IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 14/08

In the matter between

Chemical, Energy, Paper, Printing, Wood and Allied Workers Union	**Appellant**
And	
National Bargaining Council for the Chemical Industry	**First Respondent**
Charoux, L N.O	**Second Respondent**
Le Sel Research (Pty) Ltd	**Third Respondent**

JUDGMENT

WAGLAY ADJP

Introduction

[1] A number of the appellant's members were dismissed by their employer, the third respondent, for allegedly committing misconduct while participating in a lawful strike. The appellant referred the matter to the Bargaining Council for the Chemical Industry (the Bargaining Council), the first respondent, to set aside

the dismissals on the grounds that the dismissals were substantively unfair.

[2] The commissioner, the second respondent, who arbitrated the dispute on behalf of the Bargaining Council found that the dismissals, save in respect of Maria Moses were both substantively and procedurally fair. The appellant then approached the Labour Court to review and set aside the award handed down by the commissioner except insofar as it dealt with Maria Moses.

[3] The Labour Court dismissed with costs the application for review, but granted the appellant leave to come to this Court on appeal.

Background

[4] While the members of the appellant were participating in a lawful strike some of them were alleged to have intimidated those employees who refused to participate in the strike. In particular it was averred that some of the striking employees intimidated employees from going to do their night-shift by preventing taxis from transporting the non-striking employees into the employer's premises. This alleged act(s) of intimidation was said to have taken place between 17h00 and 17h40 on 17 June 2003.

[5] The appellant's members who were charged with the misconduct were those identified on photographs in the possession of the employer. 15 employees were indentified and charged, 12 of the 15 admitted that they were depicted on the photographs; they were found guilty and dismissed. The remaining 3 denied that they were on the photographs and were acquitted.

[6] In the course of the misconduct enquiry 6 new employees were identified on the photographs. A second enquiry was then initiated by the employer where the 6 newly identified employees were charged. 4 of the 6 admitted being on the photographs and suffered the same fate as the 12 at the previous enquiry while the remaining 2 having denied being on the photographs were acquitted.

[7] Two employees who are important *dramatis personae* in this matter are Margaret Soetmelk and Doris Mangena, hereafter referred to as Soetmelk and Mangena. Soetmelk was amongst the 12 employees dismissed after the initial misconduct enquiry. She was, however, reinstated before the appellant challenged her dismissal at the Bargaining Council. Mangena was one of the employees acquitted at the second misconduct enquiry because she denied that it was she who was depicted on the photographs.

The arbitration

[8] At the arbitration the dismissed employees denied that they were involved in any act(s) of intimidation but admitted that they talked to the non-striking employees in an attempt to convince them to join the strike. They also led evidence to the effect that both Soetmelk and Mangena were depicted on the photographs and were part of their group who spoke to non-striking employees.

[9] The commissioner found that those employees who were alleged by the employer as being present at the place, date and time when the misconduct was committed were guilty of intimidating non-striking night-shift employees with the intention of preventing

them from going to work. This conduct, the commissioner found to warrant dismissal. The commissioner thus found, save insofar as Maria Moses was concerned, the dismissals to be both substantively and procedurally fair. With respect to Maria Moses the commissioner found that she could not be clearly identified on the photographs and because she denied being on the photographs, her dismissal was unfair and ordered her reinstatement.

[10] Furthermore, the commissioner found that the employer was correct in only taking disciplinary action against the employees it could identify and acquitting those employees whose identity was unclear and not confirmed by the employee concerned. In the case of Maria Moses the employer stated that she had admitted being on the photograph and was therefore dismissed. Maria Moses, however, later denied being on the photograph and because the photograph was unclear the commissioner gave her the benefit of the doubt and found her dismissal unfair.

The Review

[11] On review in the Labour Court the appellant did not dispute the arbitrator's findings that: the dismissed employees were guilty of misconduct for which they were charged; and, that dismissal was an appropriate penalty. The application was limited to the allegation that the commissioner committed a reviewable irregularity by failing to find that the employer had been selective in the employees it dismissed and therefore the dismissals should have been found to be unfair and all dismissed employees reinstated.

[12] The appellant's allegation that the employer had chosen to discipline certain employees while turning a blind eye to others who were co-perpetrators was based on Soetmelk's reinstatement and Mangena's acquittal.

[13] In the Labour Court the appellant argued that notwithstanding Soetmelk's failure to appeal the findings of the disciplinary enquiry that found her guilty and dismissed her, she was reinstated in her employment. In the alternative, it argued that even if Soetmelk did appeal such appeal was without merits and should have been dismissed. The appellant's arguments were based on Soetmelk admission that she was depicted on the photographs and the fact that every employee who was identified on the photographs and admitted their photograph, was dismissed. Soctmelk's reinstatement was therefore, so the appellant submitted, *"selective and discriminatory reinstatement."*

[14] With regard to Mangena the appellant argued that the failure by the employer to dismiss her was also selective because substantial evidence was available to the employer to challenge Mangena's denial of being part of the group that was found to have intimidated non-striking employees on the day, the time and the place in question. The appellant referred to the evidence it led at the arbitration which was to the effect that Mangena was a *"marshall"* at the time of the incident and clearly identifiable on the photographs. The appellant argued that the employer's failure to use the above evidence while accepting Mangena's *ipse dixit* that she was not depicted on the photographs thus acquitting her of the misconduct charge amounted to *"selective dismissal"*.

[15] Both of the above arguments were dismissed by the Labour court. In so far as Soetmelk was concerned it found that there was no evidence from the appellant to gainsay the evidence of the employer's witnesses[1] that Soetmelk had in fact appealed against the finding of the disciplinary enquiry. An appeal application form with Soetmelk's signature was also produced in evidence, and there was no evidence presented to indicate that the appeal was in any way withdrawn. The Labour Court also took into account the evidence of the chairperson of the appeal committee that she reversed the decision of the disciplinary enquiry because there was no evidence to dispute Soetmelk's version that although she was in the photograph the photograph shows her walking away from the group.

[16] Having regard to the evidence presented with respect to Soetmelk's reinstatement at the internal appeal, the Labour Court stated:

> *" It was never the applicant's [appellants] version in the arbitration proceedings that its members were involved in acts of intimidation …in the absence of any convincing evidence led by the applicant at the arbitration proceedings that Soetmelk was indeed guilty of intimidation, the company's evidence that she was exonerated after the appeal hearing must be accepted. There is no suggestion that Soetmelk's appeal was contrived, or that she was favourably treated on some nefarious basis".*

[1] Wendy Frodshan- who was the chairperson of Soctmelk's appeal; Anthea Rose- the human resource manager before whom Soetmelk signed her appeal form; and, Mary- who was the chairperson of the disciplinary hearing.

[17] With regard to Mangena, she was identified by some of the employees who were initially charged with misconduct. The disciplinary enquiry accepted her averment that she was not the person on the photograph. There was no other evidence against her and the chairperson of the disciplinary enquiry thus acquitted her. At the arbitration the evidence presented by the employer was that after the initial enquiry where 15 employees were charged and 12 convicted a second enquiry was held against those indentified at the initial enquiry precisely to ensure that it would not be accused of selective discipline. The second enquiry followed the same pattern as the first with those who were not clearly identifiable on the photographs and denying being on the photographs being acquitted. The commissioner found nothing wrong with this approach.

[18] The Labour Court thus held that the commissioner's decision was not open to be reviewed as it was not a decision that a reasonable commissioner would not make[2].

The Appeal

[19] The appellant has not presented any new arguments on appeal. It persists with the arguments presented at the Labour Court that the dismissal of its members amounted to "selective unfair dismissals" because: there was no basis on which Soetmelk's appeal should have been successful; and because it allowed Mangena to escape being disciplined for committing serious misconduct by choosing

[2] The Labour Court followed the decision of Sidumo & Another v Rusternburg PlatinumMines Ltd & Others (2007) 28 ILJ 2405

not to put evidence before the disciplinary evidence to "discredit the dishonest evidence of Mangena".

[20] While the principle is correct that all employees who have committed misconduct must be treated similarly unless there is some justification to treat them differently- in cases of collective misconduct an employer can only act against those employees it can prove to have committed the misconduct complained of[3]. An employer is therefore obliged, in situations as obtained in this matter, to charge only those employees against whom it has evidence. If such employees are found guilty the employer may impose an appropriate penalty. An employer cannot, in matters such as this, simply dismiss all of its striking employees because some from amongst them committed serious misconduct. As a consequence, some employees who commit serious misconduct may not be charged or when charged, the employer is unable to satisfy the disciplinary enquiry that each of the employee who is charged is in fact guilty of the misconduct. Hence, where there has been collective misconduct and the employer only charges some of the employees because it only has evidence against them and from amongst those charged some are found to have committed the wrong and dismissed and a few acquitted, it does not and cannot follow that the dismissal was unfair because of any selective application of discipline. An employer can only be accused of selective application of discipline if, having evidence against a

[3] See Mabinana and others v Baldwins Steel (1999)5 BLLR 453 LAC.

number of individual employees it arbitrarily selects only few to face disciplinary action.[4]

[21] An employer is also not obliged to investigate the identity each and every employee who may have participated in a wrongful activity and then proceed to take disciplinary measures against all the wrongdoers. An employer need only proceed against those it has evidence against. In ***Mabinana & others v Baldwins Steel***[5] this Court held that while only a handful of employees were dismissed despite the large number of persons who had participated in the unlawful act, their dismissal was not unlawful as the employer is not obliged to ensure that it has identified all the perpetrators. Similarly in the matter of ***SA Commercial Catering and Allied Workers Union and others v Irvin & Johnson***[6] this Court held that where there is collective misconduct and one employee is acquitted by one chairperson while another employee is convicted by another chairperson this would not amount to differentiation or selective discipline. The Court here went on to say that "*some inconstancy is the price to be paid for flexibility which requires the exercise of discretion in each individual case.*"[7] Hence, where a number of employees are dismissed consequent upon a collective wrongful conduct, a wrong decision by the employer resulting in an acquittal of an employee who did commit the wrong can only be unfair if it is a result of some discriminatory management policy.[8]

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[4] In Reckitt & Coleman (SA)(Pty)Ltd v CWIU & others (1992) 12 ILJ 806 (LAC) where the Court held that there is a difference between cases where employees are arbitrarily selected for discipline and cases in which an employer selects for discipline from a mass if workers only those against whom it has evidence.
[5] Supra at paragraph [7] to [10]
[6] (1999)20 ILJ 2302 (LAC) al
[7] Ibid at paragraph [29]
[8] ibid at paragraph [29]

[22] It is evident from the record, the findings and the award handed down by the commissioner that he properly conducted the arbitration and properly considered the issues including that of selective application of discipline by the employer. After considering all of the evidence the commissioner concluded that the employer could not be faulted for acting only against those it had evidence against. The commissioner also, in my view, correctly found that the convictions of some employees and acquittal of others was based on the evidence before the chairperson of the disciplinary hearing and the chairperson's interpretations of it.

[23] Based on the above there can be no argument of selective unfair dismissals: there is no evidence that employees were arbitrarily selected to face misconduct charges or that Soetmelk and Mangena were acquitted because of some "discriminatory management policy". Soetmelk and Mangena were not selected for differential treatment: Soetmelk was found not guilty on appeal and reinstated because the appeal committee had no evidence to contradict Soetmelk's averment that while she was on the photograph she was not part of the group and the photograph confirmed that she was away from the group. In the case of Mangena, she was treated no differently to the other employees. She was not singled out for any special treatment: if she lied that could not be imputed to the employer. The Labour Court correctly, in my view, stated that if Mangena was dishonest her "*dishonesty cannot be the basis on which others, who admit being present at the scene of and who*

were found guilty of serious misconduct, should escape" the consequence of their wrongful conduct.

Conclusion

[24] I am satisfied that the findings of the commissioner are supported by the reasons given for it, the facts and the law[9] and there is no basis upon which this Court can interfere with that award, the award is not one that a reasonable decision maker could not make[10].

[25] In the circumstances the court *a quo* was correct in dismissing the review. With regard to costs I see no reason in equity and in law for the costs not to follow the result.

[26] In the result :

The appeal is dismissed with costs.

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WAGLAY ADJP

I agree

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KHAMPEPE JA

[9] See Bato Star Fishing (Pty) Ltd v Minister of Enviromental Affairs & Others2004 (4)SA490 (CC); Sidumo (Supra) and Fidelity Cash (Supra)

[10] See Sidumo & Another v Rusternburg PlatinumMines Ltd & Others (supra); Fidelity Cash Management Services v CCMAand (supra)at para 97 and Edcon v Pillemer NO & Others (2008) 5BLLR 391 (LAC) at para 23

I agree

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TLALETSI AJA

Appearances

For the Appellant	:	Adv. H. Van der Riet SC
Instructed by	:	Cheadle Thompson & Hayson
For the Third Respondent	:	Adv. F. Bhoda
Instructed by	:	Yusuf Nagdee Attorneys
Date of Judgment	:	3 September 2010