REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JA69/2013

In the appeal between:

DRAKEN INDUSTRIES CC **Appellant**

and

COMMISSIONER AC MAANDE **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE WOOD AND PAPER SECTOR **Second Respondent**

CEPPWAWU OBO B Mathole & 16 others **Third Respondent**

Heard: **20 May 2014**

Delivered: **19 August 2014**

Summary: Review of arbitration award- review test restated- employees dismissed for allegedly misconducting themselves during strike. Mutually destructive evidence at arbitration proceedings. Balance of probabilities favouring employees' version. Commissioner finding dismissal substantially unfair and reinstating employees. Labour Court upholding award- Appeal- commissioner misapplying his mind to picketing rules and to certain evidence- such misapplication not vitiating the entire award- Award falling within the band of reasonableness. Remedy- employer failing to prove trust relationship irretrievably broken- reinstatement practical. Appeal dismissed with costs

CORAM: DAVIS JA, MOLEMELA AJA et SUTHERLAND AJA

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Barnes, AJ) dismissing an application for a review of an award rendered by the first respondent (commissioner). In his award, the commissioner found that the appellant's dismissal of seventeen employees represented by the third respondent was substantively unfair and granted an order of retrospective reinstatement. The court *a quo* found that the commissioner's decision was one that a reasonable decision-maker could reach and accordingly dismissed the review application. The appeal is with leave of the court *a quo.*

Background facts

[2] The salient facts are as follows: On or about the 8th July 2009, the third respondent gave notice to embark on a protected strike as from 13 July 2009. On 9 July 2009, the appellant gave notice of a responsive lockout. The appellant apparently also took the liberty of drafting picketing rules and communicated them to the third respondent. The third respondent did not respond. The protected strike duly commenced on 13 July 2009. It is common cause that during the course of the strike the striking employees picketed outside the gate of the appellant's premises. On 15 July 2009, the appellant wrote a letter to the third respondent and informed the latter that in the absence of any response to the proposed picketing rules the appellant accepted that the rules constituted agreed rules. In the same communication, the appellant pointed out that the third respondent's members that were on strike were in breach of the picketing rules, that they had been intimidating non-striking employees, customers and temporary staff and had also blocked the entrance to the business premises. It is common cause that on one

occasion during the strike, a number of temporary employees were gathered outside the appellant's premises. One of the appellant's managers talked to them through the boundary fence of the premises and offered six of them employment. However, the six employees in question did not enter the premises. According to the appellant, the reason why they could not enter the premises was because of the intimidation the striking workers subjected them to by throwing stones at them. The strike ended after about seventeen days. When the striking employees returned to work, they were notified that they were to be charged with misconduct. Seventeen of them were subsequently charged with misconduct. They were divided into two groups. The employees in Group "A" faced five charges, while those in group "B" faced three charges.

[3] The five charges faced by those in Group A were the following: See p 78 of record.

> 'GROUP A
>
> 1. Gross Misconduct- in that you engaged in behaviour during the strike aimed at intimidating or threatening non-striking employees, not to go to work, thus trying to destroy the trust relationship;
>
> 2. Gross Misconduct- in that you engaged in behaviour aimed at threatening or intimidating temporary labour by amongst other things throwing rocks at them, thus destroying the trust relationship.
>
> 3. Gross Misconduct- in that you engaged in behaviour aimed at causing injury to fellow employees or temporary employees and possibly causing damage to company property by throwing rocks and stones during the strike, thus destroying the trust relationship.
>
> 4. Gross Misconduct- in that you engaged in behaviour in flagrant disregard of the picketing rule by preventing customers, non-striking employees or temporary staff to enter the employer's premises, thus destroying the trust relationship.
>
> 5. Gross Misconduct- in that you engaged in behaviour during strike aimed at damaging the employer's business interests by preventing

customers or potential customers from entering the employer's premises thus destroying the trust relationship.'

[4] The three charges faced by those in Group "B" were the following: See p79 of record.

'Group B

1. Gross Misconduct- in that you engaged in behaviour during the strike aimed at intimidating or threatening non-striking employees, not to go to work, thus trying to destroy the trust relationship;

2. Gross Misconduct- in that you engaged in behaviour in flagrant disregard of picketing rules by preventing customers, non-striking employees or temporary staff to enter the employer's premises, thus destroying the trust relationship.

3. Gross misconduct- in that you engaged in behaviour during the strike aimed at damaging the employer's business interests by preventing customers or potential customers from entering the employer's premises, thus destroying the trust relationship.'

[5] One of the employees, Michael Raphela was also charged but had a separate disciplinary hearing. According to the employer, Raphela had a separate hearing partly because of his illness and also because he had pleaded guilty to all the charges. The sixteen employees were all found guilty on all the charges and were dismissed. A sanction of dismissal was imposed. In a separate hearing, Raphela was also found guilty on all the charges and dismissed. At the arbitration hearing, both procedural and substantive fairness were placed in dispute. The commissioner found that the appellant was entitled to proceed with the final stages of the disciplinary hearing in the absence of the employees as they had opted not to attend the hearing due to their representatives' absence. The commissioner found that the dismissal was procedurally fair but substantively unfair. The appellant launched a review application. There was no counter-application.

Labour Court Proceedings

[6] The labour court summarised the numerous submissions made by the appellant under four grounds:-

> '.1 Firstly, the appellant contends that the arbitrator made factual findings that were not based on the evidence before him and were made on the basis of his own assumptions derived from fabricated, speculative circumstances. The appellant contends that the employee gave no real factual evidence on he contested issues in the arbitration and that the evidence of the appellant's witness was therefore not properly in dispute. The appellant contends that the findings of the arbitrator are not rationally connected to the evidence before him and are findings that no reasonable arbitrator could reach.
>
> .2 Secondly, the appellant contends that the arbitrator failed to acquaint himself with the code of good practice on picketing, failed to evaluate the evidence in accordance with that code, and in effect adopted the view that lawful picketing includes violence and intimidation. The arbitrator accordingly misconducted himself in relation to his duties as an arbitrator.
>
> 7.3 Thirdly, the appellant contends that the arbitrator's reference to section 186 (1)(d) of the Labour Relations Act 66 of 1995 ("the LRA") and to the fact that one of the dismissed strikers was re-employed reveals that the first respondent considered the case to be one in terms of section 186(1)(d) of the LRA and failed to apply his mind to the real issue in the case, namely whether the employees were fairly dismissed for misconduct.
>
> 7.4 The final ground relates to the granting of re-instatement as a remedy in the matter. The appellant contends that no reasonable arbitrator could have formed the view that reinstatement was the appropriate remedy in the matter.'

[7] The Labour Court found that there were two mutually destructive versions before the commissioner in respect of all the charges. It found that the dismissed employees did give factual evidence on all the contested issues at the arbitration and found that the employees' version was, on the whole, more probable than that of the appellant. It found that while it may be that a different

arbitrator may have come to a different conclusion on one or more of the contested incidents, it could not be said that the conclusions reached by the commissioner were conclusions that a reasonable arbitrator could not have reached.

Issue to be decided

[8] In its Notice of appeal, the appellant raised numerous grounds of appeal practically attacking every finding made by the court *a quo*. Essentially the same grounds of review argued in the Labour Court were reiterated in the heads of argument filed in this Court, with some elaboration. At the commencement of the appeal hearing, counsel for the appellant, Mr van Graan, placed on record that the appeal was being pursued only in respect of the court's findings on the probabilities and the remedy of re-instatement that it endorsed. The issue in this appeal is therefore whether the labour court's finding that the commissioner's decision that the dismissal was substantively unfair and its endorsement of an order granting reinstatement were decisions that a reasonable decision-maker could reach.

Evaluation

[9] The appellant argued that the Labour Court erred not reviewing and setting aside the commissioner's award. The test applicable in review applications is trite. See *Sidumo v Rustenburg Platinum Mines and Others Ltd* 2008 (2) SA 24 (CC). This judgment was followed in the SCA case of *Herholdt v Nedbank* [2013] 11 BLLR 1074 (SCA) par 25 at 1084 where, the court, *inter alia,* elaborated as follows:-

> *'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable.*'

In the case of *Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA and Others*[1] this Court stated as follows:

> 'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as aprocess. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork.'

[10] The evidence led at the arbitration proceedings covered `three incidents, namely, Employees appearing under Group A allegedly throwing stones at temporary employees, the driver of the appellant's client (Mathe) being denied access into the premises and the intimidation incident regarding three employees (Mr Maponya, Mr Mahlape and Mr Lepebe) who testified that the striking employees had denied them access into the appellant's premises by blocking the gate. The evidence adduced at the arbitration proceedings must be considered in totality and not on a piecemeal basis. Mr van Graan criticised the commissioner for finding that it was improbable for the stone throwing incident to have occurred since no one was struck by any stone despite the fact that the two groups were a mere ten metres from each other. He stressed that a reviewing court is not confined to the reasons advanced by the commissioner but is at liberty to consider whether on the evidence before the arbitrator there was other evidence which justified the commissioner's conclusion. The labour court in its judgment demonstrated that it was alive to this power and hence did not confine itself to the commissioner's reasons.

[1] [2014] 1 BLLR 20 (LAC) at para 21

What is important to consider is that it is clear that the commissioner was presented with two mutually exclusive versions regarding what transpired at the gate, including the alleged breach of picketing rules. When evaluating evidence, this must be done in such a way as to guard against a piecemeal evaluation. Evidence must be considered in its totality. In Stellenbosch Farmers Winery v Martell et cie 2003 (1) SA 11 (SCA) at 5, the court stated as follows:-

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[11] When the evidence is analysed accordingly, the inconsistencies in the written statement of Maponya and his evidence at the hearing i.e. the fact that the stone throwing incidents were not alluded to in the statement come into play,

the improbability of stones thrown at a distance of ten metres not striking a single person in a group; the fact that the police, having been summoned by the employer to the scene, did not make any arrests are factors that are all taken into consideration when probabilities are weighed.

[12] While Hubble, Maponya and Lebepe testified that the striking employees had blocked the entrance to the premises, evidence by one of the appellant's witnesses, viz Mahlape seemed to suggest otherwise. The three employees that testified vehemently denied having blocked the premises or having intimidated any persons. As correctly pointed out by the commissioner, important evidence that casts doubt on the plausibility of the appellant's version is that, while Samson Mathe, a customer's truck driver, testified that he was stopped by the striking employees from gaining access into the premises, his employer's evidence was that upon arrival at the gate, he entered the appellant's premises in another vehicle without any problems and later fetched the truck from the gate. He later exited without any incidence, all of which evidence negates the driver's testimony that the striking employees stopped him from entering the premises and threatened to set the truck alight. It is also odd that his employer would, upon taking the truck, leave him to his own devices outside the premises while being aware of the threats and the unruly behaviour of the striking employees. The fact that he was left at the gate suggests that the striking employees were not as aggressive as alleged by the appellant.

[13] The appellant adduced evidence to the effect that the temporary employees that wanted to offer their services to the appellant were intimidated and that stones and rocks were thrown at them. It is common cause that one of the appellant's managers was able to speak to these temporary employees through the fence and invited six of them into the premises but they did not do so. A possibility that they did not enter simply because they were intimidated by the mere presence of the striking employees at the gate is not far-fetched and thus cannot be ruled out, given the circumstances.

[14] It was contended on behalf of the appellant that on their own version, the employees had blocked the entrance to the appellant's premises. This

contention ignores the evidence tendered on behalf of the third respondent, to the effect that the customer who went to collect at the premises had unhindered access into the premises. It also ignores Mogobole's evidence that, although the striking employees were standing in front of the gate, "there was enough space for anyone to pass".

[15] The appellant made much of the fact that one of the appellant's witnesses, viz Mahlape, testified that he "forced himself" into the employer's premises. It needs to be borne in mind that the same witness also testified that after he was told that he would not be allowed into the premises, one of the striking employees who was also dismissed, viz Frank Seabe said "you must let him through". The following exchange between him and the appellant's representative during the arbitration hearing is also significant :- (See p223 of the record)

> 'Mr Roodt: Did they tell you anything else when you tried to enter the premises?
>
> Mahlape: These people?
>
> Mr Roodt: Ja
>
> Mahlape: They promised to assault me but I forcibly entered the premises.
>
> Mr Roodt: Was it one person who said that they will assault you or …?
>
> Mahlape: They did not say that they are going to assault me. They only raised their arms but they wanted to assault my daughter.'

[16] Mahlape also disavowed his written statement in which he had allegedly stated that the striking employees wanted to assault him (p233 vol 3). Although the commissioner stated that he would not comment about Mahlape's daughter being stopped from going through, it must be borne in mind that in any event, on this aspect, too, there were two mutually destructive versions. Mahlape's evidence that Mogobolo stopped his daughter from passing through was denied by both Mogobole and Magobate. The commissioner correctly remarked that on probabilities it was unlikely that one employee would force his way through a group of seventeen aggressive

employees. Once Mahlape was allowed to go through, it is unclear why the other two employees, Mathole and Lebepe would not have been allowed to go through on the same day.

[17] The appellant was at pains to point out that the undisputed evidence that the police were summoned to the appellant's premises on about three occasions lends credence to the appellant's assertion that the striking employees were aggressive and unruly. This evidence cuts both ways, for it equally lends credence to the evidence of the third respondent's witnesses to the effect that no violent acts occurred, including the throwing of stones, as the police would have arrested the perpetrators as the throwing of stones is a criminal offence. The third respondent's version on this aspect is bolstered by the undisputed evidence that none of the temporary employees were struck by any stones.

[18] Having considered the conspectus of the record into account, I agree with the labour court that the employee's version pertaining to the alleged breach of the picketing rules pertaining to physically preventing members of the public from gaining access into or out of the employer's premises was more probable.

[19] The contention that the commissioner's reference to section 186(1)(d) of the LRA in respect the employee that was subsequently re-employed reveals that he considered the case to be one in terms of section 186(1)(d) of the LRA and thus failed to apply his mind to the real issue amounts to a distortion of the commissioner's reasoning and is devoid of any merit. The tenor of the whole award shows that the commissioner was alive to the fact that the real issue between the parties was whether the seventeen employees were fairly dismissed for misconduct.

[20] The appellant's contention that the trust relationship had broken down and that a continued employment relationship would be intolerable seems to be premised on the assumption that the dismissed employees were dismissed on account of misconduct. Considering that the misconduct with which they were charged was not proven, it would be unfair to premise the intolerability of the relationship on this unproven misconduct. In considering the appropriate

remedy, the commissioner was certainly entitled to take into account that another employee who had participated in the strike and was in the exact position as the other dismissed employees was subsequently re-employed. This indeed served to negate the appellant's allegations pertaining to intolerability of the working relationship. The record does not show anything surrounding the dismissal that could have served to show that the restoration of a normal working relationship between the affected employees and the appellant was not feasible. It would be unfair on the employee to find, in the absence of evidence adduced by the employer to show that the trust relationship has broken down and cannot be restored, that the employment relationship is intolerable. See *Edcon v Pillemer NO* [2006] 11 BLLR 1021 (SCA) at para 23, where the court stated that:

> 'It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC, this Court in the *Sidumo* matter as well as the Constitutional Court in the same matter. In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair'. [Footnote omitted]

[21] In *Equity Aviation v CCMA and Others* [2008] 12 BLLR 1129 (CC) at para 36, Nkabinde J stated:

> 'The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the

> exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word 'reinstate' means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a Commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.' [Footnote omitted]

[22] In *Billiton Aluminium SA LTD t/a Hillside v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 27 the court held that these remarks made in the *Equity Aviation* case "relate to the inquiry at the first level of engagement, namely when a matter first comes before a court or commissioner. A commissioner or court, at that level, must act in accordance with the provisions of section 193(1) and (2) in the manner explained in *Equity Aviation"*.

[23] With regards to the submission pertaining to the impracticality of re-instatement on account of the fact that other employees had in the interim been employed by the appellant, this evidence was also not placed before the arbitrator. In *Mediterranean Textile Mills v SACTWU and Others,*[2] it was held that the focal point and overriding consideration in an enquiry concerning the practicability of re-instatement is the notion of fairness between the parties. The employment of other employees does not, in itself, show that it was not reasonably practicable for the appellant to reinstate the unfairly dismissed employees.

[24] Many criticisms were directed at the commissioner's award. It is not necessary to traverse all the minute details of these criticisms. The evidence

[2] [2012] 2 BLLR 142 (LAC) para 28.

that has already been canvassed above demonstrates that this criticism was unjustified. Certainly, there is no justification for the contention that the commissioner's conclusions were based on "his own assumptions" derived from "fabricated speculative circumstances". Having perused the whole record, I agree with the Labour Court's finding that the commissioner gave cogent reasons for preferring the dismissed employees' version to that of the witnesses of the employer on all the contested issues. Indeed the probabilities favoured the employees in question. The Labour Court correctly recognised that another commissioner may perhaps have come to a different conclusion on one or more of the contested incidents but it could not be said that the conclusions of the commissioner in the case under consideration were not those that a reasonable decision maker could reach. With regards to the commissioner's finding that the temporary employees were intimidated, it is important to mention that (i) he also found that the striking employees did not throw stones at the temporary workers; (ii) he found that because the striking workers were singing and dancing at the gate, their mere presence at the gate "intimidated or threatened the temporary workers. To the extent that this may found to be a contradiction, this would not suffice to render the whole award reviewable. The same is applicable to the commissioner regarding the picketing rules as invalid despite the fact that they, to a large extent, echo clause 6(7) of the code of good practice on picketing. See *Herholdt v Nedbank* (SCA judgment). There was no basis for reviewing the award and the court *a quo* correctly dismissed the review application. The appeal thus stands to be dismissed. I can see no reason why the costs of the appeal should not follow the result.

[25] The following order is made:

The appeal is dismissed with costs.

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Molemela AJA

I agree

_____

Davis JA

I agree

_____

Sutherland AJA

APPEARANCES:

FOR THE APPLICANT:	ESJ Van Graan SC
	Instructed by Riki Anderson Attorneys (Pretoria)
FOR THE RESPONDENT:	H Van Der Riet SC
	Instructed by Cheadle Thompson & Haysom Attorneys