Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN
Case no: C 545/09

In the matter between:

NATIONAL UNION OF MINEWORKERS First applicant
JOHANNES MADITO Second applicant
PULE WILLIAM MELAMU Third applicant
and
CCMA First respondent
ANTONY OSLER N.O. Second respondent
SEDIBENG DIAMOND MINE JV Third respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] The second and third applicants, messrs Madito and Melamu, were dismissed for misconduct. It was alleged that they had committed the offence described in the disciplinary code of the employer, Sedibeng

Diamond Mine (the third respondent), as: “Unauthorised breaking and searching of fissure and/or aiding and abetting diamond theft.”[1]

[2] The commissioner, Antony Osler (the second respondent) presided over an arbitration that continued over five days.[2] The applicants were represented at the arbitration by their attorney of record, Mr Neville Cloete. In a comprehensive arbitration award comprising 128 paragraphs in single spacing (and what appears to be a 10pt font) over 24 pages, he came to the following conclusion:

2.1 “The dismissals of employees OJ Madito and PW Melamu are found to be substantially fair.

2.2 The dismissal of employee OJ Madito is found to be procedurally fair while that of employee PW Melamu is found to be procedurally unfair.

2.3 The employer is ordered to pay to the employee PW Melamu compensation in the amount of R1575, 00[3] by 31 July 2009 by means of a cheque issued in the employee‟s name or by any other means agreed to by the parties.

2.4 There is no order as to costs.”

[3] The applicants seek to review this award in terms of s 145 of the Labour Relations Act.[4]

1 The charge was formulated only as “aiding and abetting diamond theft”. I will deal with the significance of this in the course of the judgment.

2 The matter has a long and tortuous history. The employees were dismissed in April 2006. They referred an unfair dismissal dispute to the CCMA. The commissioner in that arbitration found that the dismissals were fair. The award was set aside on review by the Labour Court and referred back to the CCMA for a fresh hearing. The arbitration heard by Mr Osler was then convened and concluded over five days in February and May 2009. The review application was launched on 31 July 2009. This application was heard on 1 October 2010.

3 This seemingly paltry amount comprised one month‟s salary.

4 Act 66 of 1995 (the LRA).

GROUNDS OF REVIEW

[4] The applicants raised the following grounds of review:

4.1 The arbitrator committed a gross irregularity by applying a disciplinary code that was inapplicable to the parties.

4.2 The arbitrator committed a gross irregularity by finding that the employees had been guilty of “unauthorised breaking of fissure or diamond-bearing gravel”, whereas the charge at the disciplinary hearing that led to their dismissal was “aiding and abetting diamond theft”.

4.3 The circumstantial evidence on which the arbitrator relied in reaching his conclusion on substantive fairness did not justify the finding.

4.4 The arbitrator did not apply his mind to the amount of compensation to be awarded to the second applicant, Madito, following his finding on procedural unfairness in Madito‟s case.
[5] I will deal with each of the grounds in turn. But first, the background facts.

Background facts

[6] The company (the third respondent) operates a diamond mine in the Kimberley area.[5] Diamond theft is a serious problem. The current disciplinary code lists as one of 33 offences that may lead to summary dismissal for a first offence, “unauthorised breaking & searching of fissure and/or aiding and abetting diamond theft.”
[7] Messrs Madito and Melamu were employed as a rock drill operator and rock drill assistant respectively. They worked underground and, as their titles indicate, were responsible for drilling.

5 It was previously known as Messina Diamonds (Pty) Ltd. This becomes relevant in the context of the disciplinary code.

[8] On 3 March 2006 the two employees were working on a stope in an area on level 15 underground at cross-cut 6. They were seen leaving an area where it appeared that "scratching" had taken place, ie that someone had attempted to break the diamondiferous fissure. It was found on a balance of probabilities that they had been responsible and it is on this basis that they were disciplined and dismissed
[9] At the arbitration, the company called five witnesses.
[10] The mine manager, Enrico Irvia, explained how the mining operation was conducted. He also testified that he, accompanied by Mr Manganyi, a miner, inspected level 15 on 3 March 2006. As they passed cross-cut 6, he saw two people with headlamps sitting or kneeling at the entrance of the stope, about 10 metres from the cross-cut. He and Manganyi continued to cross-cut 7 and returned, taking about 2-3 minutes to cover the 16m distance between the two cross-cuts. The two employees – Madito and Melamu – passed them from the front. According to Irvia, they were moving fast and looked "surprised" and "afraid". Irvia entered the stope through cross-cut 6 and notice that the fissure had been broken into small pieces at the entrance – this meant that the fissure had been recently disturbed or „scratched". He also saw an 8-pund hammer, a 1,2m pinch bar and a shovel on the scene. He testified that these were tools that were not normally used by the employees. The scratching must have taken place that morning, and only the two applicants were working in that area. Mr Manganyi had told Irvia that he had entered the stope before 0700 that morning and there were no scratches on the fissure. Irvia added that the two applicants would have seen if anyone else had been responsible for the scratching, as they were not far away and anyone working there would have had to wear headlamps. Had they seen any such activity, they were under a duty to report it, but they did not do so. Irvia further testified that, if the two applicants had already been drilling when they were seen by the miner and the shift boss at 0900, they should have completed the 29 holes they had drilled between 1030 and 1100 – thus giving them enough time to scratch the fissure by the time he and Manganyi arrived between 12:20 and 1300. He came to the conclusion

that it could only have been the two applicants who were responsible for breaking the fissure.

[11] It is common cause that the disciplinary enquiries of the two employees were separated – hence the complaint of procedural unfairness. Irvia testified that this was done by agreement between the company and the union (the first applicant) that represented the two employees at the disciplinary hearings.

[12] With regard to the disciplinary code, Irvia testified that the correct disciplinary code had been used. The union did hand a different code, but that was both outdated and incomplete, comprising only 4 pages of a document consisting of at least 15 pages, as can be seen from the index. Irvia explained that the applicable code was issued in 2003 under the name of Messina Diamonds, but the name changed to Sedibeng in July 2006. The content of the code remained the same. That code described the offence (in clause 3.31) as “unauthorised breaking and searching for fissure and/or aiding and abetting diamond theft.” He understood those to be elements of the same charge; and in any event, the charge was explained to the two employees and they knew exactly what the misconduct in question was.

[13] Mr NW Mocumi, acting shift boss at the time, testified that he went down to level 15 with Manganyi on the day of the incident at about 0900. At that stage, they saw Madito and Melamu drilling in the stope beyond cross-cut 6, and there was no broken fissure. Nor were there any tools consonant with broken fissure. The two applicants did not report seeing anyone breaking fissure.

[14] Mr E Manganyi (aka Spinx), a miner at the time, was on the morning shift on 3 March 2006. He went to level 15 at about 0640 and at that time there was no broken fissure at cross-cut 6. He said the employees would have had to take about 3 minutes per hole and had to drill 29 holes at cross-cut 6, whereafter they were meant to move to cross-cut 6. At about 0900 Manganyi again went down to the drilling site at cross-cut 6 at about 0900. He still didn‟t see any broken fissure. He then saw the two applicants

again at about 1245 when he went to the area with Irvia. He saw the two applicants walking in the direction of cross-cut 7. At first, he said they appeared to be walking normally, but later said (through an interpreter) that they were walking “briskly”. He did not notice if they looked scared. He then saw broken fissure, as well as a shovel, pinch bar and hammer at the entrance to cross-cut 6. He mentioned that the two applicants would have had to have passed the broken fissure or tools about six times while drilling. They would also have seen the headlamps of any other people in the area. They did not report seeing unauthorised people in the area or the broken fissure, despite a clear duty to do so.

[15] The presiding officer at the disciplinary hearing, PJ Kleynhans, testified that he had agreed with the union representative, Mr Selokale, that the disciplinary hearings of the two applicants would be split. The first hearing (that of Madito) was completed before the second one (that of Melamu) started.

[16] With regard to the applicable disciplinary code, Kleynhans said the applicable code had been revised in July 2006, but the substance remained the same. The code that the union wanted to refer to consisted of only 4 pages and was incomplete. Referring to the charge, Kleyhans said that “aiding and abetting diamond theft” was an umbrella charge that covered the breaking and scratching of fissure.

[17] The employees appealed internally. The chairperson of the appeal hearing was Mr DH van den Heever. He found on appeal that the charge was sufficiently descriptive; that the actual activity that the employees had been charged with was not in doubt; and dismissed the appeal.

[18] For the applicants, only Mr Madito (the rock drill operator) testified at arbitration. Melamu declined to do so.

[19] Madito testified that the and Madito drilled the 29 holes at cross-cut 6 and were on their way to cross-cut 7 when they came across messrs Irvia and Manganyi at about 1245. He denied that they had scratched or broken fissure. He said they took the whole time to drill the 29 holes. He also

denied that he would have seen the light of other people working, unless they were shaking the lamps to draw his attention. He only saw the tools at the scene when Irvia called him there.

[20] The union representative, Selokale, denied that he had agreed to separate hearings. He said the charge was not contained in the code the union wished to refer to.

The disciplinary code

[21] As stated above, the code that the union argued was the applicable one, was handed up at arbitration. It comprised only four pages. It is headed "Messina Diamonds (Pty) Ltd Industrial Relations Manual" and is undated – at least on those four pages. The front page is an index that suggests that the manual comprises at least 15 pages. The last entry reads: "List of appropriate penalties" against page number 15. The "offence"[6] of "theft or fraud" was meant to appear at page 5 – that was not available. From the date of the disciplinary hearing in 2006, the subsequent appeal, the first arbitration at the CCMA, the subsequent review, the second arbitration and the hearing of this matter in October 2010, the applicants have not been able to produce the full code that it wished the chairperson of the hearing, the appeal chairperson, or either of the arbitrators to have relied upon.

[22] The only available code, on the other hand, is the one dated July 2006 and reflecting this annotation on the front page (in bold capital letters): "NB: ONLY MESSINA DIAMONDS (PTY) LTSD WAS REPLACED WITH SEDIBENG DIAMOND MINE (JV)".

[23] Having considered all the evidence before him, the arbitrator concluded that "…the employer‟s code (in its pre-July 2006 version), rather than the

[6] Once again, I use the language as contained in the disciplinary code. I do not associate myself with the unnecessary criminalisation of misconduct in the workplace by using the language of "charges", "offences" and findings of "guilt" or otherwise.

union code, is probably the code used in the disciplinary proceedings and it is also the applicable disciplinary code and procedure in this instance."

[24] I do not find that to be an unreasonable conclusion on the probabilities and based on the evidence before the arbitrator.

[25] Even in instances where a disciplinary code had not been followed to the letter, this court has stated in the past that the ultimate test remains one of fairness. For example, the Labour Appeal Court held in *Highveld District Council v CCMA*[7]:

7 [2002] 12 BLLR 1158 (LAC)
8 [1999] 5 BLLR 431 (LAC)

"[T]he fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair… When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all circumstances the procedure was fair."

Similarly, in *Leonard Dingler (Pty) Ltd v Ngwenya*[8] it was held:

"In my judgment, and having regard to all the circumstances, the time when and the manner in which the apparent hearing was held, while not strictly in accordance with the appellant‟s disciplinary code, were substantially fair, reasonable and equitable."

[26] In the arbitration under review, I can see nothing unreasonable or unfair in the arbitrator‟s conduct when concluding that the relevant disciplinary code was applicable. And in any event, apart from the element of procedural unfairness relating to Melamu that I deal with hereunder, there can be no complaint that the applicants did not have a fair hearing. This ground of review must fail. The conclusion reached by the arbitrator is entirely reasonable.

The disciplinary charge

[27] The applicants were charged with “aiding and abetting diamond theft”. On review, they complain that they were not charged with having broken fissure.

[28] The arbitrator found that the phrase “aiding and abetting diamond theft” was an umbrella term that included the breaking of fissure. He pointed out that “…all witnesses for both parties agree that the activity with which the employees were charged consisted of the unauthorised breaking of fissure, that this was explained to the employees and their representative at the disciplinary proceedings, and that the activity in question is a dismissible offence.” He went on to state:

“Inelegant and poor wording of charges are a common feature of disciplinary proceedings in the workplace. There are occasions where the mis-description is of such a nature that it renders the ensuring disciplinary process and its outcome unfair; and there are other occasions where this does not lead to unfairness. It is therefore necessary to look at the substance of the matter to see what actually transpired in this instance. As mentioned above, it was at all times clear to all parties what activity the employees were accused of – namely the unauthorized breaking of fissure.”

[29] The arbitrator went on to look at the description of the offence in the disciplinary code and the content of the charge. He concluded that the wording of the charge entailed no unfairness to the employees.

[30] In my view, the arbitrator‟s reasoning on this aspect cannot be faulted. And at the commencement of the arbitration, he said to the applicants‟ legal representative, Mr *Cloete* (who also appeared for the applicants in these proceedings): “So it seems to me there are two aspects. One is the charge, you are challenging the commission of the charge, whoever it was by.” And: “That there was aiding and abetting in the form of scratching the fissure”. And the applicants‟ representative replied, “Yes, yes.”

[31] The arbitrator‟s conclusion on this aspect is eminently reasonable and not reviewable.

Substantive fairness and circumstantial evidence

[32] The arbitrator‟s findings on substantive fairness did rely mostly on circumstantial evidence. He drew his conclusions after a careful analysis of the evidence, the credibility of the witnesses, and the probabilities.

[33] While the versions of Irvia and Manganyi differed on minor aspects, they essentially corroborated each other. On the other hand, the arbitrator found Madito‟s evidence to have been evasive, contradictory and “uneven”. And Melamu chose not to testify.

[34] On the probabilities, I agree with the arbitrator that the evidence points overwhelmingly to the two applicants having broken the fissure. The broken fissure found at the entrance to cross-cut 6; the tools consonant with breaking of fissure lying there; the time it allegedly took the two applicants to drill 29 holes; and the absence of other people in the area all point to their misconduct.

[35] There is nothing unreasonable in the arbitrator‟s factual findings on the probabilities, based on the evidence before him. This ground of review must fail.

Procedural fairness and compensation

[36] It is common cause that Melamu‟s disciplinary hearing was tainted with procedural unfairness. Despite the arbitrator‟s finding that the union may well have agreed to separate disciplinary hearings, he found that it was unfair that the same chairperson presided over both disciplinary hearings.

[37] He took into account, though, that Melamu chose not to testify in the arbitration; that his dismissal was substantively fair; and the effect of the procedural unfairness. In the light of these factors, he awarded Melamu compensation in the amount of one month‟s salary.

[38] The applicants contend that this amount of compensation is so inadequate as to make it reviewable. I disagree. Another arbitrator may have awarded more; but is the award so unreasonable that no reasonable commissioner could have awarded it?[9] I think not. The arbitrator took into account the relevant factors set out above and, in the light of those factors, any prejudice caused to Melamu arising from the procedural unfairness was minimal.

[9] *Sidumo and another v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC)

CONCLUSION

[39] Commissioner Osler‟s award is not only reasonable; it is the very model of a considered, reasoned and extensive award. He properly considered all the evidence available to him. He considered the parties‟ arguments on each aspect – in circumstances where the applicants were legally represented – and applied them to the evidence. He gave full and proper reasons for the conclusions that he reached. The award cannot be faulted and is not reviewable.

[40] With regard to costs, I considered the ongoing relationship between the union and the employer. However, both parties asked that costs should follow the result; and I take into account that there is no ongoing relationship between the individual applicants and the employer. I have no objection in law and fairness to grant the parties their wish that costs should follow the result.

ORDER

[41] The application for review is dismissed with costs.

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ANTON STEENKAMP
Judge of the Labour Court
Date of hearing: 1 October 2010
Date of judgment: 22 October 2010
For the applicants: Attorney Neville Cloete
For the respondent: Attorney Helena Strijdom