

SOUTH AFRICA / JUDGMENT

South African Clothing and Textile Worker's Union and Others v Commission for Conciliation, Mediation and Arbitration and Others (JR686/2015) [2017] ZALCJHB 24 (26 January 2017)

[2017] ZALCJHB 24

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR686/2015

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THE

LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not reportable

Case no: JR 686 /2015

In

the matter between:

SOUTH
AFRICAN CLOTHING AND TEXTILE
WORKERS'
UNION
First
Applicant
ALFRED
LETIMELA Second
Applicant
RONNIE
APOLS
Third
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND

ARBITRATION First
Respondent
M
MANTSHULE
N.O. Second
Respondent
HELM
TEXTILE MILLS (PTY)
LTD Third
Respondent

Heard: 12 October 2016

Delivered: 26 January 2017

Summary: Review application. Applicant challenges findings on consistency and sanction. No merit in the grounds for review and the arbitration awards is not to be interfered with on review.

JUDGMENT

PRINSLOO J.

Introduction

- [1] The Applicants seek to review and set aside an arbitration award issued on 13 March 2015 wherein the Second Respondent (the arbitrator) found the Second and Third Applicants' (the employees collectively or Letimela and Apols individually) dismissal substantively and procedurally fair and dismissed their cases.
- [2] The Third Respondent (Respondent or employer) opposed the application.

Background facts

- [3] The background facts are herewith summarised as follows:
- [4] The members of SACTWU embarked on a national protected strike as from 24 July 2014 and as the Respondent is a textile manufacturer, its employees participated in the said strike action.
- [5] It is common cause that the striking employees made a small fire on 28 July 2014 to keep warm and this fire was made with grass and dry wood on the bare ground and out of the way where it posed no risk or threat to any person or property. The Respondent was aware of this fire and had no problem with it.
- [6] It is also common cause that on 4 August 2014 the employees made a fire in front of one of the gates using old tyres. The Respondent's

managing director, Mr Willy Lochman (Lochman) came out of the factory with the general manager, Mr Norbet Jaeger (Jaeger), and shouted at Apols to stop what they were doing and Jaeger extinguished the fire with a fire extinguisher where after Lochman and Jaeger took the tyres inside the factory.

[7] On 5 August 2014 more tyres were burnt until the South African Police Service (SAPS) told them to stop burning tyres. The Respondent's

case is that the tyres were burnt under trees with low, dry branches near the building with the intention to ignite the tree.

[8] On 11 August 2014 the Respondent issued a notice of lock out and on 20 and 25 August 2014 the employees were issued with notices to attend a disciplinary hearing. The charges related to intimidation and taking the lead in burning tyres at or near the workplace with the intention to display an act of intimidation, causing damage to the company property through arson, disrupting operations by blocking the entrance to the premises with burning tyres and inciting other employees.

[9] The disciplinary hearing was held on 5 September 2014 and the Respondent's case was that the employees were the only ones

actively involved in the act of arson by either starting or propagating the burning of tyres and all other employees who appeared

on the video footage taken by the Respondent, were bystanders and the arson charges against them were withdrawn.

[10] On 8 September 2014 the employees were found guilty of misconduct and they were dismissed with effect from 9 September 2014. An unfair dismissal dispute was referred to the CCMA and the matter was arbitrated.

The evidence adduced

[11] The issue to be decided by the arbitrator was whether the employees' dismissal was substantively and procedurally fair. It is evident from the application and the grounds for review raised by the Applicant that issue is not taken with the findings on procedural fairness. For purposes of this judgment it is not necessary to consider the evidence or findings pertaining to procedural fairness.

[12] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to

consider the charges the employees were dismissed for and the evidence adduced.

- [13] The Respondent's general manager, Jaeger, testified that a national protected strike action was ongoing during July and August 2014 and the strike action commenced at the employer's premises on 24 July 2014. Wage negotiations were done at national bargaining council level and the employer had no say in the outcome of those negotiations. Whether the Respondent's employees went on strike or not, it had no impact on the outcome of the national wage negotiations.
- [14] On Monday 28 July 2014 the striking employees were standing at gate 3 in front of the building and they made a small wood fire to keep warm. The employer made an interim offer of 8% increase to the employees pending the outcome of the national wage negotiations and Letimela conveyed the proposal to the striking employees. Instead of responding to the offer, the conduct of the striking employees changed. They started to carry sticks and they moved to gate 1, which gate gives access to the yard for deliveries and parking. The strikers intimidated customers, suppliers, drivers and they sent threatening messages to working employees. Drivers could not enter the premises to make deliveries and as a result the employer lost orders for 37 000 metres of fabric.
- [15] On Monday 4 August 2014 Jaeger was called by Lochmann to assist with a fire at gate 1 which prevented customers, suppliers and staff from entering the premises. He took a fire extinguisher and ran to gate 1, where he extinguished the fire and pulled the tyres away. The fire was made directly in front of gate 1 in order to block access.
- [16] On Tuesday 5 August 2014 Jaeger was working in his office when he saw a yellow glow through the glass windows on the first floor. When he investigated he saw that several tyres were burning and were placed in front of the building under low hanging branches of dry trees. Lochmann called the SAPS and when SAPS arrived, they told the strikers that they could not burn tyres as part of industrial action. In the afternoon of the same day, more tyres were burnt and SAPS had to be called once again. The employer subsequently locked out the striking employees with effect from 11 August 2014.
- [17] On 20 August 2014 the employer issued notices of a disciplinary hearing to all employees who behaved violently or who displayed acts of aggression by carrying and waving sticks during the strike. The strikers were disciplined depending on the nature of the misconduct during the industrial action and the employees were categorised by looking at pictures and video footage taken during the strike. All the employees, except Letimela and Apols, were issued with written warnings and the lock out was uplifted with effect from 25 August 2014 and they were allowed to return to work.
- [18] Letimela and Apols were not allowed to return to work on 25 August 2014, as their disciplinary hearings were still pending. The misconduct they were charged with, was far more serious than the misconduct the other striking employees were charged with and for which they were issued written warnings.

- [19] Jaeger testified that the employees were dismissed for serious misconduct in that they burnt tyres in front of the gates and the employer's building on three occasions despite being told to refrain from doing so by Lochmann and the SAPS. Riotous behaviour is prohibited in the employer's disciplinary code and burning of tyres is riotous behaviour.
- [20] On the issue of inconsistency Jaeger testified that there was no evidence to implicate any other employee in the act of misconduct the employees were dismissed for.
- [21] It was never alleged that any other employee was involved in the burning of tyres and no pictures or video evidence showed any other employee involved with the burning of tyres. The mere fact that other employees were standing around or looking at the Second and Third Respondent, was not enough to charge those employees as the employer charged the ones who started the fire, not the ones who were standing around the fire. No evidence was adduced to implicate any other employee and all the evidence adduced portrayed, only the two employees as playing a leading role in the burning of tyres. The SAPS had to be called and came on two occasions, still the employees persisted with their conduct to burn tyres.
- [22] The employees were not dismissed for their participation in the strike, but for their misconduct committed during the strike. The conduct of the employees was not justified as it was not promoting protected industrial action. The trust relationship was destroyed and the sanction of dismissal was appropriate.
- [23] In cross-examination Mr Hadebe (Hadebe) focussed most of his questioning on issues relating to procedural fairness, which is not relevant for this application. Hadebe further focussed on the fact that the burning of tyres did not affect the employer's production. Jaeger explained that although no trees or buildings caught fire as a result of the burning tyres, the burning tyres still prevented suppliers from coming to the factory and it resulted in the loss of a big contract for the employer. The fires were not made to keep the strikers warm, but were made to threaten and it displayed riotous behaviour.
- [24] The employer's second witness was the managing director, Mr Lochmann. He testified that he saw Apols lighting paper and starting

a fire by burning tyres in front of the employer's entry gate. He shouted at Apols to stop and to think about what he is doing, but he ignored Lochmann and ignited the fire. Apols was assisted by Letimela. Lochmann made a video recording of this, where after he went to call Jaeger to assist him to extinguish the fire. By the time they extinguished the fire, the flames were quite high. They moved the tyres into the employer's driveway.

- [25] The next day, 5 August 2014, it became worse when a number of tyres were placed in front of the building and set alight. Some tyres were placed so that they could cause the dry trees to catch fire. At that point the employer called the SAPS who responded quickly and told the strikers to extinguish the fires. Later the same day the employees ignited the fires once again. Lochmann testified that he never saw any other employee involved in the igniting of the fires, it was just Apols and Letimela. They showed not only disrespect towards him, but

also towards the SAPS and any kind of authority. Lochmann testified that the employees could not return to work as they disregard authority and they are expected to work with supervisors, taking instructions from them. This to him was worse as the employer had no say in the wage increases and only implemented what was decided on a national level.

- [26] On the issue that the employees used the fires to keep warm, Lochmann testified that one does not burn tyres to keep warm as it makes really big flames and it gives off toxic fumes that a human being cannot inhale, but has to move away from. He further explained that the tyres were placed strategically to ignite the trees and to try to burn down the building and to intimidate suppliers, customers and staff who wanted to enter the premises. He testified that the strikers initially had a small wood fire at the side of the building to keep warm, which is much different from igniting tyres in front of the entrance gate. Lochmann testified that no one was standing around the fires to keep warm. This was done to block the gate, not to keep warm.
- [27] Lochmann rejected the employees' version that they did not know that they were not allowed to make fires. He testified that he personally told them to stop that and that they were told by the SAPS, yet they persisted to burn tyres.
- [28] In cross examination Hadebe put it to Lochmann that it was not disputed that tyres were burnt, but what was disputed was the intention.

Hadebe's version was that the fires were made to keep the strikers warm and not to burn the employer's property. This was disputed by Lochmann as his testimony was that the trees and building would have caught fire if they had not used the fire extinguisher to extinguish the fire and if the SAPS did not come to the premises and told the employees to extinguish the fire. He further testified that the fires were not to keep the strikers warm because of the size and location of the fires and the fact that people were not milling around those fires to keep warm. Furthermore, the employees disregarded all instructions not to burn tyres, even the instructions from the SAPS.

- [29] Apols testified that they burned tyres as it was the only option because there was no more wood to make a fire with. He also testified that the tyre burning never caused any fire to the trees or building and it was never a threat to anything. In respect of the issue of consistency Apols presented evidence and put forward versions that were never put to the employer's witnesses. Be that as it may, Apols conceded that the acts of misconduct he was charged with and dismissed for differed from the charges of the misconduct levelled against the employees who received written warnings.
- [30] Apols testified that he was able to go back to work if he would be reinstated. He testified that he would participate again in protected

strike action but he would conduct himself in a different way. Apols confirmed in his testimony that others brought the tyres, but he lit the fire. He also persisted that tyres were burnt to keep warm and that he was unaware that it was wrong to burn a tyre outside the Applicant's premises.

- [31] Apols conceded that the positioning of the tyres right in front of gate 1 interfered with access to the employer's premises. He further conceded that it was wrong to put a tyre there in front of the gate where there is an entrance of vehicles and trucks to deliver. He also conceded that he lit the fire.
- [32] Letimela testified that they did not burn tyres in front of gate 1. He contradicted the evidence of Apols who testified that the fire was in front of gate 1. Lochmann also testified that the fire was in front of gate 1.
- [33] It was common cause that tyres were burnt outside the employer's premises. Letimela testified that the intention was to keep warm and not to burn any property. He stated that if he knew that to burn tyres was wrong, he would not have continued. If he were to participate in strike action again, he will not burn tyres as it is wrong.
- [34] In his evidence in chief Letimela conceded that he took the lead in the burning of tyres but insisted that the intention was to keep warm.

Analysis of the arbitrator's findings and grounds for review

- [35] On substantive fairness the arbitrator found that the employees burnt the tyres and the only issue in dispute was their intention when doing so. The employees insisted that they burnt the tyres to keep warm whereas the Respondent viewed the burning of tyres differently and regarded it as an act of intimidation, causing damage and disrupting its operations.
- [36] The arbitrator considered the Code of Good Practice in Schedule 8 of the Labour Relations Act[1] in determining the substantive fairness of the employees' dismissal. The arbitrator accepted that there was a rule of which the employees should have been aware and which they contravened. He rejected their version that they were unaware of a rule that

prohibited the burning of tyres during a strike as they were shop stewards and should be aware of the general rules regulating a picket during strike action. The employees burnt tyres in front of gate 1 which was used by staff and suppliers and had the potential to interfere with the operations of the Respondent.

- [37] The arbitrator considered the appropriateness of the sanction and found that dismissal was appropriate and that the Respondent consistently applied its rules and disciplinary action.

- [38] The Applicants' case is that the arbitrator committed a gross irregularity in the conduct of the proceedings, committed misconduct

in relation to his duties as an arbitrator, failed to apply his mind to the evidence and rendered an award that no reasonable decision

maker could have reached. It is also the Applicants' case that the arbitrator misconceived the enquiry insofar as sanction is concerned and he did no more but to rubber stamp the employer's decision.

[39] In argument before Court Mr Makhura on behalf of the Applicants submitted that the review application is limited to two issues and he persisted with the review application on two grounds only. The Applicants' case before Court was that the arbitrator misconstrued the nature of the enquiry in respect of sanction and inconsistency.

Sanction

[40] Mr Makhura submitted that the arbitrator made a material error in approaching the issue of sanction in that he approached it as an appeal and he failed to assess the appropriateness of the sanction afresh.

[41] Specific reference was made to paragraph 37 of the arbitration award where the arbitrator held as follows: "In the circumstances I am satisfied that the Respondent has proven that it acted appropriately in dismissing the Applicants. I thus accept that the Respondent has on a balance of probabilities proven that the dismissal of the Applicants was substantively fair. No evidence as such has been presented before me to interfere with the sanction imposed."

[42] Mr Makhura argued that the arbitrator approached the sanction as whether there was evidence to interfere and in his approach, he shifted the onus of prove and expected the employees to adduce evidence that their dismissal was indeed unfair, which is not the correct approach.

[43] There is no merit in the argument. Paragraph 37 of the arbitration award is a concluding paragraph and should not be read and considered in isolation. The arbitrator dealt with the issue of substantive fairness comprehensively and from paragraph 31 – 37 of the

award he dealt with the appropriateness of the sanction, after he was satisfied that the employees were indeed guilty of the misconduct

they were dismissed for. It is evident from a holistic reading of the award that the arbitrator considered and applied the test whether an employer could have fairly imposed the sanction of dismissal in the circumstances because the conduct of the employee on its own rendered the continued employment relationship intolerable or because of the cumulative effect of the misconduct when weighed together with other instances of misconduct. The arbitrator considered the gravity of the misconduct, the impact it had on the employer and its operations, the employees' length of service, the employees' failure to take responsibility for their actions and the breakdown of the trust relationship. Considering all these factors, the arbitrator concluded that the Respondent acted appropriately in dismissing the employees. In other words, considering all the relevant factors, the arbitrator

concluded that dismissal was an appropriate sanction.

- [44] In my view this finding is reasonable and is based on the evidence that was before the arbitrator. I fail to see where the arbitrator shifted the onus, as submitted by Mr Makhura.
- [45] Mr Makhura also argued that the arbitrator did not consider the issue of remorse when he decided the appropriateness of the sanction. The argument is that there is no analysis of the apology tendered by the employees where they tendered an apology at the first opportunity.
- [46] Mr Makhura referred to the transcript of the arbitration proceedings and specifically the evidence of Letimela[2] where he testified that “We will never burning the tyre because of we do not know to burning tyre it is a big mistake (sic).”
- [47] Mr Makhura submitted that this is an apology and a clear indication that they would not do it again. I fail to see an apology in the portion of the testimony Mr Makhura referred to. At best there is an acknowledgement that the burning of tyres is a mistake and they won’t do it again. There is no apology.
- [48] Apols in his testimony persisted[3] “Because I do not think I have done something wrong. I have done nothing wrong.”
- [49] The arbitrator found that the employees failed to take responsibility for their actions, but instead continued to claim that they burnt tyres as a means of keeping warm. He also found that it was clear when the Respondent extinguished the first fire caused by the burning of tyres, the Respondent did not want the employees to burn tyres. Notwithstanding that the employer made this clear, the employees continued to burn tyres. Although the employees claimed to be remorseful, the arbitrator found that they saw no wrong doing on their part, persisted with their claim that they wanted to keep warm and therefore their remorse is not sustainable.
- [50] A holistic reading of the transcribed record shows that the employees believed that they did nothing wrong and that they burnt tyres to keep warm. They claim that it was a mistake they were not aware of at the time and they won’t do it again.
- [51] In my view there is a contradiction as on the one hand the employees claim that they did nothing wrong and merely wanted to keep warm and on the other hand they claim it was a mistake they would not repeat. This does not give the impression of a genuine apology or remorse. In fact, it is not clear what the employees apologised for as they believed they did nothing wrong. At best they acknowledged that the burning of tyres offended the employer. The arbitrator was not unreasonable when he concluded that the employees’ claim to be remorseful cannot be sustained because they don’t see any wrong in their actions and persisted to justify what they did.
- [52] There is no merit in the first ground for review.

Inconsistency

[53] The Applicants' case is that the arbitrator failed to apply his mind to the fact that the Respondent did not dismiss the other

employees who associated themselves with the employees' conduct or those who brought the tyres to be burnt. Letimela stated in the founding affidavit that "The only difference is that we lit the fire and that is what the company meant by saying that we took the lead." The Applicants' case is that had the arbitrator considered and applied his mind to the fact that no other employee was dismissed,

his decision would have been different.

[54] Mr Makhura submitted that the only distinguishing factor between the conduct of Letimela and Apols and the other employees is that Apols and Letimela lit and made the fire and this is not a justifiable differentiation. The Applicants' case is that the employer applied discipline inconsistently and provided no justifiable explanation for that and the arbitrator's finding that the employer was consistent in its application of discipline is unreasonable.

[55] The arbitrator considered the issue of inconsistency and found that the case of Letimela and Apols is not similar to the other employees as by their own admission, they were the only ones who took part in the burning of tyres and the other employees were not charged with the same charges, but faced charges relating to carrying sticks while picketing.

[56] These findings accord with the testimony of Jaeger.

[57] On the issue of inconsistency Jaeger testified that there was no evidence to implicate any other employee in the act of misconduct the employees were dismissed for. He testified that the employees were dismissed for serious misconduct in that they burnt tyres in front of the gates and the employer's building on three occasions despite being told to refrain from doing so by Lochmann and the SAPS. Riotous behaviour is prohibited in the employer's disciplinary code and burning of tyres is riotous behaviour.

[58] The Respondent's case is the mere fact that other employees were standing around or looking at the Second and Third Respondent, was not enough to charge those employees as the employer charged the ones who started the fire, not the ones who were standing around the fire. No evidence was adduced to implicate any other employee and all the evidence adduced portrayed only the two employees as playing a leading role in the burning of tyres. That is the misconduct the employees were dismissed for.

[59] In *SA Commercial Catering and Allied Worker's Union and others v Irvin and Johnson Ltd*[4] the LAC held that:

"In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle'. There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness. Every employee must be measured by the same standards (Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and others(1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious."

[60] In casu the Respondent provided an explanation for disciplining and dismissing the employees. There was no allegation of capricious conduct made. There is no merit in the Applicants' argument that the employer applied discipline inconsistently and provided no justifiable

explanation for that. The evidence shows that an explanation was indeed tendered.

[61] The arbitrator's finding that the employer was consistent in its application of discipline is reasonable and there is no merit in this ground for review.

The test on review

[62] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*;[5] as 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[63] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator ignored material facts, committed a material error or that he ignored evidence and made findings not supported by the evidence or that he misconceived the nature of the enquiry.

[64] I am not convinced that the arbitrator should have come to a different conclusion based on the evidence that was before him. The

arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make.

[65] The award and the findings contained therein are reasonable and are not to be interfered with on review.

Costs

[66] In *Wallis v Thorpe and another*[6] the Court held:

"In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, ie that costs follow the result, is a factor to be taken into account, but it is not a determinative factor....."

[67] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*[7] it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[68] Mr Makhura argued that there is an ongoing relationship between the parties, but he ultimately left the issue of costs in the hands of the Court.

[69] Mr Schmidt for the Respondent argued that the application should be dismissed with costs. I can see no reason to disagree.

[70] I accept that there is an ongoing relationship between SACTWU and the Respondent. However, this matter will not affect the collective

bargaining relationship that is ongoing between the parties.

[71] The Respondent was compelled to engage in litigation and oppose an application that had no merit from the onset. The Applicants came to Court without merit and with no consideration of the prospects of success, causing the Respondent to incur legal costs and the Respondent is entitled to costs.

[72] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. A review application is not the next automatic step after arbitration and the practice to review arbitration awards where the decision is reasonable, should be discouraged.

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

Order

1. The application for review is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court

Appearances

Applicants:

Mr Makhura of Cheadle Thompson & Haysom Attorneys

Third Respondent: Advocate M J Schmidt

Instructed by: H

B L Klopper Attorneys

- [1] Act 66 of 1995.
- [2] Page 289 line 8 of the transcribed record.
- [3] Page 260 lines 23- 24 of the transcribed record.
- [4] (1999) 20 ILJ 23-2 (LAC).
- [5] (2007) 28 ILJ 2405 (CC) at para 110.
- [6] [2010] 31 ILJ 1254 (LC)
- [7] 2012 33 ILJ 2117 (LC).

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