IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in

Case no: DA24/06

In the matter between

Ntokozo Archibald Khanyile **Appellant**

And

Billiton Aluminium SA Ltd **Respondent**
t/a Hillside Aluminium

JUDGMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgment by Steenkamp AJ in a review application that had been brought by Billiton Aluminium SA Limited t/a Hillside Aluminium against the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**"), Mr AC Zwane, a commissioner of the CCMA, and the present appellant. The CCMA was the first respondent in the Labour Court, Mr Zwane, the second respondent and the present appellant, the third respondent. Mr Zwane is a commissioner of the CCMA and he issued the arbitration award in the dispute between the present appellant and Billiton Aluminium concerning the fairness or

otherwise of the dismissal of the appellant by Billiton Aluminium from the latter's employ which is the subject of these proceedings. The review application was for an order reviewing and setting aside the arbitration award that had been issued by the commissioner. It would appear that in the preparation of the record the CCMA and the commissioner were left out as respondents. The attorneys who represent appellants in appeals in this Court should make sure that this kind of omission does not occur. This is a second case in a few days which I have become aware of in which the CCMA and the commissioner who arbitrated the dismissal dispute have been left out in the citation in the appeal although they were cited in the proceedings in the Labour Court. That they do not oppose the appeal does not justify their being left out. If the order that is to made by this Court is intended to be binding on them as well, they should continue to be cited in all appeals. The appeal record must be appropriately amended by the appellant to ensure that the CCMA and the commissioner are included as respondents. Billiton Aluminium SA Ltd t/a Hillside Aluminium is to deemed to be the first respondent, the CCMA, the second respondent and Mr AC Zwane the third respondent.

[2] The arbitration award was issued under the provisions of the Labour Relations Act 1995, (Act 66 of 1995) ("**the Act**") relating to compulsory arbitration of disputes concerning alleged unfair dismissals. In terms of the arbitration award the appellant's dismissal was found to have been unfair for lack of a fair reason and the first respondent was ordered to reinstate the appellant with retrospective effect to the date of dismissal and to pay him an amount of R436 000.00 which the commissioner said represented a

back pay of 32 months (from August 2001 when the appellant was dismissed to 2004 by which I think he meant April 2004 when the award was issued).

[3] The full terms of the award – leaving out the reasons for the award – were the following:

> "**(a) The dismissal of [the appellant] was substantively unfair.**
>
> **(b) [The first respondent] is ordered to reinstate [the appellant] to the position he occupied prior to his dismissal on terms and conditions no less favourable than those that governed his employment prior to his dismissal.**
>
> **(c) [The appellant's] reinstatement in terms of this award is retrospective to the date of his dismissal, 2 August 2001.**
>
> **(d) [The first] respondent is to reinstate [the Appellant] within seven days of this award.**
>
> **(e) The [first] respondent is ordered to pay an amount of R436 000,00 to [the appellant] as retrospective payment. Such payment is to be made to [the appellant] within 14 days of this award."**

[4] The first respondent was aggrieved by the arbitration award and brought an application in the Labour Court for an order reviewing and setting the arbitration award aside in its entirety. The Labour Court, per Steenkamp AJ, confirmed the finding previously made by the commissioner that the dismissal was substantively unfair but took the view that the commissioner had not applied his mind

properly in ordering the first respondent to reinstate the appellant. The order that Steenkamp AJ made was in the following terms:

> **"23.1 The dismissal of the [appellant], Mr Khanyile, was not for a fair reason.**
>
> **23.2 The [first] respondent is ordered to pay the [appellant] compensation equivalent to 12 months' remuneration, amounting to R 163 500,00. Payment is to be made within 14 days of this judgment.**
>
> **23.3 There is no order as to costs."**

[5] The appellant was aggrieved by this outcome. He took this order to mean that that part of the arbitration award which ordered his retrospective reinstatement and the payment of R 436 000,00 as backpay to have been reviewed and set aside and replaced with orders in 23.2 and 23.3 of Steenkamp AJ's judgment. The first respondent also understood Steenkamp AJ's order in the same way as the appellant. Consequently, even the appeal before us was argued on the footing that that is what the order means. The truth of the matter is that there is no order made by Steenkamp AJ which reviewed and set aside any part of the commissioner's arbitration award. Accordingly, technically it would be fair to say that the award made by the commissioner stands as it was issued. However, it is clear from the reasons for judgment contained in Steenkamp AJ's judgment that he intended to make an order which accorded with the parties' understanding of the order that he ultimately made. This being the case the matter will have to be approached on the understanding shared by the parties.

[6] The appellant made an application for leave to appeal to this Court against the order contained in par 23.2 and 23.3 of Steenkamp AJ's judgment. The application for leave to appeal was apparently made about six weeks out of time. He made an application for condonation for non-compliance with the relevant time limits. The Labour Court dismissed the application for condonation and, therefore, effectively refused leave to appeal. The appellant petitioned the Judge President of this Court for leave to appeal. This Court subsequently granted the appellant leave to appeal to this Court against the judgment and order of the Labour Court. Hence, this appeal. Before I can consider the appeal, it is necessary to set out the facts of this case as they emerge from the evidence.

The facts

[7] The facts in this matter are largely undisputed. The appellant was employed by the first respondent as a supervisor in 1995. His terms and conditions of employment required him to keep certain information obtained within the first respondent confidential within the company. In April 2001 one of the supervisors employed by the first respondent, namely, Mr SS Mashaba, was dismissed for poor performance in that he had allegedly failed to keep certain information updated which he was required to keep updated. It would appear that subsequently a dispute arose between the first respondent and Mr Mashaba about whether or not Mr Mashaba's dismissal was unfair and that dispute was referred to the CCMA for resolution through arbitration in terms of the relevant provisions of the Act. Apparently, part of Mr Mashaba's case before the CCMA was that there were other employees, I think supervisors like him, who were guilty of failing to update similar information that they

were required to update just like him against whom the first respondent had failed or was failing to take disciplinary action. In other words Mr Mashaba was alleging a breach of that rule of fairness that says like cases should be treated alike. He was accusing the first respondent of inconsistency in enforcing the rule that employees in Mr Mashaba's position should keep such information updated.

[8] The undisputed evidence given by the appellant before his disciplinary inquiry as well as before the arbitration in the CCMA was that the first respondent tendered evidence before the CCMA that was not balanced or fair towards Mr Mashaba in that it did not present the full or correct picture with regard to what was happening in the company with regard to supervisors updating or not updating the relevant information. The appellant's undisputed evidence was that he thought that it was very important that his colleague's claim of unfair dismissal be decided fairly by the CCMA with the CCMA having a balanced picture of the situation rather than that it make its decision on the basis of evidence that was not balanced. It was because of this that he then went to give evidence before the CCMA in Mr Mashaba's case. He brought documentary evidence to the CCMA – effectively certain reports. The reports indicated, according to the appellant, that the relevant supervisors did not keep the relevant information up to date as well and that it reflected that certain employees had been present at work when they were in fact not present and that some employees had worked overtime when in fact they had not worked overtime.

[9] On the day(s) when the appellant gave evidence in the Mashaba matter in the CCMA, there was no company representative in the arbitration. The company was represented by its attorneys. Mr Mashaba was represented by a trade union official, Mr Patrick Mkhize, from a trade union called Azanian Workers Union. It was common cause that the records did not include information about salary rates or wage rates applicable to any of the employees of the first respondent.

[10] The first respondent learn't of the fact that the appellant had given evidence in the Mashaba matter and had divulged the reports or records obtained from the first respondent relating to overtime and attendance of some of the employees. The first respondent decided to call the appellant to a disciplinary inquiry in regard to his conduct in divulging the information which was contained in the reports he presented in the arbitration proceedings in the Mashaba matter. The first respondent alleged that that information was confidential and the appellant was obliged to treat it as such and not to divulge it to any third parties and his conduct in doing so constituted misconduct. To this end the first respondent served the appellant with a notice of allegation of misconduct. The allegation was that of "**unauthorised disclosure of company information**." The full allegation was:

> "**On or about April 2001 you disclosed confidential information in violation of company policy and in particular rule 5.4 of the company's corporate governance and code of best practice and conditions of employment policy. Documents furnished to the third party:**

- **saco report**
- **info type entry**
- **dot report for F Thomas**
- **dot report for a number of employees"**

[11] This notification was dated 18 June 2001. It needs to be pointed out that it was at all times common cause that the first respondent had in Mashaba's case disclosed to the CCMA and to the union representative information similar to the information that it objected being disclosed by the appellant to the CCMA. The inquiry was scheduled for 22 June 2001. Prior to the date of the disciplinary inquiry, the appellant again attended the arbitration proceedings in the Mashaba matter in the CCMA and once again divulged similar or the same information that he had previously disclosed. As a result of this the first respondent decided to add a second allegation to the original allegation that the appellant was to face in the disciplinary inquiry. The second allegation was identical to the first one save that more items were added to the list of information that the appellant was said to have disclosed. It does not appear necessary to list the additional items of information that were included in the second allegation.

[12] The disciplinary inquiry which was scheduled to be held on the 22nd June 2001 seems to have been moved to the 24th June 2001 to deal with both allegations. In the disciplinary inquiry the appellant admitted having taken the reports in question and having divulged them in the CCMA arbitration. He disputed the allegation that the information that he had disclosed was confidential. It was common cause that he had not obtained the first respondent's permission or authorisation to divulge that information. At any rate he took the

position that he was entitled to disclose such information in terms of the Protected Disclosure Act 26 of 2000. He made it clear that he believed that he was entitled to help his colleague in his unfair dismissal case and that he did what he did for a good cause. In the course of the disciplinary inquiry the appellant stated that, if the need arose again, he would disclose the information that he had disclosed.

[13] The chairman of the disciplinary inquiry concluded, after obtaining legal advice, that the Protected Disclosures Act did not apply. He held that the information was confidential and found the appellant guilty of the allegations of misconduct. He imposed the sanction of dismissal. The appellant thereafter noted an internal appeal against the decision of the chairman of the disciplinary inquiry as well as the imposition of the sanction of dismissal. The internal appeal was unsuccessful and the finding that he was guilty and should be dismissed was confirmed.

[14] Subsequent to the internal appeal hearing, the appellant referred to the CCMA an unfair dismissal dispute initially for conciliation and later arbitration. The conciliation process failed. The dispute was then referred to arbitration. This was the first arbitration. The arbitrator was a Mr Mathe who was also a commissioner of the CCMA. The first arbitration must have been about March 2002. On 18 March 2002 Mr Mathe issued the first arbitration award in the dispute between the parties. In terms of that arbitration award, Mr Mathe found that the appellant's dismissal was substantively unfair and ordered that the appellant be reinstated retrospectively to the date of his dismissal.

[15] The first respondent was aggrieved by the first arbitration award and brought a review application in the Labour Court to have the award reviewed and set aside. The appellant opposed that review application. On 15 April 2003 the Labour Court granted the respondent's review application, set aside the arbitration award and remitted the dispute back to the CCMA to be arbitrated afresh by a commissioner other than the one who had arbitrated it previously.

[16] The second arbitration was conducted by Mr AC Zwane, the commissioner. The first respondent led the evidence of two witnesses, namely, Mr E Moropodi, who was the appellant's immediate superior at the time of the incidents that gave rise to his dismissal as well as Ms B Campbell. The appellant testified in his own defence but did not call any witnesses.

[17] At the commencement of the arbitration proceedings the appellant's case, as outlined in his representative's opening statement, included disputing that the information that he divulged at the CCMA was not confidential. In the alternative the union contended that, if the information was confidential, the first respondent waived its right by disclosing similar information to the CCMA and the union in the Mashaba matter. It was, once again, common cause that the appellant had divulged information relating to attendance and the working of overtime relating to some of the first respondent's employees as well as some e-mail relating thereto. Again it was common cause that the information that he disclosed did not include salary rates for any of the first respondent's employees.

[18] Mr Moropodi was the first witness to be called by the first respondent in the arbitration. His evidence did not in any way support the first respondent's case against the appellant. If anything his evidence largely supported the appellant's case, particularly under cross-examination. A few aspects of his evidence under cross-examination can be referred to. He agreed that the first respondent had taken to the CCMA arbitration in the Mashaba matter reports similar to the ones that the appellant also took to the same proceedings. He conceded that in doing so the first respondent sought to prove its case against Mashaba. He conceded that the types of documents that the appellant took to the Mashaba arbitration were the right type of documents for the appellant to take to the CCMA if he wanted to help Mashaba refute the first respondent's case against him.

[19] Mr Moropodi also testified that the documents were confidential because they related to wages and different rates of pay. Under cross-examination he conceded that there was no reference to wages and rates of pay in the documents. With regard to the alleged confidentiality of the documents, it was put to Mr Moropodi that, if the documents were confidential, the first respondent would have asked the union official representing Mr Mashaba in the latter's arbitration to treat them as confidential and the fact that it did not ask him to treat them as confidential meant that they were not confidential. To this Mr Moropodi answered: "**It's true**".

[20] Mr Moropodi was then asked whether, if a business person picked up in the street any of the reports that the appellant disclosed to the

CCMA, it would mean anything to him and Mr Moropodi replied: "**It wouldn't mean much to a business person but to another employee of the same level it would reflect, it would give a different reflection or a different meaning which would be Mr X or like Mr Thomas seemed to be given more overtime than the rest.**" He was then asked whether that was all that this was about and he said: "**That's right**". Ultimately, Mr Moropodi's evidence was that the issue of confidentiality related to "**internal confidentiality**" by which he meant that one employee in the first respondent should not see information that would tell him for example how much overtime another employee was working.

[21] Mr Moropodi was also asked under cross-examination what "**evidence**" he could give "**to tell us that these DOT reports (i.e the information disclosed) are defined or classified as confidential information?**" His answer was: "**I don't have anything**". Mr Moropodi was asked whether, if he has been in the appellant's position and he wanted to save his colleague from being dismissed unfairly, he would not have felt the obligation to disclose the information. He answered: "**I would feel that obligation**". Under re-examination Mr Moropodi inter alia testified as follows about the issue of the confidentiality or otherwise of the information disclosed by the appellant: "**I mean, initially, we had regarded DOT reports as confidential information, and I've explained that for internal use, that's how we always considered that.**" Under re-examination he testified that the procedure for the appellant to follow if he wanted the information was to ask him as his supervisor for the information. At this stage it may be important to point out that under cross-examination Mr

Moropodi said that, if the appellant had approached him for permission, he would not have given it if he knew that the appellant wanted to use that information against the first respondent.

[22] Ms Campbell testified under cross-examination that the first respondent was justified in disclosing to the CCMA in Mashaba's matter similar information to the information that the appellant disclosed in the same proceedings. She was then asked whether she did not think that the CCMA deserved or was entitled to the truth or to have "**balanced**" facts before it could make its decision and she answered that it was so entitled. She was then asked how the CCMA would have had the "**complete truth**" or "**balanced**" facts before it without the appellant disclosing the information to it. At this stage Ms Campbell said: "**Mr Khanyile or Mr Mashaba's representatives could have requested that information from the company**." In the end Ms Campbell's evidence no longer focussed on the misconduct being that the appellant disclosed confidential information and that that was wrong but it focused on saying that the appellant needed permission from his superiors before he could disclose the information that he disclosed. This must have been upon Ms Campbell's recognition in the course of cross-examination that the information was relevant to the issues in the Mashaba arbitration and was, therefore, legitimately required. That, of course, could not have come as a surprise because otherwise why would it have been relevant and legitimate for the first respondent to use it at Mr Mashaba's arbitration but irrelevant and illegitimate for use by or on behalf of Mr Mashaba? In this regard it needs to be pointed out that the first respondent has never taken

the attitude that the information was not relevant to the arbitration proceedings relating to Mr Mashaba's dismissal.

[23] Going back to the issue of confidentiality Ms Campbell sought to justify the assertion that the information was confidential by stating that the information about overtime was part of the remuneration and remuneration was confidential. Under cross-examination the more she tried to defend this alleged confidentiality the more unconvincing the first respondent's case became. It is not necessary to go into details in this regard. Under cross-examination Ms Campbell was led into disclosing her own information that would be confidential if her evidence that the information that the appellant disclosed was to be taken as confidential. She was then asked why she had disclosed her information in the arbitration without the first respondent's authorisation. She said it depended on the purpose for which such information was asked for. She then changed and said: "**I made the individual choice there to answer that question that I work forty hours a week, okay**."

[24] The union representative then asked her whether there had not been a need for her to obtain authorisation before she could disclose such information. She answered: "**Yes, there is**." She was asked: "**Now you just made a disclosure without authorisation**?" She then said: "**Ok because I made a decision based on the fact that it was a general question and it could not harm anybody in terms of how many hours of work I work**." She was then asked: "**Who did the information that [the appellant] disclosed to the CCMA, not to Mkhize, who did it harm**?" Ms Campbell

answered: "**It didn't actually harm anybody, the point was that Mr …..**
Mr Mkhize: Who did it harm?" Ms Campbell: "**No, the point is that he didn't request authorisation.**"

[25] Ms Campbell was also asked under cross-examination why the first respondent would have given the union representative in the Mashaba arbitration information similar to the one that the appellant also disclosed in those proceedings if, indeed, the information similar to the one that the appellant also disclosed in those proceedings was confidential. She replied that the first respondent would give such information if the union requested it. She was told that the union had not requested it but the first respondent gave it to the union. She was then asked to justify that and she answered: "**I don't know**."

[26] The appellant testified in support of his unfair dismissal claim. He said that, when he disclosed the information to the CCMA, he did not regard it as confidential. He also stated that in the disciplinary inquiry he disputed that the information was confidential and his attitude was also that he was entitled to disclose the information under the Protected Disclosures Act. He made it clear in the arbitration that, if the employer was saying that the information was confidential, he was prepared to proceed on the assumption that the information was confidential but maintaining that at the time of his disclosing same to the CCMA, he was not aware that it was confidential. The first respondent's attorney in the arbitration did not challenge this evidence by the appellant. Accordingly, the matter must be decided on the basis that he accepted the appellant's

version that the appellant bona fide believed at the time that the information was not confidential.

[27] The appellant was asked why he had disclosed the information on the second occasion after he had been served with a notice calling him to a disciplinary inquiry to answer for the first occasion when he made the disclosure. The appellant's answer was that he did so because he believed that the first respondent's officials were not aware of the true nature of the information he had disclosed or was disclosing at the CCMA because, if they were, they would have been aware that he was disclosing to the CCMA information that was similar to the information that the first respondent had itself disclosed to the CCMA. He said that he thought that the reason for this lack of information on the part of the first respondent was due to the fact that none of its officials were at the Mashaba arbitration and the first respondent was represented by attorneys only. Once again this explanation by the appellant was not challenged under cross-examination and the matter has to be decided on the basis of an acceptance of this explanation.

[28] The appellant was also cross-examined on the statement that he made in the disciplinary inquiry that, if the need arose again in the future, he would disclose the same information to the CCMA again. His answer to this was that that was his attitude in the disciplinary inquiry because at that time he believed that the Protected Disclosure Act entitled him to make such disclosures and that he was protected. He said also that at that time he was maintaining that the information was not confidential and that there was nothing wrong with what he had done. He said that when

asked at the disciplinary inquiry whether he could do the same again, he had to answer in the way he did because at that time he truly believed that he was right. The appellant said that in the arbitration his attitude was different. He said that his attitude at the arbitration was that, if the employer said that the information was confidential, he was prepared to assume that it was confidential and would not repeat the same conduct.

[29] Although the appellant confirmed in his evidence in chief - that he was seeking reinstatement and payment of full-back-pay, under cross-examination it was never put to him that circumstances existed which would make a continued employment relationship intolerable or which would make reinstatement impracticable. If that had been done, it would have given him an opportunity to deal with such factors.

[30] The commissioner came to the conclusion that the dismissal was substantively unfair and made the award referred to earlier. In the subsequent review application that the Labour Court dealt with, the Labour Court confirmed the finding of the commissioner that the dismissal was substantively unfair. As I said earlier, the Labour Court took the view that the commissioner ought not to have ordered reinstatement. The only reason advanced by Steenkamp AJ for his conclusion that the commissioner should not have ordered reinstatement was that the appellant had said in the disciplinary enquiry that, if similar circumstances arose again in the future, he would repeat his conduct complained of. Steenkamp AJ said in par 20 of his judgment that this "**points to a breakdown in the trust relationship between [the appellant] and the [first respondent].**

This is all the more so where he was employed in a relationship of trust as a supervisor."

[31] The Labour Court misdirected itself in this regard. That does not mean that statements made in a preceding disciplinary inquiry can never be taken into account. However, it must be borne in mind that the arbitration is a hearing *de novo*. Secondly, the Labour Court completely ignored the explanation that the appellant gave in the arbitration for the statement he made in the disciplinary inquiry. That explanation was not challenged under cross-examination. Accordingly, the conclusion of the Labour Court in this regard was completely unjustified. With regard to the trust relationship, the Labour Court failed to have regard to the positive and co-operative attitude displayed by the appellant in the witness stand before the arbitrator. In this regard I am referring to his stance that, if his employer regarded the information as confidential, he would take it as confidential and that he would not in the future repeat his conduct.

[32] I see from par. 22 of its judgment that the purpose of the Labour Court referring to the "**long history**" of the matter was not to justify denying the appellant reinstatement but to justify its decision to determine the dispute itself rather than remitting it to the CCMA. I have no difficulty with that but, obviously, that would not arise if the award was not reviewed. Counsel for the first respondent had also relied on the aforesaid statement made by the appellant in the disciplinary inquiry to support the order of the Labour Court. The submission is totally without merit.

[33] There was also a submission made by Counsel for the first respondent that the Labour Court's decision to deny reinstatement to the appellant was justified because there were certain changes that had taken place in the company. Ms Campbell testified about that. She said employees or supervisors had had to undergo some training as a result of those changes. She testified that such training lasted one day or even less for some of the supervisors. Obviously that can simply be no impediment to the granting of a reinstatement order. The appellant can be put through such training and resume his work.

[34] In the end the Labour Court, in deciding to interfere with the order of reinstatement made by the commissioner, did not deal with the matter as a review. It dealt with it as if it was an appeal. In this regard I draw special attention to the fact that, when the Labour Court was dealing with the issue of reinstatement, it did not ask the question whether the commissioner's decision to order reinstatement fill within any one of the grounds of review. It ought to have done so. In not doing, so it erred. As I have said, it dealt with the issue as if the question was whether the commissioner's decision was right or wrong. In the light of the evidence that was before the commissioner and the fact that, in the absence of the exceptions provided for in sec 193(2)(a) – (d) of the Act, reinstatement is compulsory, there can be no doubt that the commissioner was correct in ordering reinstatement. This being the case, the commissioner's award must be restored. Subsequently the appellant petitioned the Judge President of this Court for leave to appeal which petition was granted.

[35] It was not argued on behalf of the respondent that, by reason of the delay that had occurred prior to the issuing of the second arbitration award, the commissioner should not have ordered reinstatement nor was it argued that the appellant was in any way to blame for such delay. None of this could have been argued by the respondent because there is no suggestion that the appellant in any way acted less than diligently in prosecuting his matter. Indeed, the main delay had been caused by the fact that the respondent brought a review application in the Labour Court after the first arbitration award in the appellant's favour had been issued. After the second arbitration award a further delay was caused by the fact that the respondent brought another review application before the Labour Court. I am not criticising the respondent for exercising its right to bring those review applications but I am merely stating the fact that the mere bringing of those review applications caused certain delays. It is, of course, an undeniable truth that most employers who have arbitration awards issued against them do not take each and every one of those on review. If the majority of employers did that, out entire labour dispute resolution system would grind to a halt.

[36] With regard to costs I am of the view that the requirements of the law and fairness dictate that the first respondent pay the appellant's costs.

[37] In the premises I make the following order:

1. The appeal is upheld.

2. The first respondent is ordered to pay the appellant's costs on appeal
3. The order of the Labour Court is set aside and replaced with the following order:
   "(a) **The application for review is dismissed with costs**."

Zondo JP

I agree.

Khampepe ADJP

I agree.

Leeuw JA

Appearances

For the Appellant:	Mr Z.E. Buthelezi
Instructed by:	Buthelezi Attorneys
For the Respondent:	Mr C.F. Watt-Pringle SC
Instructed by:	Deneys Reitz Inc
Date of Judgment:	24 February 2009