IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C587/08

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
STEMBISO PHILMON SIBIYA	Second Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
SARENG NEVILLE MOCWALEDI N.O.	Second Respondent
SEDIBENG DIAMOND MINE JV t/a SEDIBENG DIAMONDS	Third Respondent

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JUDGMENT

TIP AJ:

[1] This review application has come before me on an unopposed basis. It concerns the dismissal of the second applicant, which dismissal was upheld pursuant to an arbitration conducted before the second respondent. The second applicant was dismissed after having been found guilty of a charge of assault. In these proceedings Mr Cloete, who appeared for the applicants, did not contest that aspect of the

finding. He raised two issues, being questions relating to inconsistent disciplinary treatment and a question as to whether the third respondent had demonstrated that the employment relationship had irretrievably broken down.

[2] The factual circumstances may be fairly briefly described. As at 11 February 2008 the second applicant was employed as a team leader performing underground work at the Sedibeng Diamond Mine. The principal evidence about the incident was given by the complainant, who worked as an onsetter transporting miners from the surface to underground and back again. On the instruction of the banksman he proceeded to level 15 to collect employees and took them to the surface. After that he went down again to level 14 to collect other employees. The second applicant embarked at that level and confronted the complainant about why he had started with employees at level 15 and not 14. The complainant explained to him that this was the decision of the banksman. The second applicant then started to swear at him, poked a finger in his face, pulled the complainant by the cord of his lamp and hit him on the nose with a clenched fist. The complainant's nose started bleeding. A fellow employee intervened and the incident was reported to security personnel as soon as the surface was reached. The complainant says that he did not provoke the second applicant in any way nor give him any reason to assault him.

[3] The second applicant denied that there had been any assault. His version was that there had been a short conversation about why the transport had begun at level 15 and not level 14 and that was the end of it. As is apparent from this, the second applicant has shown no remorse and has maintained a plea of innocence both in the internal disciplinary proceedings and at the arbitration. Corroborative evidence was called on behalf of the employer and, overall, the guilt of the second applicant was clearly established.

[4] It is of course so that any assault in the workplace is a serious matter. The gravity of it in this instance was materially compounded by the fact that the assault took place underground and in a transport cage, that being an environment with a considerable degree of inherent danger. Moreover, the assault was on the man who was in charge of the transport. All things being equal, the second applicant would ordinarily find it very difficult to resist the conclusion that he had made his continued employment intolerable and that he had been rightfully dismissed.

[5] The issue in this review is whether or not the arbitrator, the second respondent, was correct in dismissing the grounds of inconsistency which had been placed before him on behalf of the second applicant. Although Mr Cloete has raised the further question whether the employer showed that a continued employment relationship had become intolerable, that is really bound up with the primary issue of the inconsistency. For the purpose of this judgment, it is sufficient for me to give consideration to that aspect only.

[6] Before I turn to a consideration of the particular facts here in question, some general observations may be made. Consistency in the application of disciplinary standards and consequences forms an important part of dealing with workplace transgressions. At its core is the requirement that the treatment of employees should be fair. Plainly, inconsistent outcomes in relation to evidently comparable factual circumstances will lead to the serious erosion of respect for the applicable disciplinary regime. At the same time, it must be borne in mind that the objective of consistency is but one of several factors in the field of disciplinary measures and, equally, that it is primarily essential that fairness should be seen to result in any particular case on the basis of the facts in that case.

[7] To put the matter slightly differently, recourse to comparative

elements as between one case and another should not readily be handled in such manner as to produce an absurd or manifestly unfair result in a particular case. In short, consistency is not a rigid rule but a guiding concept calculated to ensure that discipline is not capricious or uneven. The manner in which an employer applies it must be in keeping with existing standards and expectations. See, variously: *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545; *SACCAWU and others v Irvin & Johnson Ltd* [1999] 8 BLLR 741 (LAC) at paras [29] and [30]; *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC) at 1961B-C. Where these considerations must be applied to a situation where outcomes in different events fall to be examined for consistency, it may be useful to compare different facets of them. Ultimately, though, a value judgment must be exercised and not a 'checklist' or 'scorecard' approach.

[8] In the present matter, two other disciplinary events were raised. The first one concerned Ms Catherine Dube, who testified at the arbitration. She was employed at the mine as a waste sorter, which essentially involved sorting rock and other material which was passing on a conveyor belt. Whenever the belt stops, the sorters are to step back from it. On 4 October 2007, according to Ms Dube, she had done this when another employee, Ms Sithole, came up to her and pulled her by her neck. Ms Dube was dragged and choked by Ms Sithole. A security officer intervened. Ms Dube felt strongly that she had been assaulted and raised that matter with various mine officials. However no charge was laid against Ms Sithole. Her dissatisfaction continued and on 24 October 2007 the two employees were called before the plant manager. They were informed that the matter had been fully investigated and that the company had concluded that no real assault had taken place. Rather, it was said, this had been childish, irresponsible and potentially dangerous

behaviour from both parties. It was further said that Ms Dube had provoked Ms Sithole by deliberately occupying the latter's usual sorting position. On this basis, both employees were given *"a final counselling and stern warning"*. The employer's note goes on to record that in the event of a further incident of this nature, the fact that this counselling had been given would serve as an aggravating circumstance. Ms Dube was not at all happy with this outcome and referred a dispute to the CCMA. This resulted in an agreement on 13 December 2007 to the effect that Ms Dube would raise the issue of the final counselling together with a letter that she had given to the manager, and that this would be dealt with at the workplace on or before 18 January 2008.

[9] Pursuant to this, a letter setting out Ms Dube's complaint was lodged with the third respondent on 18 January 2008. This produced the following response from the mine manager:

> *"With reference to your letter dated 18 January 2008 regarding the above-mentioned matter I wish to inform you that we are not prepared to discuss the issue. The case was at the CCMA on 13 December 2007 and you, in terms of the agreement at the CCMA, had sufficient time to raise your concerns with regard to your final counselling before 18 January 2008 (as was also agreed at the CCMA that the case be dealt with on or before 18 January 2008). It cannot be accepted that you only wrote a letter on 18 January 2008 and then expected the case must be discussed. If it was such a crucial issue you would have raised your concerns much earlier."*

[10] On the face of the evidence presented by Ms Dube, there were at least some parallels with the case concerning the second applicant in this matter. The conduct of Ms Sithole was unprovoked on any reasonable assessment. It involved dragging and choking. It occurred in the vicinity to some moving machinery and was therefore in a dangerous location. The question then arises what the implication is of the fact that the employer chose not to take Ms Dube's complaints

seriously enough to institute a formal assault charge.

[11] In his evaluation of this matter, the arbitrator set out the evidence of Ms Dube, noted that the shop steward, Mr Bashi, was not an eyewitness, and then proceeded to state that:

> *"Against this, we have the evidence of Mr Van der Heever that the decision to give final counselling to both Ms Dube and Ms Sithole was based on an investigation and the account of eyewitnesses to the incident in the form of the security officers who were present during the said incident."*

[12] Those officers did not give evidence at the arbitration. That fact forms one of the grounds for criticism of the arbitrator's approach to this matter, but the weight to be accorded to this in the context of a review requires further evaluation. It is of course so that the evidence given by Mr Van der Heever in this regard embodies a hearsay reflection of what those security officers apparently reported to the company investigators in respect of the incident. According to the account given by Mr Van der Heever, such information was to the effect that there had not been an assault of any consequence – and, implicitly, that the version of the incident given by Ms Dube had been overstated. That view led to the decision that the company would not institute formal disciplinary proceedings against Ms Sithole, but resorted to what it called a *"final counselling"*.

[13] The arbitrator dealt with the resultant situation on the basis that it could not be said that the employer had simply folded its arms in relation to Ms Dube's complaint. To the contrary, he considered, there had been an investigation and, on the strength of the information which was thus gathered, a particular course of action had been decided upon.

[14] *Prima facie* this approach on the part of the mine management left a good deal to be desired. What it in effect did was to reach a

conclusion, through its own evaluation, in respect of a question of credibility that should have been determined through a hearing. If that revealed that Ms Dube had falsely exaggerated the event, consequential action could then have been taken against her. Conversely, if her account proved to be correct then action against Ms Sithole would have had to follow. However, this perspective on what the employer did and did not do does not *per se* constitute a disciplinary result that is directly comparable to the outcome in the case of the second applicant in this matter.

[15] An allied question that flows from this is the extent to which an arbitration of the sort here in the picture is obliged to delve into the detail of matters that are raised as founding an allegation of inconsistency. In my view, it is not contemplated within the jurisprudence relating to inconsistency that an arbitration concerning one particular dismissal should find itself seized with a full rehearing in respect of various other incidents. That is also not what is contemplated in the objective of expeditious dispute resolution as formulated and given expression in the LRA. Rather, the basis of an inconsistency contention should comprise relatively patent demonstrations that a particular employee is the victim of a whimsical and haphazard disciplinary system.

[16] In the course of the evidence before the arbitrator, Ms Dube produced a copy of a medical certificate purporting to show that she had been booked off as from 5 October 2007 until 9 October 2007. Precisely what the reason for this was is not clear from the certificate itself. Ms Dube also said that she had prepared a grievance form in respect of the fact that her complaint against Ms Sithole had not taken the form of formal disciplinary proceedings. She went on to say that when she tendered this form, it was refused by the official to whom she sought to deliver it. Both of those submissions contain inherent evidential shortcomings and, in any event, had not in any way been

put to the company witnesses at the arbitration. The arbitrator had regard to these circumstances – correctly so in my view.

[17] I turn now to the second of the incidents upon which the contention of inconsistency was based. This related to an incident between two employees called Sebeela and Malebane. Plainly, there had been some quarrel between them with physical exchanges. However, the precise details thereof are unclear since no formal disciplinary proceedings were instituted. The two employees in question fully settled their differences on their own and neither wished any disciplinary action to be pursued. Both employees had been suspended for five days pending the investigation. The suspension did not amount *per se* to a direct disciplinary sanction. When the investigation led to the realisation that it would not be feasible to conduct a formal hearing, the matter came to an end.

[18] Once again some criticism of the company may be appropriate, in the sense that generally speaking disciplinary action should not be averted merely because of an agreement between the employees concerned. That said, however, it must also be taken into account that the material placed before the arbitrator was hardly such that he could with conviction have concluded that the company was indeed in a position to present a prosecution case and that it had failed to do so in a manner amounting to comparable and inconsistent treatment.

[19] Ultimately the question whether an arbitrator has rendered an award which should be reviewed and set aside by this Court is one that requires some circumspection. Whilst there may be points of criticism and even disagreement with the analysis and conclusions reached by the arbitrator, that does not mean that the award cannot stand. There must be an irregularity in his conduct of the hearing or in his treatment of the evidence such as to bring the award's reasoning and conclusion within the zone of reviewability. In the present case I am

not persuaded that the second respondent's award falls into that latter category. In my judgment, he was alive to the issues with which he had been confronted. He analysed them with care. Having done so, he found that the two incidents which had been put forward as constituting the basis for an inconsistency finding were not sufficient for the dismissal of the second applicant to be set aside. I find myself unable to disagree with that result.

[20] Although I have found that there are not sufficient grounds for the upholding of the review, it is appropriate that I should record my appreciation for the able manner in which Mr Cloete dealt with this case. The papers were carefully prepared and well presented. Mr Cloete's argument was direct and pertinent. Moreover, he assisted with the submission of helpful supplementary heads of argument subsequent to the hearing.

[21] I make the following order:

[1] The application is dismissed.

[2] There is no order as to costs.

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KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 29 January 2010

DATE OF JUDGMENT: 12 March 2010

FOR APPLICANTS: Mr N Cloete
of Neville Cloete Attorneys Inc

FOR RESPONDENTS: No appearance