IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 2266/17

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION WORKERS UNION OBO MKHONTO AND OTHERS **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

SOLLY MASHEGO N.O. **Second Respondent**

ANDRU MINING (PTY) LTD **Third Respondent**

Heard: **08 November 2022**

Delivered: **13 February 2023**

(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 February 2023.)

Summary: Review application – insubordination – refusal to obey an instruction to work overtime – absent an agreement to work overtime per section 10(1)(a) of the BCEA, the instruction was unlawful and unenforceable.

Sanction of dismissal is not appropriate where insubordination was not wilful or malicious – progressive discipline should avail.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) in terms of which the applicant (AMCU) seeks an order reviewing and setting aside the arbitration award (award) issued by the second respondent (commissioner) under case number MP 4577-17 and the auspices of the first respondent (CCMA), dated 13 August 2017. The commissioner found the dismissal of its members, Messrs Mbulelo Mkhonto (Mr Mkhonto), Themba Shongwe (Mr Shongwe), David Nthako (Mr Nthako) and Ms Ethel Nkebe (Ms Nkebe) (applicant employees), by the third respondent (ANDRU) substantively fair and dismissed their claim.

[2] AMCU impugns the award on several grounds of review and seeks condonation for the late delivery of the review application. ANDRU is only opposing the review application.

[3] I deal first with the condonation application as I do not intend to be arrested by it. The degree of lateness is two weeks, which is not excessive. Even though the explanation is relatively reasonable, as it will be apparent later in this judgment that the prospect of success justifies the grant of condonation.

Factual Background

[4] The applicant employees were charged and dismissed for gross insubordination in that they refused to obey the instruction from their Site Manager, Mr Terence Veere (Mr Veere) to work overtime on 29 May 2017 in order to meet production targets; conduct that allegedly resulted in loss of

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[1] Act 66 of 1995, as amended.

production. It is a common cause fact that the applicant employees' normal working hours were 06h00 to 16h00 on this particular day.

[5] Mr Veere testified that on 25 May 2017, he instructed the whole team to work overtime, from 16h00 to 18h00, on 29 May 2017. There is a dispute as to whether all the applicant employees were present when the instruction was issued. Still, the applicant employees conceded that they were aware of the instruction but did not agree to work overtime.

[6] Disgruntled with the dismissal of the applicant employees, AMCU referred a dispute to the CCMA which remained unresolved at conciliation and proceeded to arbitration. At the commencement of the arbitration proceedings, the commissioner summarised the issues in dispute as follows:

> 'The applicant is disputing that there was a meeting. You must prove that there was a meeting. No agreement. You must prove that there was agreement. And what else? The Sanction.'[2] (Own emphasis)

Was the instruction to work overtime lawful?

[7] I deem it convenient to deal with the third ground of review which pertains to the contention that the commissioner misdirected himself by finding that there was an agreement which bound the applicant employees to work overtime.

[8] The evidence of ANDRU in this regard was that the applicant employees were bound by their respective contracts of employment to work overtime. Mr Veere conceded that there was no agreement entered into on 25 May 2017 when he issued the instruction; save for the fact that there was no one who objected. AMCU's evidence, on the other hand, was that the applicant employees did not agree to work overtime because of safety issues in terms of section 23 of the Mine Health and Safety Act[3] (MHSA) as the water cart and grader were not working on the day in question.

[9] The commission found that:

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[2] See: Transcript, p 164, lines 13 - 15.
[3] Act 29 of 1996.

'… the Applicants did not disagree to work overtime when they were informed about the need and instruction to work overtime. This entails an implied or tacit agreement. Besides, the absence of explicit agreement, the Applicants have already agreed in their employment agreements that they would work overtime as and when required.'[4]

[10] The crisp issue that this matter turns on is whether ANDRU did prove the charge of insubordination. AMCU contends that the applicant employees could not have been guilty of insubordination because the instruction to work overtime was unlawful. To the extent that ANDRU relied on the overtime clause in the applicant employees' contracts of employment, it was further contended that the said clause had lapsed a year after the conclusion of those contracts and thus was not enforceable.

[11] Overtime is regulated by section 10 of the Basic Conditions of Employment Act[5] (BCEA) which provide that:

'(1) Subject to this Chapter, an employer may not require or permit an employee to work –

(a) overtime except in accordance with an agreement;

(b) more than ten hours' overtime a week.

(1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day.

(2) An employer must pay an employee at least one and one-half times the employee's wage for overtime worked.

(3) Despite subsection (2), an agreement may provide for an employer to –

(a) pay an employee not less than the employee's ordinary wage for overtime worked and grant the employee at least 30 minutes' time off on full pay for every hour of overtime worked; or

[4] See: arbitration award, pp 17 – 18, para 5.4.
[5] Act 75 of 1997, as amended.

(b) grant an employee at least 90 minutes' paid time off for each hour of overtime worked.

(4)(a) An employer must grant paid time off in terms of subsection (3) within one month of the employee becoming entitled to it.

(b) An agreement in writing may increase the period contemplated by paragraph (a) to 12 months.

(5) An agreement concluded in terms of subsection (1) with an employee when the employee commences employment, or during the first three months of employment, lapses after one year.' (Own emphasis)

[12] ANDRU's contention, that the issue of the lawfulness of the instruction was not before the commissioner, is flawed. The commissioner's summary of the issues in dispute clearly shows that he was alive to this fact. He clearly understood that ANDRU had to prove that there was an agreement to work overtime in order to validate the instruction. Hence his conclusion that the applicant employees had impliedly agreed to work overtime; alternatively, they were bound by their contracts of employment put paid to this contention.

[13] It is apparent from Mr Nthako's contract of employment that he had not agreed to work overtime at the commencement of his employment like his fellow colleagues. As such, there was no binding contractual obligation to work overtime.

[14] Whereas Ms Nkebe and Mr Mkhonto's contracts of employment had an overtime clause in terms of which they consented to work overtime. Nonetheless, they commenced their employment with ANDRU in July 2008 and January 2011, respectively. Evidently, when the instruction was issued on 25 May 2017, the overtime clause in their contracts of employment had already lapsed as contemplated in section 10(5) of the BCEA. It stands to reason that, absent an agreement to work overtime on 29 May 2017, Mr Veere's instruction was unlawful as it offended section 10(1)(a) of the BCEA as correctly contended by AMCU. This notion was expounded by the Labour Appeal Court (LAC) in *Maripane v Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome)*[6], where it was stated:

> 'Whether the refusal to obey an instruction amounts to insubordination also depends on various factors, including the employee's conduct before the alleged insubordination, the wilfulness of the employee's refusal to obey, and the reasonableness of the instruction. The reasonableness of any instruction also depends on its lawfulness and enforceability. It seems axiomatic, that any instruction to do what is unlawful, or in breach of a contractual term is not reasonable.' (Own emphasis)

[15] Instructively, there is no evidence of record that supports the commissioner's finding that there was an implied or tacit agreement to work overtime. The applicant employees' version was that they were not present when the instruction was issued but concede that they were aware of it through their colleagues and were informed that failure to comply would lead to disciplinary action. This evidence was not seriously disputed. In fact, Mr Veere testified that some of the applicant employees said they would not be working overtime because they would be going to church, which he understood to mean that they would be drinking alcohol.

[16] It is also inconceivable that Mr Veere would threaten the disobedient employees with disciplinary action when they had agreed to work overtime. Therefore, it cannot be inferred from the conduct of the parties that it was their unexpressed common intention that the applicant employees would work overtime per Mr Veere's instruction.[7] In my view, an agreement that is contemplated in section 10(1)(a) of the BCEA could be inferred only when an employee had actually worked overtime without prior consent. Otherwise, without a prior consent, an employee would be under no obligation to work overtime.

[17] Based on the evidence that was before the commissioner, the finding that Mr Mkhonto, Ms Mkebe and Mr Nthako were guilty of gross insubordination is apparently unreasonable and stands to be reviewed and set aside.

Insubordination and appropriateness of the sanction

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[6] [2019] 8 BLLR 750 (LAC) at para [29].
[7] *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W) at 61G.

[18] Mr Shongwe's circumstances are different in that he had agreed, in his contract of employment, to work overtime and was hardly a year into employment with ANDRU when the instruction was issued. Thus, the instruction was lawful. Also, it does not seem as if the applicant employees took issue with the reasonableness of the notice to work overtime.

[19] That, therefore, takes me to the other two grounds of review which pertain to the reasonableness of the commissioner's findings that the applicant employees were guilty as charged and the appropriateness of the sanction of dismissal.

[20] The applicant employees' version was that Mr Shongwe, Ms Mkebe and Mr Mthako were not present when the instruction was issued on 25 May 2017. Furthermore, they disputed the fact that they were reminded of the instruction on 29 May 2017. On the contrary, ANDRU's evidence was that all the applicant employees were present when the instruction was issued. On 29 May 2017, they were reminded by their Foremen, Mr Warwick Potgieter (Mr Potgieter) and Boitumelo.

[21] The commissioner accepted the version of ANDRU per the evidence of Messrs Veere and Potgieter and rejected the evidence of Mthako and Mr Tswagae Mpolokeng (Mr Mpolokeng), the applicant employees' witnesses. Well, I have no qualms with the commissioner's finding in this regard because the applicant employees conceded that they were aware that they had to work overtime but failed to comply with the instruction solely because of safety issues.

[22] The converse is true when it comes to the appropriateness of the sanction. Mr Veere conceded that the applicant employees had never refused to work overtime before this particular incident. Also, it was only two hours of overtime that was lost. Even though ANDRU tried to use the loss of production to justify the sanction of dismissal, Mr Veere refused to give the details of the production that was lost at the instance of the applicant employees' conduct and the cost thereof. The same applies to Mr Potgieter whose evidence in this regard was speculative. Tellingly, Mr Veere was adamant during his cross-

examination that the case was not about the loss of production but insubordination.

[23] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[8] (*Palluci*), the LAC, dealing with the appropriateness of a sanction of dismissal in cases of insubordination, observed that:

> '[22] … acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.' (Own emphasis)

[24] It was further stated that:

> '[39] The sanction of dismissal was, regardless of whether the conduct constituted insubordination or insolence, manifestly incongruent and unfair. The appellant's own code of conduct recommends a written warning for the first offence of impertinence/insolence, and a final written warning for the second. Dismissal is only recommended for the third offence of insolence. Similarly, item 3(4) of the Code of Good Practice for Dismissals in Schedule 8 to the LRA (the Code of Good Practice) deems it inappropriate for an employer to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Gross dishonesty or wilful damage to the employer's

[8] (2015) 36 ILJ 1511 (LAC) at para [22].

> property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination are listed as examples of serious misconduct, subject to the rule that each case must be judged on its own merits. This, the commissioner, similarly failed to apply his mind to.'[9] (Own emphasis)

[25] It also trite that the enquiry on the appropriateness of the sanction entails a consideration of the totality of circumstances which, *inter alia*, include the importance of the rule breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; the harm caused by the employee's conduct; whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee; and his or her long-service record.[10]

[26] In the present case, the commissioner failed to apply his mind to the fact that the insubordination was the first offence and was not accompanied by insolence. There was no evidence that the applicant employees acted wilfully and repeatedly. It is apparent that their conduct was informed by the ill-considered belief that they were protected by section 23 of the MHSA. Obviously, a progressive disciplinary sanction in a form of a warning or final written warning could have availed.

[27] It follows, in my view, that the sanction of dismissal is disproportional and unfair. Thus, the findings of the commissioner in this regard are equally unreasonable and stand to be reviewed and set aside. In the light of the outcome I have arrived at in relation to Mr Mkhonto, Ms Mkebe and Mr Nthako, this finding only applies to Mr Shongwe. Even so, in the event I am wrong in my finding that the instruction to work overtime was unlawful, this finding would equally apply to Mr Mkhonto, Ms Mkebe and Mr Nthako.

[28] The review test is well accepted and "*transcends the mere identification of process related errors to reveal the Commissioner's basic failure to apply his mind to*

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[9] Id at para [39].

[10] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA 23 (CC) (*Sidumo*) at para [78]; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers Union of South Africa and Others* (2016) 37 ILJ 2277 (LAC); *National Commissioner of the SA Police Service v Myers and others* (2012) 33 ILJ 1417 (LAC) at paras [82] – [85].

considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision maker could reach on all the evidence that was before him or her"[11].

[29] In all the circumstances, the finding of substantive fairness of the dismissal of the applicant employees is vitiated by unreasonableness.

Relief

[30] In light of the conclusion I have arrived at above, I proceed to deal with the issue of relief. I deem it superfluous to remit the matter back to the CCMA given the lapse of time since the dismissal of the applicant employees, which is about five years; the fact that the adequacy of the record is not disputed; and the interest of justice.

[31] Having considered the evidence on record in totality, I reckon that the dismissal of the applicant employees is substantively unfair. Moreover, there is no reason why the mandatory remedy of reinstatement in terms of section 193(1) read with section 193(2) of the LRA cannot be awarded as the circumstances identified in section 193(2)(a)–(d) were not applicable. Full backpay is also justifiable.

Costs

[32] In line with the requirements of the law and fairness, each party must carry its own costs.

[33] In the result, I make the following order.

Order

[11] See: *Palluci* at paras [15] - [16]; *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Sidumo* above n 10.

1. The award under case number MP 4577-17 dated 13 August 2017 is reviewed and set aside and substituted with the following order:

   1.1 The dismissal of Messrs Mbulelo Mkhonto, Themba Shongwe, David Nthako and Ms Ethel Nkebe is substantively unfair.

   1.2 ANDRU Mining (Pty) Ltd shall reinstate the above-mentioned applicant employees retrospectively with full back pay.

2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Ashely Cook

Instructed by: LDA Inc Attorneys

For the Respondents: Adv Lenette Pillay

Instructed by: Yusuf Nagdee Attorneys