IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: JA41/2014

In the matter between

LH MARTHINUSSEN	**Appellant**
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**First Respondent**
AHMED CACHALIA *N O*	**Second Respondent**
VUSI DANIEL KUBEKA	**Third Respondent**
JEFFREY NKOSENHLE NDLOVU	**Fourth Respondent**
MSELEKI WILBERFORCE MAZULA	**Fifth Respondent**
MASTER BHEKI DLUDLU	**Sixth Respondent**

Heard: **12 May 2016**

Delivered: **14 June 2016**

Summary: Review of arbitration award – arbitrator finding that employee's dismissal substantive unfair on the basis that sanction of dismissal too harsh – arbitrator taking into account all relevant factors in arriving at his decision – award falling within the band of reasonableness – Labour Court's judgment upheld – appeal dismissed with costs.

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Coram: Davis, Musi JJA *et* Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Le Roux AJ), dismissing its application for review of the award of the second respondent ('the arbitrator"). The appeal is with the leave of the court *a quo*.

[2] The third to sixth respondents ("the respondents") were employed by the appellant as machine operators for periods ranging between 28 and 3 years. They were charged with dishonesty in respect of false time keeping for the night shifts of 26 April 2010 and 28 April 2010. The appellant had been experiencing low productivity levels during nightshift and decided to investigate to establish the reasons. It installed closed circuit video equipment and obtained video footage which showed the respondents switching off their machines before the end of the shift and some of them sleeping on duty. It is not disputed that the appellant experienced a low level of productivity during nightshifts in April 2010. The video footage showed that at various times during one or both of these night shifts all four of the individual respondents had turned off their machines prior to the end of their shifts. The appellant had to run an extra shift on 27 April 2010 to make up for the low level of productivity on the nightshift of 26 April 2010.

[3] The respondents were charged with dishonesty in accordance with the disciplinary code of the appellant. The code provides for dismissal both for a first occurrence of dishonesty of any nature and refusal to obey a legitimate instruction.

[4] The respondents were found guilty by the disciplinary enquiry and were all dismissed on 5 May 2010. The respondents referred the matter to the bargaining council, the first respondent. The arbitration took place on 19 September 2011. The arbitrator handed down his award on 12 October 2011. He held that the sanction of dismissal was not appropriate and hence that the dismissal was substantively unfair. He ordered the appellant to reinstate the

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respondents on the same terms and conditions as at the date of dismissal, but with effect from 17 October 2011, thus not including retrospective payment of any remuneration, and that the respondents be given a final written warning valid for 12 months. In effect he substituted the sanction of dismissal with a lengthy suspension without pay and a final written warning.

[5] During the arbitration, the respondents put forward unconvincing explanations justifying their conduct. They claimed variously to be unwell and fatigued. The arbitrator rightly rejected the explanations as not "valid". He accordingly found all the respondents guilty of switching the machines off before the close of shift without valid reason and of not working for the full period for which they were to be paid. Despite the appellant initially deducting amounts, the respondents were ultimately paid for the entire shift, even though they had not worked the full hours for which they were remunerated. The arbitrator identified the issue he had to determine as being "whether this amounted to dishonesty as a result of false time keeping".

[6] The arbitrator's reasoning in relation to this question is set out in the award as follows:

> 'The Applicants were essentially "dishonest" by not working the hours they were expected to. By clocking out at the correct time, they gave the impression that they were working. According to the Respondent this is dishonesty…..Strictly speaking, when employees do not work, they are being dishonest. This in my opinion would be true if an employee is found sleeping on duty or having an extended lunch hour or taking too many smoking breaks etc. the same principle of not working and being paid for it applies…..Dishonesty is an extremely strong term for this type of behaviour….In my view the Applicants were truant and did not work as expected of them….At most, the Applicants are guilty of not performing their work (not to be confused with poor quality of work) as expected and not meeting the expected production as a result of them switching the machines off and not working.'

[7] Having defined the misconduct of the respondents thus, the arbitrator turned to the question of sanction. All of the respondents except Mr Ndlovu, the fourth respondent, had more than 10 years' service. The third respondent had

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28 years' service. The arbitrator then returned to the nature of the offence. He continued:

> 'The Respondent dismissed them for dishonesty as a result of false timekeeping in that they did not work their full hours as expected and switched their machines off. In my view by wording the charge as dishonesty the Respondent would easier be able to dismiss. Dishonesty is an offence for which employers can fairly dismiss employees in most instances. However, I believe the true essence of the charge is not dishonesty in the normal understanding of the word but rather the failure of employees to diligently fulfil their work functions as expected of them in respect of them working their full hours. I do not think the Applicants would have been charged let alone dismissed had they met their production targets. I also don't believe the Applicants would have been dismissed had they had their machines on but did not meet the expected production.'

[8] Taking account of the employees' length of service, the nature of the offence and the policy of progressive discipline, the arbitrator concluded that dismissal was too harsh and substituted it with the sanction of suspension and a final warning.

[9] The appellant on review in the court *a quo* and in the appeal before us argued that the award was reviewable on various grounds which can be summarised as follows. It submitted that the arbitrator erred in holding that the conduct of the respondents did not constitute dishonesty and was instead akin to failure to work diligently; and that the sanction of dismissal was too harsh. The arbitrator furthermore, according to the appellant, failed to attach sufficient weight to the facts that the respondents deliberately switched off the machines without permission; claimed full salaries when they did not work the hours claimed; and did not show remorse for their conduct at the disciplinary enquiry. These factors, in the appellant's view, outweighed the long service period and past disciplinary record of the respondents and strongly indicated that the trust relationship had broken down. In addition, it submitted that the arbitrator erred by not properly considering the circumstances that led to the decision to install the surveillance cameras at the work stations of the

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respondents and the financial loss suffered through low productivity in the nightshifts over a sustained period.

[10] The court *a quo* was brief and to the point in its conclusion. It held:

> '[23] I have considered the award. Whilst a court on review may differ in its view as to whether or not dismissal was an appropriate sanction in this regard, this is not the test to be applied. I must decide whether the award is one that could reasonably be reached on the evidence and other material properly before the second respondent. In my view this question must be answered in the affirmative.
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> [24] The second respondent's finding that the individual respondent's conduct did not amount to dishonesty in the strict sense of the word and that this amounted to something akin (to) failure to work diligently is, in my view, a reasonable finding. The second respondent considered the length of service of the individual respondent's and their disciplinary record and came to the conclusion that the trust relationship had not been broken down. He came to the conclusion that dismissal was too harsh a sanction and that a lesser sanction would serve a corrective purpose. I should also observe that the lesser sanction is in fact a fairly severe one in that, apart from the imposition of a final written warning, the fact that the individual respondents were not retrospectively reinstated meant, in effect, that they were suspended without pay for a lengthy period of time."

It accordingly dismissed the review application and made no order as to costs.

[11] It is trite that decision-makers acting reasonably may reach different conclusions on the issue of sanction. Provided the sanction falls within a reasonable range of options the court should be loath to interfere where the arbitrator has considered all relevant factors and not been influenced by capricious or irrelevant considerations distorting the outcome. The record reveals that the arbitrator considered all the relevant evidence. Much of the appellant's argument before us complained about the failure of the arbitrator to accept its interpretation on dishonesty and show deference to the employer's prerogative on sanction. As the court *a quo* pointed out, the notion advanced by the appellant that an arbitrator must accord deference to the employer's decision as to sanction was rejected by the Constitutional Court in

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Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.[1] However, the appellant also intimated that the arbitrator irrationally contradicted himself in finding initially that the conduct was dishonesty but then holding later that it was not. The submission misrepresents the arbitrator's reasoning. His finding was essentially that the dishonesty in this case was not of the egregious kind, where, for instance, the perpetrator deliberately steals from or blatantly defrauds the employer. Truancy is a lesser form of dishonesty. There is no incongruity in that reasoning. The arbitrator did not contradict himself or unreasonably substitute the offence. He merely engaged in a rational gradation of the offence to reveal its less serious nature, which taken with the lengthy periods of service and clean disciplinary records of the respondents, supported his conclusion that the trust relationship had not been damaged to the extent of making the continuation of the employment relationship objectively intolerable. The severe sanction he chose to impose, 18 months suspension, implicitly took account of the harm caused to the employer and its need to enforce discipline. The arbitrator thus evinced an understanding of the rule breached and the importance of that rule. He took account of the employer's reason for imposing the sanction of dismissal and the prejudice to the employer caused by the conduct. But he disagreed with the employer's approach and reasonably refused to defer to it. He rationally held that the potential effect of a dismissal and the long-service record of the employees justified a sanction less than dismissal. He then imposed the suspension without pay and a final warning valid for 12 months. There was nothing improper or unreasonable about the manner in which the arbitrator exercised his discretion; nor did he misconceive the nature of the enquiry.

[12] The court *a quo* was accordingly correct to dismiss the application and the appeal must fail. There is no reason why costs should not follow the result.

[13] In the premises, the appeal is dismissed with costs.

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[1] (2007) ILJ 2405 (CC).

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JR Murphy AJA

I agree

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Davis JA

I agree

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Musi JA

APPEARANCES:

FOR THE APPELLANT: Mr N Mkhize Attorney

FOR THE RESPONDENTS: Mr A Goldberg Attorney

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