IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA62/2018

In the matter between:

HOSEA MUSHI **Appellant**

And

EXXARO COAL (PTY) LTD

GROOTEGELUK COAL MINE **Respondent**

Heard: **21 May 2019**

Delivered: **13 June 2019**

Summary: Review of arbitration award – employee dismissed for endangering the life of the foreman and insubordination – employee showing remorse for acting in an incorrect manner – commissioner finding that dismissal not

appropriate sanction in accordance with employer's disciplinary guideline which provides final warning for insubordination

Held that:

In finding that reinstatement with a final written warning was appropriate when there was no evidence that the misconduct committed was so serious and of such gravity that it made a continued employment relationship intolerable, the arbitrator cannot be faulted. No reviewable error or irregularity was committed by him and the decision arrived at was not one which a reasonable decision-maker could not reach on the material before him. Labour Court's judgment set aside. Appeal upheld with costs.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment of the Labour Court in terms of which the award of the arbitrator was set aside on review and substituted with an order that the dismissal of the appellant, Mr Hosea Mushi, was fair.

[2] The appellant had been employed by the respondent, Exxaro Coal (Pty) Ltd, at Grootegeluk Coal Mine for 24 years when he was dismissed. On 10 March 2015 at around 22h50, he was on duty driving an oversized coal haul truck, the wheel size of which exceeded the height of two adults. He reported to his foreman that the shovel operator was loading the truck in an unsafe manner.

The foreman instructed the appellant to continue loading and undertook to observe the loading process. Shortly thereafter the foreman informed the appellant via radio that he would board the truck at the loading area. The appellant refused to let the foreman board the truck at this area. As the foreman walked towards the loading area the appellant moved the truck forward causing the foreman to have to move out of the way.

[3] At the ensuring disciplinary hearing, the appellant admitted that he had behaved improperly, but not that he had undermined the authority or threatened the life of the supervisor. The disciplinary code, which was stated to be a guideline, provided for a final written warning for misconduct of the nature committed. The appellant was nevertheless dismissed from his employment on 29 April 2015, for having refused to obey an instruction of a foreman, unsafe acts committed while driving the truck and improper behaviour in operating the truck after the foreman was proceeding towards it.

Arbitration and review

[4] Aggrieved with his dismissal the appellant referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). At arbitration, the parties agreed that the misconduct committed was not in dispute and that the issues for determination by the arbitrator were the appropriateness of the sanction and the issue of consistency since the foreman had not been disciplined. No oral evidence was presented by either party at arbitration.

[5] The arbitrator found that in not taking disciplinary action against the foreman there had been no inconsistency by the respondent in the application of discipline. However, in relation to the charges against the appellant, it was stated:

> '*The three charges are mutated of one another. The number of the charges by mutating them does not make the act to be more severe than it would ordinarily be. In any event, there is no dispute about the fact that it is not a dismissible offence at first instance. The respondent is not correct when it argues that it has a zero tolerance attitude towards an offence of this nature*.'

[6] In finding the sanction of dismissal imposed on the appellant to be inappropriate, the arbitrator had regard to the fact that the appellant had not been charged with gross insubordination, there were no aggravating circumstances present to prove that progressive discipline was inappropriate, the appellant had a long period of service, a clean service record and had shown remorse for his conduct. The dismissal was found to be unfair and the appellant was reinstated retrospectively into his employment with the respondent, with no loss of remuneration and back pay awarded in the amount of R77 398.72. A final written warning was imposed on the respondent operative from the date of his reinstatement, to expire on a date as prescribed by the respondent's disciplinary code.

[7] The respondent sought the review of the arbitration award by the Labour Court. In its judgment the Labour Court found the award reviewable on the basis that the respondent had been prejudiced by not having been given an opportunity to address the issue raised *mero motu* by the arbitrator relating to the duplication or "mutation" of charges. The Court took the view that it did not matter that the misconduct committed by the appellant had not been termed "gross" insubordination and that since the appellant had admitted endangering the life of the foreman, it was inconceivable that dismissal was not a fair sanction. The award of the arbitrator was therefore set aside on review on the basis that it was so unreasonable that no other reasonable arbitrator could have come to the same conclusion. The award was substituted with an order that the dismissal of the appellant was fair, with no order as to costs made.

Submissions on appeal

[8] On appeal, it was argued that the Labour Court had erred in considering all three charges when the arbitrator had not found the appellant guilty of all charges. The appellant in explaining why he had pleaded guilty stated that he did not accept that he had acted in an unsafe manner or that he had endangered the foreman's life, but rather that he had not carried out the foreman's instructions as he was required to do. As a consequence, the

misconduct committed amounted to insubordination and this finding was not challenged by way of a cross-review by the respondent. It was submitted that the Labour Court had therefore erred in finding that the arbitrator had acted unreasonably in not raising the issue of the mutation of charges with the parties when the parties chose not to present oral evidence at the hearing and the arbitrator had correctly found that for the purpose of sanction the charges should be treated as one. As a first offender, in terms of the respondent's disciplinary code, a final written warning was the appropriate sanction. Consequently, it was submitted that the appeal should succeed with costs.

[9] The respondent opposed the appeal on the grounds that in finding that the three charges were "mutated of one another" the arbitrator had exceeded his mandate when the only issue before him was whether the sanction of dismissal imposed was appropriate. It was submitted that the Labour Court correctly found that the issue of mutation was raised for the first time in the arbitration award, without the parties afforded an opportunity to address the issue. Furthermore, the arbitrator's criticism that the appellant had not been charged with gross insubordination was without merit given that the applicable disciplinary code does not provide for "gross" misconduct. In disregarding the applicable working conditions, the respondent's statutory obligations and its rules and procedures in the consideration of an appropriate sanction, the respondent argued that the commissioner had committed a reviewable irregularity and that the appeal should be dismissed with costs.

Evaluation

[10] The parties elected to approach the arbitration on the basis that only two issues required determination - the appropriateness of the sanction and whether there had been a consistent application of discipline by the respondent. No statement of case nor any oral evidence was presented to the arbitrator for the purpose of determining these issues. The result was that the parties were limited to the documentary evidence placed before the arbitrator which indicated that the appellant had admitted at the disciplinary hearing to having behaved improperly in the manner he had operated the truck. The appellant had not admitted misconduct in relation to the other charges and did

not accept that he had by his conduct threatened the life of the foreman, nor was there evidence that he had done so.

[11] The respondent's disciplinary code, which was expressly stated to be a guideline, provided that the appropriate sanction in cases of insubordination, refusal to obey instructions, misuse of property or improper behaviour was that of a final warning. Disciplinary rules are intended to create a degree of certainty and consistency in the application of discipline in the workplace. It follows that departures from a code should not be arbitrary or for no valid reason.[1] Even where the code is expressed as a guideline there must be a "plausible and reasonable justification"[2] for the sanction imposed, having regard to the gravity of the misconduct and relevant aggravating or mitigating factors. It follows that in this matter for dismissal to be appropriate the respondent was required to prove that the imposition of the most severe of sanctions, on which exceeded that provided in the disciplinary code, was fair.

[12] While health and safety issues, particularly in the mining industry, is of paramount concern, no evidence was put up to show that the foreman's life was endangered as a result of the appellant's conduct. The appellant admitted that he had erred in his conduct and showed remorse for it. The arbitrator's finding that the three charges related to the same misconduct did not amount to an irregularity in the conduct of proceedings when regard is had to nature of the misconduct, which the parties had agreed to be common cause. In addition, the failure to charge the appellant with "gross" misconduct did not alter the nature or degree of the misconduct committed on the facts of this matter. Nevertheless, the arbitrator had regard to the material before him in the manner he was required. This included that the respondent had a clean disciplinary record, long service and the disciplinary code recommended a final written warning for the type of misconduct committed. Endorsing the concept of corrective or progressive discipline, the arbitrator arrived at the conclusion that the imposition of the sanction of dismissal was too harsh.

[1] See *SAMWU obo Abrahams v City of Cape Town* [2008] 7 BLLR 700 (LC) at 706.
[2] *Wasteman Group v SAMWU* [2012] 8 BLLR 778 (LAC); (2012) 33 ILJ 2054.

[13] In finding that reinstatement with a final written warning was appropriate when there was no evidence that the misconduct committed was so serious and of such gravity that it made a continued employment relationship intolerable, the arbitrator cannot be faulted. No reviewable error or irregularity was committed by him and the decision arrived at was not one which a reasonable decision-maker could not reach on the material before him.[3]

[14] Turning to the issue of costs, the parties agreed that if successful costs should follow the result. Having regard to considerations of law and fairness there is no reason as to why this should not be so.

Order

[15] For these reasons the following order is made:

1. The appeal is upheld with costs.

2. The order of the Labour Court is set aside and substituted as follows:

'*The review application is dismissed with costs*.'

_____

Savage AJA

Waglay JP and Murphy AJA agree.

APPEARANCES

[3] Section 145(2) of the Labour Relations Act 66 of 1995 (the LRA); *Herholdt v Nedbank* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2015] 1 BLLR 50 (LAC) at para 33; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

FOR APPELLANT: Instructed by Shepstone & Wylie Attorneys

FOR RESPONDENTS: Instructed by E S Makinta Attorneys