties should have maintained written notes of the evidence given during the Arbitration. It is necessary to record that where the parties are advised that the recording system is not operational this should encourage them to either use their own recording devices or to properly transcribe the proceedings in longhand. If necessary assistance should be sought.

10. It is significant that the affidavits and heads of argument submitted for the Review and Cross-Review are extensive and accordingly much attention was given to

those aspects of the matter. The task of reconstructing a material part of the record however received no attention.

11. Although Mr Mthini on behalf of the First Respondent initially objected to the manner in which the Applicant had dealt with the record, he later accepted that the Review could proceed on that basis. It was inappropriate for the legal representatives of the Applicant to omit a material part of the record. As the Third Respondent lodged a cross-review, it was also the duty of the legal representatives of the Third Respondent to ensure that they complied with the Rules of the Labour Court and the Practice Manual in relation to preparing the record. Where a party launches a cross-review, it is not entitled to ignore the preparation of the record because the principal reviewer has failed to prepare a proper record.

12. Inconvenience and materiality must be clearly distinguished, and inconvenience does not impact on materiality. The record or part of a record does not lose its material status because it becomes inconvenient to deal with the correction of the record.

13. When parties fail to prepare a proper record this also potentially compromises the Labour Court and this can lead to a miscarriage of justice. What is most important is that where a party leads a single witness, it is incumbent upon the reviewing party to ensure that the evidence of that witness is transcribed in those respects where it is material. There is no other evidence which that party can rely upon. Important questions arise in that context which include factors such as whether the witness was a person of integrity, whether he testified on a satisfactory basis, whether he convincingly dealt with the issues and what issues are either common cause or are disputed.

14. The Applicant's legal representatives submitted that, it was unnecessary to transcribe the evidence of the witness of the Applicant because they had submitted that part of the record which was relevant. As the transcription in that

respect was not available it was not possible for them to determine whether the evidence of the witness of the Applicant was material or not. The test of materiality requires an objective and thoroughgoing analysis of the evidence in order to determine whether it is relevant or not. As neither of the legal representatives attended the arbitration, it was incumbent on them to transcribe or reconstruct the evidence of that witness in order to determine its materiality. The issue of reconstructing records is comprehensively dealt with in the matter of *Francois Baard District Municipality v Rex N.O. and others*[1].

15. It should also be noted that the First Respondent was dismissed on 7 February 2014 and the matter was heard in the Labour Court on 6 July 2016.

16. After having considered whether the review and cross-review should either be dismissed or be remitted for a fresh hearing I have decided to exercise my discretion, albeit on exceptional basis, in order to deal with the matter. I have taken account of the interval between the termination of the First Respondent's employment and the current hearing at the Labour Court, and because, in my opinion, there are sufficient common cause facts which will enable me to reach a proper decision. There are also the interests of fairness. I nevertheless appreciate that there is some risk attached in relation to adopting this approach for the specific reason that I have not been given the opportunity to peruse the evidence in chief of the only witness of the Applicant.

<u>Background Facts</u>

[1] Unreported decision of the Labour Appeal Court.

17. During 2012 the Applicant and the National Union of Mine Workers ("NUM") entered into a Health and Safety Agreement which stipulated that a full time health and safety shop steward would be appointed by NUM at the Applicant.

18. The First Respondent was the Full-Time Health and Safety Shop Steward for the Applicant. The members of NUM held an election and he was then appointed to that position during 2012. The appointment was intended to operate for a period of 36 months subject to certain conditions which are not relevant for the purposes of this Judgment.

19. During 2013 NUM convened an election and another employee was appointed to replace the First Respondent. The First Respondent, as a member of NUM, was entitled to participate in the election process.

20. NUM duly advised the Applicant on 26 September 2013 that an election had taken place and that the First Respondent would be replaced by another NUM member as the full-time health and safety shop steward. The effect of this is that the First Respondent, a raw materials operator, would have to return to his position in the Raw Materials Department at the Applicant and accordingly his future employment would be secure. NUM advised that the replacement had been appointed for the period between 19 September 2013 and 19 September 2016.

21. In response to the notification of NUM, the Applicant advised the First Respondent that he would cease to be the full-time health and safety shop steward and he was instructed to return to his position in the raw materials department.

22. The First Respondent failed and/or refused to obey that instruction and hence did not return to that position as from 1 December 2013. During another meeting held in December 2013 the Applicant accordingly repeated the instruction but the First Respondent again failed or refused to obey the instruction.

23. The First Respondent's explanation was that he wished to clarify the outcome of the election with NUM and particularly as he contended that his period of office had not expired in terms of the collective agreement entered into between the Applicant and NUM. He therefore held the view that he was not disobeying an instruction of the Applicant.

24. During late December 2013 the Applicant met with the First Respondent, instructed him to return to his position and warned him that there could be disciplinary implications if he did not observe the instruction. At least by that stage the First Respondent should have understood that he was engaging in insubordination and that he was not entitled to characterise his refusal or failure to work as being based on a wish to clarify the issue.

25. On 31 December 2013, the Applicant advised the First Respondent that his refusal or failure to return to the position constituted misconduct; he would be charged with disciplinary offences and would be required to attend a disciplinary enquiry which eventually took place on 28 January 2014. He was charged with gross insubordination on the basis that the instruction had been repeated and the insubordination was serious in nature. He was found guilty at the disciplinary enquiry and was dismissed by the Applicant on 16 January 2014. He lodged an appeal but was advised on 7 February 2014 that it was unsuccessful.

26. The First Respondent was represented by NUM at the disciplinary enquiry although it had notified him that pursuant to the election that his appointment as the Full-Time Health and Safety Shop Steward had been terminated in terms of the collective agreement.

27. In terms of the Disciplinary Procedure of the Applicant an employee who is found guilty at a disciplinary enquiry of having engaged in insubordination by not

responding to an instruction should be issued with a written warning which will operate for a period of 12 months[2].

28. On the basis that the instruction was repeated on three occasions and that the First Respondent did not comply with the instruction, the chairperson of the enquiry decided to dismiss the First Respondent.

The Arbitration

29. The First Respondent referred a dispute to the CCMA and the Arbitrator issued the Award on 1 August 2014. Ms Colleen Tema testified on behalf of the Applicant which was represented by its Human Resources Manager. He was cross-examined by the First Respondent's representative, a NUM official. The First Respondent testified in respect of his case and he was the only witness that testified on his behalf.

30. In his Award the Arbitrator found that the Disciplinary Code and Procedure formed part of a collective agreement between the parties and hence the Applicant was bound to comply with the provisions of the collective agreement in relation to the sanction.

31. The Arbitrator accordingly found that the dismissal was substantively unfair and reinstated the First Respondent with "back pay" in an amount equivalent to seven months' remuneration.

32. In the review application the Applicant submitted that:-

32.1. the Disciplinary Code and Procedure was not part of a collective agreement;

[2] P189 of Record.

32.2. no evidence dealt with that issue at the arbitration;

32.3. the First Respondent bore the onus of proving that the Disciplinary Code and Procedure constituted a collective agreement;

32.4. the Arbitrator misdirected himself in finding that it constituted a collective agreement and that accordingly the Applicant was bound by its provisions in relation to deciding upon the penalty in respect of the misconduct;

32.5. the First Respondent had been issued with the instruction on at least 3 (three) occasions during December 2013.

33. It is clear from the record that the evidence of the First Respondent at the arbitration did not indicate that the Disciplinary Code and Procedure constituted a collective agreement and accordingly this submission was introduced later in the absence of any such evidence.

34. The Arbitrator found that the First Respondent had engaged in misconduct by not obeying the instruction but found that there was a single offence and that as the Disciplinary Procedure formed part of a collective agreement, the Applicant could not deviate from the Disciplinary Procedure when deciding upon the sanction.

35. The evidence in this matter and the probabilities indicate that the First Respondent was issued with the instruction on more than one occasion.[3] Even if he had not been issued with the instruction on more than one occasion during the whole of December 2013, these are circumstances where:-

35.1. he was replaced by another Full-Time Health and Safety Shop Steward after an election and accordingly he was required to return to his position;

[3] P39 of record

35.2. the recognised Union, NUM, had authorised the appointment of the new Full-Time Health and Safety Shop Steward in terms of the collective agreement;

35.3. two employees could not both hold the same position of the full time Health and Safety Shop Steward;

35.4. if the First Respondent had a dispute with the appointment for any reason including whether a democratic process had taken place (which is not suggested by the evidence), he should have lodged a formal complaint with NUM given that NUM was responsible for convening the election process in conformity with the collective agreement;

35.5. in the event that NUM did not resolve the complaint he would have been entitled to exercise his rights against NUM, assuming that they existed;

35.6. he was paid during December 2013 but was not productive during that period as he did not return to his position and exercise his duties;

35.7. his refusal to accept the change in the circumstances constituted obstructive behaviour and he should have dealt with the matter on a constructive basis at an early stage and should have done so by directly engaging with NUM;

35.8. he was entitled to obtain formal advice;

35.9. he had at least 4 weeks to deal with and resolve the matter and by failing to return to the raw materials department, he engaged in gross insubordination.

36. In these circumstances even if the instruction had been issued on a single occasion which is highly improbable a dismissal would be justified. Furthermore the Disciplinary Procedure constitutes a guideline and the specific circumstances in respect of the alleged misconduct impact significantly on the sanction[4].

37. The Arbitrator based his approach on the sanction on the basis that the Disciplinary Procedure constituted a Collective Agreement. This does not appear from a reading of the Disciplinary Procedure and there was no evidence indicating that it is a collective agreement. In the context of the evidence given, no reasonable decision maker could have reached that decision and accordingly he committed an irregularity.

38. In these circumstances and where a collective agreement is operative an employee who is aggrieved with the decision of a Union is not entitled to breach his conditions of employment in order to vent his opposition to the outcome of an election process conducted by the Union. He is obliged to return to his position in accordance with his conditions of employment and the collective agreement.

39. He can concurrently challenge the outcome of the election by seeking advice and where appropriate seeking to implement corrective measures. He however needed to address that issue with NUM in the first instance.

40. It was not however appropriate to disobey the instructions of his employer and he was obliged to assume his work duties while he pursued his complaint.

41. In that regard it is now conceded in the supplementary submissions of the First Respondent that the Disciplinary Procedure did not constitute a Collective Agreement.

[4] See: Motor Industry Staff Associations and 1 Other v Silverton Spray Painters and Panel Beaters (Pty) Ltd and 2 Others (2013) 34ILJ 1440 (LAC)

42. In the context of the circumstances and on the basis that the Applicant issued the instruction to the First Respondent on at least (three) occasions it was inappropriate for the Arbitrator to reinstate the First Respondent and accordingly the decision of the Commissioner in that respect was not the decision of a reasonable decision maker. The issue is not whether there was a single offence in these circumstances but whether he deliberately continued to disobey the instructions. In that regard the First Respondent during cross-examination did not dispute that the instruction had been issued on (three) occasions.[5]

43. The question now arises whether the First Respondent should be granted compensation. The First Respondent was granted back pay. As the dismissal was fair and warranted it is my view that a reasonable decision maker would not grant compensation in these circumstances. An employee should not be awarded compensation where he has repeatedly refused to assume his work duties. A material breach of conditions of employment in the form of insubordination should not invite the granting of compensation and a reasonable decision maker would not draw such a conclusion. In these circumstances accordingly I have decided not to grant the Applicant any compensation.

44. It would however not be appropriate to grant an order of costs in respect of the review application.

45. In respect of the Cross-Review the issue of whether the Disciplinary Code and Procedure was a collective agreement has been dealt with. In respect of whether there was a single instruction or repeated instructions I have found that there were (three) instructions and that the First Respondent conceded this during cross-examination at the Arbitration.

46. For the reasons stated there is therefore no merit in the Cross-Review.

[5] P46 of record

47. I therefore make the following Order:-

47.1. The Review Application is granted and hence the award of the Arbitrator is substituted with an order that the First Respondent is dismissed as from 7 February 2014;

47.2. No compensation is granted to the First Respondent;

47.3. No order is granted in respect of the costs of the Review;

47.4. The Cross-Review is dismissed;

47.5. There is no order granted in respect of the costs of the Cross-Review.

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R.A.L. Harper

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Mr D Masher of Edward Nathan Sonnenbergs

FOR THE FIRST RESPONDENT: Mr ES Makinta of E.S Makinta Attorneys