

SOUTH AFRICA / JUDGMENT

Mofokeng v Commission for Conciliation Mediation and Arbitration and Others (JR 1200/18) [2022] ZALCJHB 230 (16 August 2022)

[2022] ZALCJHB 230

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR 1200/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 1200/18

In

the matter between:

LITSHANI
SYLPHIA MOFOKENG Applicant
and
THE
CCMA First
Respondent
LAZARUS
METLALA N.O. Second
Respondent
THARISA
MINERALS (PTY) LTD Third
Respondent

Heard:

14 June 2022

Delivered:

27 June 2022

Summary: Review application - reasonability of the decision. Sartorial elegance against health and safety. Which must prevail at a business conducting mining operations? Gross insubordination and incitement of co- employees - applicant not guilty. The outcome is not one that a reasonable decision maker may reach. The award is reviewable in law. Held (1): The arbitration award is reviewed and set aside. (2): It is replaced with an order of this Court. (3): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The evil that surrounds this dispute is the wearing of high heels as opposed to flat shoes. It is a case that pits sartorial elegance against health and safety at the workplace. Researchers completed biomechanical analyses and found that high heels give women a more feminine gait. The raised heel makes the women's stride shorter and increases the rotation and tilt of the women's hips. There is no dispute that the third respondent, Tharisa Minerals (Pty) Ltd (Tharisa) operates as a Mine. As such, its operations are regulated by the provisions of the Mine Health and Safety Act[1] (MHSA). The MHSA impels an employer like Tharisa to ensure safety[2] at the workplace.

[2] As required by section 8 of the MHSA, Tharisa, on 1 June 2015 adopted a policy and procedure covering issues of health and safety at the Mine. Clause 8.13 of the policy and procedure provided as follows:

"Appropriate shoes must be worn at all times. Slippers, high heels and open shoes are not allowed."

[3] Of course this policy was and still is ambiguous. It does not clearly mention as to where in the premises of Tharisa are high heels and open shoes not allowed. Owing to this ambiguity, on 21 September 2017, the policy was reviewed to introduce the following note:

"NOTE: Only flat shoes may be worn at work on Tharisa premises. No sleepwear is allowed."

[4] On 20 September 2017, a risk assessment was conducted over the wearing of high heels. The outcome of the assessment indicated that high heeled shoes pose a safety risk. On 22 September 2017, all the employees of Tharisa were notified of the risk and were instructed as follows:

"Employees are thus hereby instructed to wear only flat shoes when entering the mine premises and safety boots to be worn where applicable. This will reduce the risk of slip, trip and fall incidents and ensure the wellbeing of our employees. Non-compliance with regard(s) to this instruction may lead to disciplinary action."

- [5] Having outlined the above, this is an application seeking to review and set aside an arbitration award issued by Commissioner Malala (Malala), in terms of which, he found that the dismissal of Ms Litshani Sylvia Mofokeng (Mofokeng) was fair. Aggrieved by such an outcome, Mofokeng launched the present application. The application is duly opposed by Tharisa.

Background

facts

- [6] Recently, the Ukraine Ministry of Defence faced sharp criticism for its requirement that female soldiers march in high heels in an August 2021 parade. The dress code was deemed sexist and harmful to the health of the soldiers. The controversy was why so many women choose to wear uncomfortable and potentially dangerous heels[3].
- [7] Mofokeng was employed by Tharisa on 1 September 2013 as a Human Resources Coordinator. Pertinent to the current dispute, on 11 September 2017, a director of Tharisa observed Mofokeng in the main office complex wearing a high heel. The director highlighted the dangers of wearing high heels at work to one manager, Ms Karen Chetty. It is unclear from the statement by Mr Derek Baker (Baker), Head of Sustainable Development at Tharisa, as to whether the highlighted dangers were communicated to Mofokeng. Nonetheless, on 20 September 2017, a risk assessment was conducted, the outcome of which were spelled out above.
- [8] On 21 September 2017, Mofokeng was again spotted wearing high heels. Baker summoned her to his office and instructed her to comply with the policy and procedure outlined above after it being reviewed, as outlined above, on that same day. Mofokeng attempted to plead her case for her desire to retain the feminine look at the Mine. Baker informed her of the outcome of the risk assessment and also shared his experience at a previous Mine. Thereafter, Mofokeng complied with the instruction to comply with the policy and procedure.
- [9] Of course Mofokeng was chagrined by the fact that her desire to retain her femininity has been dealt a blow, particularly because in the recent past, she had retained the feminine look without any hindrance, she vented her dissatisfaction to some of her female colleagues. She approached one Ms Zodwa Monamodi (Monamodi), and requested that they should come together as female colleagues to voice out their dissatisfaction regarding the instruction to comply with the policy. Monamodi advised the visibly distraught Mofokeng to rather wait for the memorandum, communicating the instruction, which memorandum

ultimately came out the following day, whereafter they could approach management to plead their case further. Mofokeng agreed with the advice. Later after consultation with her supervisor, Monamodi retreated and recanted from the advice she offered to Mofokeng.

- [10] Owing to the fact that the issue was close to the desires of Mofokeng to retain femininity, she placed a call to one Ms Pulane Mongale, seeking for her support. She too agreed to support her, but later reneged.
- [11] Mofokeng also approached a trade union leader to support hers and other women's cause. The trade union leader refused to come to her aid. On 26 September 2017, Baker got wind that Mofokeng has expressed dissatisfaction about the policy. He interviewed employees she made contact with and decided to charge Mofokeng with gross insubordination, because he viewed the actions of Mofokeng to lobby others against the memorandum as an act of challenging his authority since the memorandum was issued by the Operations Manager at his behest. Further, Mofokeng was charged with incitement in that she lobbied other employees to challenge the memorandum.
- [12] Mofokeng was subjected to a disciplinary enquiry; she was found guilty of gross insubordination and incitement and was dismissed on 16 October 2017. She was aggrieved and referred a dispute alleging unfair dismissal. As indicated earlier, Malala found that the dismissal was fair, hence the present application.

Grounds of review

- [13] Mofokeng contends that the finding that she is guilty of gross insubordination as well as incitement is not one that a reasonable decision maker may reach, particularly because she removed her high heels once Baker informed her about the policy. Above all she contends that the arbitration award is not one that a reasonable decision maker may reach

Evaluation

The offence of gross insubordination.

- [14] Tharisa takes a view that there was misconduct of insubordination because Mofokeng after complying with the policy which was later purified suggested to other employees her unhappiness about the policy itself. It is common cause that until 22 September 2017, there was no full compliance with the policy. This point is perspicuously underscored by the memorandum of 22 September 2017. The memorandum highlights that there was no full adherence to the rule. Owing to the fact that there was no full adherence to the rule/policy, which was also discovered to be ambiguous, hence the note on 21 September 2017, Mofokeng was, in my view, justified in being concerned about the sudden change. It seems to be so that had the director not raised a concern in August 2017 and observed Mofokeng on 11 September 2017, Mofokeng and other female employees would have continued to wear high heels at work without any difficulties.

- [15] At any workplace, employees are entitled to question and resist application of certain work rules. As a matter of fact, employees have a right to strike in order to compel an employer to accede to a demand or grievance involving any matter of mutual interest. A dress code at workplace is a matter of mutual interest. In certain instances, it may be considered as a term and condition of employment. Without deciding whether a dress code is a term and condition of employment or a mere work practice, it suffices to mention that an employer is by law not entitled to unilaterally change the terms and conditions of employment. If an employer does so, such an employer is acting unlawfully[4]. Therefore, any instruction to obey an unlawful instruction does not breed insubordination.
- [16] On the facts of this case, inasmuch as the policy regarding the dress code was first adopted in June 2015, there seem to have been no justification provided why high heels were not allowed and at which part of the mining premises was it not allowed. On the face of it, before the risk assessment, the rule seemed invalid and unreasonable. Item 7 (b) (i) of Schedule 8 of the Labour Relations Act [5](LA) requires that a rule must be a valid and/or reasonable one. The justification of the rule against the wearing of high heels only emerged after the risk assessment which was conducted two years later. The obligation to conduct a risk assessment emanates from section 11 of the MHSA. The obligation is predicated on the common law duty of care, which includes the duty to provide safe working premises[6].
- [17] Of importance, section 11 (d) of the MHSA impels the employer to make the records identifying the risks assessed for inspection by employees. This must, in my considered view, imply that upon inspection, an employee may make an [...] MHSA the employer determines all measures including changing the organisation of work and the design of safe systems of work necessary

to amongst others minimize, control or eliminate the risk in consultation with the health and safety committee. Section 25 (2) of the MHSA obligates an establishment of one or more health and safety committees. So it must follow in this regard that the risk assessment with regard to the wearing of the high heels was conducted in consultation with the health and safety committee. Ex facie the assessment report, the team comprised of Sharon Gerber; Nikita van der Westhuizen; Walter Masakane; Derek Baker; and Share Makaba. Mofokeng was not part of that team. Thus her inputs, if any, were not taken into account during the assessment. Nevertheless, a risk as defined in section 102 of the MHSA means the likelihood that occupational injury or harm to persons will occur. The exercise

contemplated in section 11 of the MHSA is a public function exercise which is subject to the principle of legality. In other words, an employee like Mofokeng may approach a Court with competent jurisdiction in order to question the legality of the risk assessment report.

- [18] Clearly the rights of Mofokeng to question the policy and/or the report that justifies it are not by any means trammled. As pointed out earlier a strike action legally exists to support grievances and/or demands. Although a strike action by one employee is not impactful, in terms of section 23 of the Constitution of the Republic of South Africa, 1996, (the Constitution) the right to strike is an individual fundamental right.
- [19] Section 16 (1) of the Constitution, guarantees everyone, Mofokeng included, the right to freedom of expression. Accordingly, Mofokeng was entitled to superior. It appears to be common cause that the policy was amended by Baker spontaneously on 21 September 2017 in order to remove any ambiguity. The policy in relation to health and safety matters is one contemplated in section 8 of the MHSA. Section 8 (2) of the MHSA, obligates an employer to consult with the health and safety committee on the preparation or revision of the document and policies contemplated in the section. On the facts of this case, the conduct of Baker, on application of the principle of legality, is unlawful, since there is no evidence that the provisions of section 8
- (2) of the MHSA has been complied with, when he spontaneously reviewed the policy on 21 September 2017.
- [20] On the conspectus of the evidence before Matlala, Mofokeng was faced with a conduct that is potentially unlawful. Inasmuch as insubordination does not manifest itself in a refusal to obey a reasonable and lawful demand only, it can also manifest itself by challenge or defiance of the authority of an employer. That authority so imposed must be one that is lawful and/or reasonable. Likewise, where the authority challenged and/or defied is unlawful and or unreasonable, there can be no basis for insubordination to exist. Nevertheless, on the evidence presented, there is no indication of Mofokeng challenging or defying the authority of Baker. After Baker explained the risk assessment to her she, albeit grudgingly complied. It would have been a challenge of authority or defiance if Mofokeng overtly stated that she is complying temporarily and that she will not in the future comply with the policy. There was no evidence of persistence and willfulness not to comply on the part of Mofokeng. Expression of dissatisfaction does not equate persistence and willfulness.
- [21] As pointed out above, section 16 of the Constitution accords Mofokeng the right to express her views about the reasonability or unreasonability of any work rule and/or policy. The fact that she expressed her dissatisfaction to her co-workers and a trade union official does not mean a challenge and/or defiance of authority. Again, the LA does create space for grieving about any matter of mutual interest or an unfair conduct of an employer. Thus any employee who grieves about a matter of mutual interest or has a demand is protected by section 5 of the LRA. In terms of section 5
- (2) (b) of the LA an employee cannot be prevented from exercising any right conferred by the LA. Baker considered it to be a challenge to his authority when Mofokeng allegedly lobbied persons to protest against the instruction. That challenge he considered to be gross insubordination. I do not believe that this type of challenge was the one contemplated in

Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)[7]. The principle enshrined in Wooltru was accepted by the Labour Appeal Court in Palluci Home Depot (Pty) Ltd v Herskowitz and Others[8].

[22] In order to understand the principle, the facts that obtained in Wooltru were briefly as follows. The employee had an altercation with her store manager during which the employee responded to the store manager when he enquired about the stock on the shelves by stating "why are you checking on me". At the office of the store manager, where she was called into, she opened and searched the manager's cupboard without his permission. Based on those facts the employee was charged with insolence and insubordination. However, the Industrial Court per Mr D A Basson AM and Hartdegen AM reached a conclusion that there was no insubordination but only insolence. The Industrial Court reached the following conclusion:

"It must be pointed out that the court in casu is of the opinion that the offence of insubordination is constituted by the following: When the employee refuses to obey a lawful and reasonable command or request and the refusal is willful and serious (willful disobedience), or when the employee's conduct poses a deliberate (willful) and serious challenge to the employer's authority[9]."

[23] Before opining in the above manner, the Industrial Court made reference to two of its previous decisions. In one decision, an employee angrily told her manager to do her work himself[10]. In the other, the employee tore up the notes of the chairman at his hearing for alleged misconduct[11]. The Court in Wooltru remarked that the conduct of tearing up the notes was not calculated to challenge the authority of the employer.

It only had the effect of disregarding the authority of an employer and making a mockery of the disciplinary procedure. The Court further remarked that the disregarding of the employer's authority did on the facts of that case of T&GWU & another v Interstate Bus Lines (Pty) Ltd[12] constitute a deliberate and serious challenge to or defiance to (all of which are stronger than a mere disregard of the authority of the employer (especially because he was making a mockery of the employer's disciplinary procedure).

[24] On the facts of this case, there is no indication of a deliberate and serious challenge to or defiance to the policy. Had Mofokeng garnered the necessary support, a demand might have been made to either amend the policy further or to reconsider the policy. Accordingly, on the facts of this case, there is no scintilla of evidence to demonstrate challenge of authority within the contemplation of Wooltru. Clearly, Mofokeng was unhappy with the policy but that does not amount to being disobedient or challenging authority. I still maintain that if the authority is exercised in an unlawful and/or unreasonable manner- by not complying with the applicable legislation or unilaterally changing what used to happen in the past - the principle of legality does authorize a challenge through lawful means. In a constitutional order everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions[13]. This simply means that everyone has a right to

demonstrate to any person in authority in order to have his or her grievance addressed.

Similarly, Mofokeng as an employee has a right to remonstrate against any authority exercised by Tharisa as an employer as long as it is done in line with the law. Armed with such statutory protection, how a mere dissatisfaction can amount to gross insubordination, baffles me. The preamble of the Regulation of Gatherings Act[14] goes to the extent of stating that every person has the right to assemble with other persons and to express views on any matter freely.

[251] Section 36 of the Constitution allows limitation only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. What Baker did when he discovered that Mofokeng is seeking to remonstrate against the fairness of the policy is equivalent to what mundanely happened

pre-constitutional democracy. In order to silence Mofokeng, he used economic power - the right to dismiss an employee. Such conduct has no place post constitutional democracy. The conclusion to reach is that a finding that Mofokeng is guilty of gross insubordination is not one that a reasonable decision maker may reach. Unilateral change of a dress code practice is tantamount to provocation. By definition provocation as a noun means an action or speech that makes someone angry. In not so distant past - 11 September 2017, Mofokeng came to work wearing high heels. Barely 10 days later, she is informed that she cannot wear high heels anymore. She became angry as a result. This propelled her to think of means and ways of changing what was ostensibly an unfair conduct on the part of Tharisa. In Palluci Home, the Labour Appeal Court (LAC) stated the following:

[33] Whether misconduct amounts to insubordination depends on a number of factors including the willfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer prior to the purported act of insubordination. Provocation by an employer prior to the act of insubordination by an employee, is thus an important factor that must be considered in assessing its gravity...If the employee was provoked into insolence or insubordination, it may have a considerable mitigating effect on the seriousness of the offence and may render dismissal inappropriate.

Thus, even if it can be said that Mofokeng insubordinated herself, who in the Court's view, did not, dismissing her was inappropriate in the circumstances where she was clearly provoked into the steps she took thereafter.

The offence of incitement

[27] Malala also found Mofokeng guilty of incitement. Incitement is basically a common law criminal offence. As defined it involves the intention by words or conduct to influence the mind of another in the furtherance of committing a crime. [15] On the facts of this case Mofokeng did not incite anyone to commit a crime. To the extent that it may be said that Mofokeng incited other co- employees to engage in a strike action, strike is a constitutionally

guaranteed fundamental right of an employee[16] and can only be protected or unprotected[17] and never illegal or unlawful. Since inciting employees to engage in a strike action is not a crime, it can never be said that by so doing, Mofokeng committed incitement. There is no evidence that Mofokeng incited any of the co-employees to engage in a strike

action. The advice was to approach management in order to plead a case of wearing high heels as they wore them in the past without any difficulties. Of course if the plea or demand is not acceded to it may have led to a strike action, which may have been protected if the procedural requirements of the LA were met. In employment context incitement is mostly used as a charge in the context of a strike action. An employee may be guilty of incitement and or intimidation if he or she incites fellow employees to take part in an unprotected strike action. In other words, that employee would be inciting fellow employees to commit misconduct. In terms of section 68 (5) of the LA, participation in a strike action that does not comply with the provisions of the chapter or conduct in contemplation or furtherance of that strike may constitute a fair reason for dismissal. In terms of item 6

[28] I reiterate where an employee influences the minds of fellow employees to institute a strike action in accordance with the LA, that employee would not be guilty of incitement. There was no evidence led before Malala to suggest that Mofokeng influenced her fellow employees to engage in an unprotected strike action. Therefore, a finding that Mofokeng made herself guilty of incitement

is not justifiable on any basis. It is not a decision that any reasonable decision maker may reach.

Conclusions

[29] For all the above reasons, the findings that Mofokeng is guilty of gross insubordination and incitement are not justifiable. They are not findings that a reasonable decision maker faced with the same evidence may reach. Applying the test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[18] as perfected in *Herholdt v Nedbank Ltd*[19] and *Head of the Department of Education v Mofokeng and others*[20] the decision of Matlala falls outside the bands of reasonableness and is not constitutionally compliant Accordingly, the arbitration award ought to be reviewed and set aside.

What then?

[30] Section 145 (4) of the LA empowers this Court, once it sets aside an arbitration award, to determine the dispute in the manner it considers appropriate. During argument, this Court was advised that it was discovered late that the evidence of Baker was not transcribed. However, this Court was assured that the evidence of Baker is correctly captured by Malala in his impugned arbitration award. Further, the evidence as captured by Matlala is repetition of his written statement he delivered on 04 October

2017. Accordingly, this Court is in as good a position as Malala was to determine the dispute afresh.

[31] As indicated earlier, on the facts of this case, Mofokeng is not guilty of gross insubordination or incitement. Thus, in dismissing Mofokeng, Tharisa was bereft of a fair reason within the contemplation of section 188 of the LRA. Accordingly, the

conclusion

to reach is that the dismissal of Mofokeng was substantively unfair.

[32] There was no serious challenge on the finding that the dismissal was procedurally fair. In premises, the finding of Matlala in that regard is unassailable.

The issue of the relief

[33] Where a dismissal is found to be substantively unfair, the primary remedy is that of reinstatement or re-employment. in order to defeat the primary remedy, the requirements of section 193 (2) of the LA must be met. Sharon Gerber testified that Mofokeng is not to be trusted because she made herself guilty as charged. Baker testified that as a result of Mofokeng's conduct of inciting other female employees the trust relationship has completely broken down and he can no longer work with her.

[34] The above is not sufficient to oust the primary remedy[21]. The loss of trust testified to, is as a result of the finding of guilt on gross insubordination and incitement. On the evaluation of the evidence and application of the applicable legal principles, Mofokeng is not guilty of anything. Accordingly, her primary relief is not lost. Had Matlala afforded her the primary relief, he would have had discretion to exercise as to whether the reinstatement would be retrospective or it was to take effect from the date of the arbitration award 07 May 2018. However, Matlala did not get to that point.

[35] Owing to the fact that Matlala did not get there, the question is can this Court get there? In my considered view, this Court is in as good a position as Malala to get there. There is absolutely no evidence on record to countervail retrospective reinstatement. Where an employee is dismissed when he or she ought not to have been, there is no reason why the status quo ante cannot be ordered. Before I do so, I hasten to say that on the strength of the latest authorities retrospective reinstatement does not mean an order of backpay. The issue of backpay may only arise once Tharisa complies with the reinstatement order I shall be making in due course.

[36] The LAC in *Kubeka and Others V Ni-Da Transport (Pty) Ltd*[22] made it abundantly clear and said:

"[41]...These employees were in effect reinstated by the respondent at different dates of their re-employment/reinstatement and remained employed in November 2018 when the reinstatement order became enforceable. It may be assumed that they tendered their prospective services which tender

was accepted by the respondent. They accordingly have a contractual right to back pay enforceable in terms of section 77 (3) of the BCEA. Their claim for back pay is limited to the period from their dismissal up until date of re-employment because after their date of re-employment, they were employed by the respondent and received their salaries.

[37] Therefore, based on Kubeka, once an employee is reinstated, the contractual right to back pay accrues to that employee.

[38] In the results the following order is made:

Order

1. The arbitration award issued by Commissioner Lazarus Malala under case number NWRB3854-17 dated 07 May 2018 is hereby reviewed and set aside.
2. It is replaced with an order that the dismissal of Litshani Sylvia Mofokeng is procedurally fair but substantively unfair.
3. Tharisa Minerals (Pty) Ltd with registration number 2006/009544/07 is hereby ordered to reinstate Litshani Sylvia Mofokeng with effect from 16 October 2017.
4. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms E Tolmay

Instructed by: Webber Wentzel Attorneys, Johannesburg.

For the Respondent: Mr W Hutchinson

Instructed by: Soldatos Cooper Inc, Johannesburg

[1] No. 29 of 1996

[2] See sections 2, 7 and 8 of the MHSA

[3] Forbes 2021/07/09.

[4] A Mauchle (Pty) Ltd t/a Precision Tools v Numsa & others (1995] 4 BLLR 12 (LAC).

[5] No. 66 of 1995, as amended.

[6] See: Van Deventer v Workmen's Compensation Commissioner 1962 (4) SA 28 (T) and OosthuizenV Homegas (Pty) Ltd 1992 (3) SA 463 (T)

[7]

(1989) 10 ILJ 311 (IC)

[8]

(2015) 5 BLLR 484 (LAC).

[9] Ibid at p 314 I

[10] Bristol en ander v Leeupoort Minerale Bron (Edms) Bpk (1987) 8 ILJ 366 (IC).

[11][11] T&GWU & another v Interstate Bus Lines (Pty) Ltd (1988) 9 ILJ 877 (IC).

[12]

(1988) 9 ILJ 877 (IC).

[13] Section 17 of the Constitution.

[14] Act No 205 of 1993.

[15] See: EFF v Minister of Justice and Constitutional Development 2019

(2) SACR 297 (GP)

[16] Section 23 (2) (c) of the Constitution - every worker has the right to strike.

[17] Section 64 (1) of the LRA.

[18]

(2007) 28 ILJ 2405 (CC).

[19]

(2013) 34 ILJ 2795 (SCA)

[20]

(2015) 1 BLLR 50 (LAC).

[21] See Mosiane v CCMA and others (JR2468/16) [2019] ZALCJHB 164 (27 June 2019) and New Clicks SA (Pty) Ltd v CCMA and others (JR1333/05)

[2008] ZALCJHB 14 (27 February 2008)

[22]

(2021) 42 ILJ 499 (LAC) at para 41.

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