REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D834/2009

In the matter between:

NUMSA obo Z JADA & 1 OTHER	**Applicant**
and	
DEFY REFRIGERATION A DIVISION OF	
DEFY APPLIANCES (PTY) LTD	**First Respondent**
METAL AND ENGINEERING INDUSTRIES	
BARGAINING COUNCIL	**Second Respondent**
NONHLANHLA DUBAZANE N.O.	**Third Respondent**

Heard: **21 May 2015**

Delivered: **10 June 2015**

Summary: review. Application dismissed.

JUDGMENT

GUSH J

[1] This is an application to review and set aside the award of the third respondent under case number MEKN 3708 dated 10 September 2009 in which award, the third respondent concluded that the dismissal of the applicant's members Jada and Nxumalo was substantively fair but procedurally unfair. The third respondent ordered the first respondent to pay Jada and Nxumalo compensation. The applicant applies for this order to be substituted with a "declaration that the dismissal of the individual applicants was both procedurally and substantively unfair" and that they be retrospectively reinstated.

[2] The application is opposed by the first respondent.

[3] The applicant's members' Zada and Nxumalo on whose behalf this application was brought, (hereafter referred to as the employees) dismissal arose from an incident which took place on 16 January 2009 when the employees together with a number of their colleagues embarked on a work stoppage. The employees were charged with disruptive behaviour and participation in an unprotected strike and, after a disciplinary enquiry, were found guilty of the misconduct and dismissed.

[4] The first respondent had, prior to the incident on 16 January 2009, on 15 September 2008, issued the employees with a final written warning and one-month suspension "without pay from 8 September 2008 to 3 October 2008 – warning valid for one year". This warning was issued as a result of had an incident which had taken place on 2 September 2008. The employee's conduct during this incident had led to them being charged with disruptive behaviour and causing a work stoppage. The employees were found guilty of this misconduct and issued with a warning referred to above.

[5] The warning and the suspension without pay was not challenged by the applicant or the employees at the time and it appears that the first respondent gave effect to the suspension.

[6] The applicant in support of its application raised in its founding affidavit the following grounds of review:

a. an “irregularity by the third respondent in finding that the dismissal was substantively fair, plus minus 250 employees were on strike” and only the employees were dismissed;

b. “the third respondent committed an irregularity by failing to take into account important evidence by the applicant’s witnesses that nothing was done with the rest of the striking employees including the shop stewards who gave evidence in the arbitration hearing” and in particular evidence regarding consistency in that the applicant disputed that warnings had been issued to the other striking employees;

c. “third respondent further committed an irregularity by not understanding her duty as a Commissioner which is that she is required to take into account schedule 8 of the Code of Good Practice in determining whether dismissal is substantively fair and among other things is whether the rule is consistently applied” and

d. Alternatively that the third respondent failed to award proper compensation.

[7] The applicant’s founding affidavit concludes by reserving its rights to amplify the affidavit once the record becomes available. Despite this, having made the record available, the applicant filed a notice in terms of rule 7A(8)(b) of the Rules of the Labour Court recording that it stood by the notice of motion and filed no further amplification.

[8] At the commencement of argument, Mr Crampton who appeared for the applicant indicated that he did not intend relying on the grounds of review set out in the founding affidavit or in the heads of argument filed on behalf the applicant that intended relying solely on the following ground of review:

That the award of the third respondent was reviewable by virtue of the third respondent's refusal to allow the parties to engage in an enquiry into the fairness of the prior final written warning issued to the employees during September 2008.

[9] This ground of review does not form part of the applicant's founding affidavit and was not raised in the heads of argument filed on behalf the applicant. There is ample authority for the "principle that a litigant cannot seek to introduce a new ground for review having failed to do so in the founding or supplementary papers".[1] On this ground alone the applicant's application cannot succeed.

[10] As this issue was raised only on the day the matter was heard, I have allowed the parties an opportunity to submit further written argument and/or authority for the proposition advanced by Mr Crampton that it was a reviewable irregularity on the part of the third respondent to refuse to enter into an enquiry into the fairness of the prior warning.

[11] Mr Crampton referred to the matter of *Changula v Bell Equipment*.[2] Mr Crampton submitted that in this matter, the court had held that an employer in dismissing the employee on the strength of a prior warning was wrong "in concluding that, because the employee had acquiesced in the final warning, no further regard need have been given to the circumstances which gave rise to it …"[3].(sic)

[12] It is important to record however that the court in *Changula* continued to state that "it must be emphasised that it is not intended in this judgment to lay down a general rule that employers when disciplining employees must reopen and reconsider previous disciplinary cases against the employee".[4]

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[1] *Northam Platinum Ltd v Fganygo NO and Others* (2010) 31 ILJ 713(LC) at p 720. See also *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A); *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) and *De Beer v Minister of Safety & Security and Another* (2011) 32 ILJ 2506 (LC).
[2] (1992) 13 ILJ 101 (LAC).
[3] At page 110.
[4] Also at page 110.

[13] The circumstances of the prior warning in the *Changula* matter are distinguishable from this matter in that Changula had been dismissed in circumstances *inter-alia* where the chairperson of the enquiry held that:

> 'In looking at your previous record I find that you had a final warning on file given to you on 27 January. This time you are cautioned that any further contribution (sic) would result in your dismissal. Taking this into account that they warning for any offence is a warning for defences I have no option but to dismiss you.'[5]

[14] The court recorded that "the main flaw in this approach is the elevation of the disciplinary code to and immutable set of commandments which have to be slavishly adhered to."[6] This, as is set out below, is in stark contrast to the factors taken into account by the first respondent in imposing the sanction of dismissal and the third respondent in this matter in determining the appropriateness of the sanction.

[15] Apart from this it is unclear from the record and the exchange between the applicant's representative at the arbitration and the third respondent what exactly the applicant's representative was challenging. The explanation may lie in the fact that when the arbitration commenced on 5 May 2009, the applicant was represented by a Mr Mashego, who did not challenge the prior written warning and a Mr Tisako who when the arbitration resumed on 23 June 2009 represented the applicant and the employees.

[16] The applicant's representative Tisako repeatedly stated that he was not challenging the final written warning: "what I am saying Madam Commissioner, we are not challenging. Let me be clear and let me repeat many times we are not challenging the final written warning. … because evidence that led to that is what we are challenging. The evidence, just presented evidence that is that evidence the one that we are challenging. If they did present the evidence then obviously we would challenge that one. … I am saying that we are not challenging the

[5] At page 109.
[6] At page 109.

warning, Madam Commissioner, we are challenging the evidence that has been presented, that's all".[7]

[17] It appears from the record that what Tisako was challenging was the evidence that had been presented on the previous occasion when he was not present.

[18] There is nothing to suggest in the record or the award that either the first or third respondent relied slavishly on the prior final warning. In the award, the third respondent, in determining whether dismissal was the appropriate sanction took into account in some detail a number of factors including the final warning, the employee's length of service and the circumstances surrounding the misconduct.

[19] In any event, in the absence of this ground of review being included in the pleadings and for the reasons mentioned above, I am not persuaded that the award of the third respondent is reviewable. As far as costs are concerned and specifically given that the applicant only raised this ground of review at the commencement of the hearing, it is appropriate that costs should follow the result.

[20] In the circumstances, I make the following order:

The applicant's application is dismissed with costs

D H Gush

Judge of the Labour Court of South Africa
Johannesburg

APPEARANCES:

[7] Record page 38.

FOR THE APPLICANT: Adv D Crampton instructed by Brett Purdon Attorneys

FOR THE RESPONDENT: R Pemberton Garlicke and Bousefield Attorneys