IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 122/2019

In the matter between:

ANGLO AMERICAN PLATINUM LTD

(RUSTENBURG PLATINUM MINES) **Appellant**

and

EDWIN ANDRIAAN BEYERS **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

IRENE TSHIFHIWA NYATHELA *N.O* **Third Respondent**

Heard: **06 May 2021**

Delivered:(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 02 July 2021

Coram: Coppin JA, Savage AJA and Molefe AJA

JUDGMENT

MOLEFE AJA

[1] This is an appeal against the whole judgment and order handed down by the Labour Court per Nkutha-Nkontwana on 11 October 2019. This appeal turns on the test and circumstances under which an employer in the private sector is permitted to interfere with a disciplinary sanction imposed by a chairperson of a disciplinary hearing appointed by an employer, and in circumstances where the employer's disciplinary code and procedures make no provisions for such interference.

[2] The appeal raises the question whether the third respondent's (the Commissioner's) finding that the appellant was entitled to intervene and change a disciplinary sanction handed down in a disciplinary enquiry from a final written warning to a dismissal, was fair.

[3] At the outset of the hearing, the appellant's late filing of the notice of appeal was condoned. The first respondent did not oppose the condonation application.

Factual background.

[4] The first respondent (Mr Beyers) was employed by the appellant on 1 June 2015 as an Electrical Foreman. At the time of his dismissal, he held the position of a Senior Electrical Foreman. On 21 April 2017, Mr Beyers was served with a suspension letter pending an investigation into an alleged breach of the lockout procedures.

[5] On 3 May 2016, Mr Beyers was issued with a notice to attend a disciplinary enquiry for the following misconduct: failure to carry out the lockout procedure in accordance with the appellant's Isolation and Lockout Operational Procedure ("the lockout procedure")

[6] The lockout procedure states that:

> 'All equipment associated with that machine must be locked out: The tandem conveyor drive-both drives must be locked out as well as the electrical counterweight must be lowered into the position to remove stored energy.

> Crushers-all conveyors feeding in ore as well as auxiliaries associated with the crushers must be locked out.
>
> It is important that equipment is isolated and locked out in order to prevent personnel from starting such equipment while it is being worked on.
>
> It is the responsibility of each person that works on equipment to do his own lockout. No person will work under someone else's lockout.'

[7] Mr Beyers pleaded guilty to the allegations against him and the disciplinary chairperson found him guilty of breaching his obligation to follow proper isolation and lockout procedures.

[8] Mr LeRoux Esterhuyse, the appellant's appointed initiator at the disciplinary enquiry presented a written submission dated 20 May 2016, which reads as follows:

> 'After my investigation, I found that the workplace was safe and no one was ever put in harms in any way. This was a breach in procedure only. This is also the first offence of Mr Edwin Beyers and the relationship is still healthy.'[1]

[9] The Chairperson imposed a final written warning sanction and required Mr Beyers to undergo retraining on the lockout procedure. After the said sanction, Mr Beyers was sent for retraining on 10 May 2016 and was subsequently instructed to report for duty.

[10] The appellant applied to review the decision of the disciplinary enquiry chairperson after the National Union of Mineworkers (NUM) lodged a complaint regarding Mr Beyers' final written warning, accusing the appellant of inconsistent application of discipline, alleging that its members who had been found guilty of the same transgression in the past were dismissed. Consequently, the appellant resolved to review the chairperson's sanction. On 23 May 2016, Mr Beyers was suspended with immediate effect pending the review hearing. A review panel was appointed and a hearing was held on 3 June 2016. The review panel recommended dismissal as an appropriate

[1] Volume 3, page 237.

sanction, and Mr Beyers was summarily dismissed with effect from 10 June 2016.

Arbitration Award.

[11] Mr Beyers referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA arbitrator held that the dismissal was both procedurally and substantively fair. The arbitrator held that the appellant had established that there was a practice of internal reviews in the workplace, and such practice was fair, and that its invocation in this case was justified. The arbitrator held that the offence was a serious one, and given Mr Beyers seniority, his dismissal was justified

[12] In the award, the arbitrator *inter alia* held as follows:

> 12.1 It is common cause that the employer in this case, reviewed the employee's sanction of a final written warning and changed it to a dismissal. It is also common cause that the employer's disciplinary code does not make provision for a review process. The onus is on the employer to prove that it was entitled on a balance of probabilities to review its sanction.
>
> 12.2 The employer's witness Mr Hlokwe testified that the employer has a practice of reviewing sanctions, if it is convinced that the sanction imposed by the chairperson of an enquiry is not appropriate considering the seriousness of the misconduct committed. Mr Hlokwe also argued that the practice is in line with the *BMW v Van Der Walt (*2000) 2 BLLR 121 (LAC) in that it provides that fairness and fairness alone is a yardstick. The employee on the other hand argued that the *BMW* case does not apply in this case as it deals with double jeopardy. I do not accept the employee's argument that the *BMW* case does not apply in this case in that it had to do with the question whether the employer can conduct a second hearing which is not different from what happened in this case.'[2]

[2] Volume 1, page 28 Award para 5 .2.1 and 5.2.2.

[13] In *BMW (SA)(Pty) Ltd v Van Der Walt* [3] (''BMW") relied on by the arbitrator, it was *inter alia* held that:

> [12] Whether or not a second disciplinary enquiry may be opened against an employee would what I consider, depend upon whether it is in all the circumstances fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA and Others v Carlton Paper of SA (Pty) Ltd (1988) 9 ILJ 588(IC) at 596 A-D* that it is unnecessary to ask oneself whether the principles of autrefois acquit or res judicata ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also. *Botha v Gengold [1996] BLLR 441 (IC).: Maliwa v Free State Consolidated Gold Mines (Operations) Ltd (1989) 10 ILJ 934 (IC).* I should make two cautionary remarks. It may be that the second disciplinary enquiry is ultra vires the disciplinary code *(Strydom v Usko Limited [1997] 3 BLLR 343 (CCMA) at 350 F-G.* That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.'

The decision of the Court *a quo*

[14] The court *a quo* found the arbitrator's decision to be reviewable and held that the appellant had not demonstrated exceptional circumstances that warranted its intervention in the disciplinary proceedings of Mr Beyers. Although the appellant sought to rely on the application of discipline as a *bona fide* reason for its intervention, it however failed to adduce proof that the sanction of a final written warning was inconsistent with sanctions issued in similar circumstances in the past, despite being specifically placed in dispute that similar cases in the past necessarily resulted in dismissal. The court *a quo* held that the dismissal was substantively unfair and reinstated Mr Beyers.

[15] On the contrary, the appellant's case during the arbitration was that the transgression was serious enough to justify the review of the sanction of a final written warning and substitution with a sanction of dismissal. No new evidence

[3] (2002) 21 ILJ 113 (LAC) at para [12].

was placed before the arbitrator in this regard, at least to justify the drastic intervention.

The Appeal.

[16] The primary grounds of appeal of the appellant relate to the following three main findings of the court *a quo*:

16.1 It was incumbent upon the appellant to prove exceptional circumstances that justified its decision to review and change Mr Beyers' sanction, and no such exceptional circumstances existed.

16.2 The transgression committed by Mr Beyers would amount to a procedural breach and no new evidence was presented to demonstrate the seriousness of the offence.

16.3 Alteration of the sanction was impermissible because of the doctrine of election.

Exceptional circumstances

[17] Counsel for the appellant submitted that the learned judge erred in her interpretation and application of the principles set out by this court in the *BMW* matter. It is argued that in *BMW,* this court decided that fairness is the overriding consideration in labour disputes. Accordingly, whether a second enquiry may be convened will ultimately depend solely on whether it is fair to do so. It is also submitted that the learned judge misdirected herself in not applying the binding authority of *Branford v Metrorail Services (Durban & others)*[4] which held that fairness is the actual test to be applied when determining whether an employer may intervene in disciplinary proceedings and hold a second enquiry.

[18] The appellant contends that, having applied the incorrect test of exceptional circumstances, the court *a quo* erred in not determining whether it was fair in the circumstances for the appellant to change the sanction of a final written warning to one of a dismissal, given the seriousness of the offence and the

[4] (2003) 24 ILJ 2269 (LAC).

inconsistency, given that the appellant dismisses employees who are guilty of breaking safety rules.

[19] It is argued on behalf of the appellant that in any event, exceptional circumstances were shown for the following reasons:

19.1 A practice to review sanctions existed at the appellant, and such practice created a precedent in the workplace;

19.2 The offence was a serious one;

19.3 Mr Beyers was a senior Electrical Foreman and his seniority justified the ultimate sanction, and the arbitrator's reliance on Mr Beyers seniority was simply not reasonable.

[20] Mr Beyers' counsel submitted that any notion to the effect that the court *a quo* gave no consideration and did not view "fairness" as a principal consideration ought not to be sustained. According to this argument this much is evident from the court *a quo*'s judgment for example in the following passage:

> [36] "It follows that in the absence of exceptional circumstances, Anglo *American's volte face* was patently unjust to Mr Beyers; hence his objection. The dictates of modest fairness between employer and employee demand that this objection should be sustained".

Doctrine of election

[21] In its judgment, the court a *quo* held that in the absence of exceptional circumstances justifying the review enquiry, the appellant's conduct is impermissible in terms of the doctrine of the right of election which is fundamental in our law and espoused in labour matters as well. In this regard, the court *a quo* relied on *Rabie v Department of Trade and Industry and Another* [5]and stated:

> [27] Another reason why abandoning the pre-dismissal arbitration is unlawful is that it is impermissible in terms of the doctrine of the right of election

[5] (J515/18) [2018] ZALCJHB 78 (5 March 2018).

which has since been endorsed by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*. The Constitutional Court referred with approval to *Chambers of Mines of South Africa v National Union of Mineworkers and Another*where it stated that:

> "One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternatives and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application".

[22] Counsel for the appellant submitted that the court *a quo* failed to consider that in at least three authoritative cases,[6] the court permitted an employer to vary the sanction imposed by a disciplinary chairperson, and upheld the arbitrator's award imposing a sanction of dismissal based on the consideration of fairness.

[23] Counsel for Mr Beyers submitted that a reading of the judgment shows that the court *a quo*'s reference to the doctrine of election was not to elevate the said doctrine to a self-standing test/principle, but rather applied same within the context of "exceptional circumstances" that need to be demonstrated by the employer in such circumstances.

[24] Mr Beyers' counsel argues that the exceptional circumstances (or the "good cause" as referred to by the appellant at the arbitration hearing) relied on by the appellant as substantiation for its interference with the disciplinary hearing) sanction, were premised on the objection by the trade union that a final written warning constitutes inconsistent discipline. However, no evidence was tendered that in the absence of such trade union intervention and insistence, the appellant would have had any cause or motivation to interfere with the said sanction.

[6] *SA Revenue Services V Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); *Moodley v Department of National Treasury and Others* [2017] 4 BLLR 337 (LAC); (2017) 38 ILJ 1098 (LAC); *James and Another v Eskom Holdings SOC Ltd and Others* [2017] 10 BLLR 979 (LAC); (2017) 38 ILJ 2269 (LAC).

Evaluation

[25] The concept of fairness applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer on the one hand and the employee on the other hand. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

[26] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd*, [7] the court made the following remarks on fairness:

> 'Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgement to established facts and circumstances (*NUM v Free State Cons at 4461).* And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down any universally applicable test for deciding what is fair.'

[27] In the decision in *Branford*,[8] the majority held *inter alia* that:

> "[15] Although during the hearing of this appeal Mr B*ingham,* for the appellant contended that the test laid down in *Van der Walt's* case (was that a second enquiry was permissible only in exceptional circumstances, that is not borne out by dictum in para [12] quoted above. In that paragraph it is quite clear that Conradie AJ considered fairness alone to be the decisive factor in determining whether or not the second enquiry is justified. The learned judge of appeal mentioned the issue of exceptional circumstances merely as one of the two caveats and not as the actual or real test to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in *Van der Walt* is that a second enquiry would only be permissible in exceptional circumstances. The current legal position as pronounced in *Van de Walt* is that a second enquiry would be justified if it would be fair to institute it."

[7] 1996 (4) SA 577 (A) at 476.
[8] (2003) 24 ILJ 2269 (LAC) para 15.

[28] According to the minutes of the disciplinary hearing, it was only after the disciplinary chairperson consulted with the ER Manager Mr Hlokwe that the final written warning sanction was imposed. In his testimony, Mr Hlokwe did not dispute the fact that he sanctioned the final written warning even though he sought to blame it on some confusion on the seriousness of the transgression at the time.

[29] Mr Beyers' evidence that Mr Pienaar did perform the lockout for him and gave him his key back was not disputed. Mr Esterhuyse conceded to the contrary during cross-examination that the transgression would amount to a procedural breach in relation to the failure by Mr Beyers to sign the register if indeed he performed a lockout using his own key. He also corroborated Mr Beyers' version of events that his lockout was indeed attended to by Mr Pienaar, but only that Mr Beyers did not sign the register.

[30] In *MEC for Finance KwaZulu-Natal- and Another v Dorkin NO and Another*[9] this court held that while the test was ultimately one of fairness, it would probably be unfair to subject an employee to further disciplinary action except in exceptional circumstances. It was held there that:

> [14] The decision of the majority in the *BMW* case sanctioned a second disciplinary as a way for an employer to achieve that if, in all the circumstances, it is fair to do so, and it expressed the view that it would probably be unfair to subject an employee to a second disciplinary hearing except in exceptional circumstances. In the light of that decision it would be consistent with that decision to hold in this case that this case presented exceptional circumstances and the second applicant had a right to approach the Labour Court to alter the decision on sanction made by the first respondent.''

[31] A reading of the above mentioned judgments, and to the extent that the principle of "fairness and fairness alone" was enunciated as a threshold or test in matters of this nature, it is evident that the threshold of fairness at all relevant times is to be informed by all the established circumstances of the relevant case

[9] [2008] 6 BLLR 540 (LAC) at para 14.

relied upon by the employer to interfere with the disciplinary hearing sanction. In particular, fairness is informed by established exceptional circumstances.

[32] At all the relevant times the appellant was aware of the final written warning sanction, accepted it and acted in accordance with its terms by re-training Mr Beyers on the lockout procedure and subsequently instructed him to report for duty. The appellant had no objection to the sanction until the Union raised a complaint in this regard.

[33] If the employer relies on a Union's concerns about the consistency of the disciplinary sanction imposed as in casu, and/or on the impact on the consistent application of discipline at a workplace, the employer was to establish such facts/circumstances through evidence properly placed before the arbitrator. It is more so considering that it was specifically placed in dispute that similar cases in the past resulted in dismissal. The appellant made no effort to place any evidence before the arbitrator that similar misconduct in relation to the lockout procedure invariably resulted in dismissal.

[34] It is trite that the reasonableness of an arbitration award is assessed with reference to the totality of the evidence properly placed before the arbitrator. [10] In applying the *BMW* test, the arbitrator failed to determine whether fairness between the appellant and Mr Beyers, informed by exceptional circumstances to do so, justified the interference with the sanction imposed by the disciplinary enquiry chairperson.

[35] Had the arbitrator given due and reasonable weight to all the relevant evidence, the arbitrator, acting as a reasonable decision-maker, could not have reached the conclusion that the dismissal of Beyers was substantively fair.

[36] Consequently, premised on the reasons advanced by the court *a quo*, the court *a quo*'s decision to interfere with the arbitrator's award was correct.

[37] For all of these reasons, the appeal is dismissed with costs.

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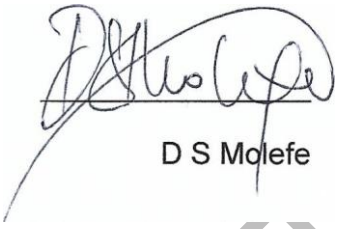
[10] See *Herhold v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)* 2013 (6) SA 224 (SCA) at para 25, *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC) at paras 32 and 33.



Acting Judge of the
Labour Appeal Court

Coppin JA and Savage AJA concur.

APPEARANCES

FOR THE APPELLANT:	FA Boda SC and Z Ngwenya Instructed by Cliffe Dekker Hofmeyr Inc
FOR THE FIRST RESPONDENT:	C Goosen Instructed by Parsons Attorneys