THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR761/22

In the matter between:

THULANI DLADLA	**First Applicant**
THABANG MOGASWA	**Second Applicant**
PHENYO HLONGWANE	**Third Applicant**
TSHILILO MAGADANI	**Fourth Applicant**
TSHEPISO MABUSELA	**Fifth Applicant**

and

MOTOR INDUSTRIES BARGAINING COUNCIL DISPUTE RESOLUTION CENTRE	**First Respondent**
COMMISSIONER DIALE NTSOANE *N.O*	**Second Respondent**
FELTEX AUTOMATIVE (PTY) LTD	**Third Respondent**

Heard: **28 June 2024**
Delivered: **4 July 2024**

JUDGMENT

SHORT AJ

Introduction

[1] In the above matter the Applicants seek to review and set aside an Arbitration Award handed down by the Second Respondent in terms of Section 145 of the Labour Relations Act[1] (LRA).

[2] The Applicants request that I review and set aside the Second Respondent's Award and remit it back to the First Respondent to be heard afresh by a Commissioner other than the Second Respondent.

[3] In the event that I review and set the Second Respondent's Award aside, the Applicants in the alternative request that I should substitute the Award of the Second Respondent with an Order that the dismissal of the Individual Applicants was substantively unfair.

[4] From the papers delivered by the parties as well as the transcript of the Arbitration proceedings, it appears that the Applicants mount no attack against the procedural fairness of the Applicant's dismissal.

Factual Background

[5] I set out hereunder a brief background of the facts which I consider to be material to the adjudication of the above matter.

[6] The Individual Applicants were all employed by the Third Respondent in its Grammar Department at its plant in Roslyn Tshwane and performed various duties.

[7] The Grammar Department of the Third Respondent produced head rests for BMW motor vehicles. BMW had cancelled its order with the Main Contractor for head rests with the effect that the Third Respondent took a decision to close the Grammar Department and momentarily considered the possibility of dismissing the Employees employed in such Department on the basis of its operational requirements.

[1] Act 66 of 1995, as amended.

[8] The Third Respondent, however, ultimately decided not to proceed with a dismissal of any of the employees employed on the Grammar line on the basis of operational requirements, as it decided that the effected employees could be absorbed on their existing terms and conditions of employment in the Ferher Department of the Third Respondent. This would also ensure that they would not lose their livelihoods.

[9] The affected employees of the Grammar Department were to be given training in March 2018, in order to facilitate their transfer to other departments within the Ferher Department of the Third Respondent. The net effect of all of this was that none of the employees of the erstwhile Grammar Department of the Third Respondent were dismissed on the basis of operational requirements.

[10] On the 12th of March 2018, the Applicants at 07h00 congregated in the smoking area and then in the canteen of the Third Respondent under the guise of them having to attend a meeting with the Trade Union Organizer Mr Mike Futshane of the National Union of Metalworkers (NUMSA).

[11] Managerial and Supervisory employees of the Third Respondent then requested the Applicants to leave the canteen and return to work, however, they refused to do so until they had met with Mr Futshane.

[12] The Third Respondent then issued 2 (two) Ultimata to the Applicants requiring them to return to work by 11h15 on the 12th of March 2022 and the second to return to work by 12h00 on the 12th of March 2022.

[13] The Applicants failed to heed both Ultimata with the effect that they were ultimately suspended on full remuneration on the 12th of March 2022 pending the finalization of the disciplinary enquiry.

[14] The Third Respondent called the Applicants to a Disciplinary Enquiry where they were required to answer to 2 (two) allegations of misconduct, namely:

> ‘a. partaking in riotous behavior in that on Monday the 12th of March 2018 you took part in an unauthorised meeting on Company premises;

b. failure to obey lawful instructions and insubordination in that on Monday 12th March 2018, despite being issued with Ultimatums (sic), you did not return to duty at Ferher Rosslyn.'

[15] Pursuant to the Disciplinary Enquiry the Applicants were found guilty on both of the allegations preferred against them by the Chairperson appointed by the Third Respondent, and the sanction of dismissal was imposed by the Chairperson appointed by the Third Respondent.

[16] The Applicants then lodged an Internal Appeal against their dismissal and such Appeal was also dismissed.

[17] The Applicants then approached the First Respondent and lodged a dispute relating to their alleged unfair dismissal. The dispute relating to the Applicants' unfair dismissal was arbitrated by the Second Respondent who rendered his Award on the 11th of December 2021.

[18] The Second Respondent found that the dismissal of the Applicants was substantively fair.

Applicants' Grounds of Review

[19] The Grounds of Review are set out in their answering affidavit and are further synthesized in the Applicants' Heads of Argument as follows:

Ground 1: The Commissioner misconstrued the nature of charge 2;

Ground 2: The Commissioner thus erred in finding the Applicants guilty; and

Ground 3: The Commissioner erred in finding the Applicants guilty on charge 1, however, to the extent that the Applicants are guilty of charge 1, the sanction of dismissal is wholly inappropriate.

Evaluation/ Analysis

Ground 1 and 2 of Review

[20] As per the Applicant's Heads of argument, ground 1 and ground 2 are intertwined and shall therefore for the sake of convenience, be dealt with simultaneously.

[21] Ground 1 and 2 refer to the assertion that: "*the Commissioner misconstrued the nature of charge 2 (ground 1); and thus, erred in finding the Applicants guilty (ground 2)'.*

[22] Charge 2 reads as follows: "*Failure to obey a lawful instruction and insubordination, in that, on 12 March 2018, despite being issued with ultimatums (sic), you did not return to duty at Fehrer Rosslyn*".

[23] The lawful instruction referred to in the notice is the direct instruction from Van Rensburg and Ntladi (management), requesting the Applicants to return to work, and also, the two written Ultimata that were issued. Despite the continual requests to return back to duty, the Applicants were adamant that they would not leave the canteen until they had met with Futshane, the trade union organizer and on the version given by Van Rensburg and Ntladi at the Arbitration proceedings, chased them away and would not allow them to address the Applicants who had gathered in the canteen. This evidence does not appear to have been challenged by the Applicants.

[24] Whilst the Ultimata are ineloquent and not a model of clarity, they do state that the Applicants were to return to work. This inevitably meant that they were required to leave the canteen. The reference to an illegal strike in both ultimata was erroneous as it is common cause between the parties that the Applicants were not on strike as no demand had been vocalized by any of the Applicants. Mr Maeso for the Third Respondent further conceded this during his address.

[25] The Applicants, from a reading of the evidence placed before the Second Respondent, were openly defiant of the instructions given to them by both Van Rensburg and Ntladi, both being their superiors and, on the evidence, presented by them, chased them away and would not engage with them. The Applicants also, to use the words of Mr Maeso appearing for the Third Respondent, gave the shop

steward Collen Sebapelo, short shift when he attempted to address them. The Third Respondent's version was, however, not disputed in cross-examination and therefore, stands unchallenged.

[26] The Applicants contend in their testimonies that they did not see the need to return to work as they were not on duty, in accordance with their shift allocations. This is, in my view, disingenuous as regardless of whether they were on shift or not, the Third Respondent required them to vacate the canteen. No evidence relating to the shift allocations in respect of the Applicants was led at the internal inquiry, but only surfaced at arbitration.

[27] The Applicants collectively submitted that management bore the onus of double-checking the Applicant's shift allocations, and therefore, there was no need for them to advise the representatives of the Third Respondent that they were not returning to duty as they were meeting with their union and were not on duty. I disagree, as the Applicants were contending that they were not on duty, and in accordance with the established rule of evidence; *"he who avers must prove"*, they bore the onus to prove such allegation, but failed to provide clear proof of such fact to the Second Respondent. The only time that it was mentioned that the Applicants were not on duty was at the Dispute Resolution Council.[2]

[28] The Third Respondent's Disciplinary Rules and Regulations make reference to various behaviour which it considers to amount to misconduct. The misconduct set out in the Third Respondents Disciplinary Code is divided into two categories. Level one being minor misconduct, which requires progressive disciplinary measures and level two being more serious misconduct which requires a disciplinary enquiry, and which could lead to more serious sanctions, inclusive of dismissal.

[29] Clause 6.4. of the Third Respondent's Disciplinary Code and Procedure relating to lawful instructions states that; employees shall obey all lawful instructions issued in the course of business by their work superiors. Failure to obey instructions has been marked as either level 1/2, and refusal to obey instructions has been

[2] The CCMA record at page 214 line 22.

marked as a level 2 transgression. This clause provides for a grievance procedure in the circumstances where an employee is aggrieved by an instruction given, however, such instruction must be carried out prior to lodging the grievance with higher authority. No grievance along these lines were submitted by any of the Applicants to the Third Respondent prior to their dismissal, which is indicative that they did not regard the instruction as objectionable.

[30] From a reading of clause 6.4., it emerges that the Applicants were duty-bound to obey all lawful instructions issued in the course of business by their supervisors and not to be insubordinate. What can be understood from *"in the course of business"*, and in the event leading to the dismissal of the Applicants, the course of business would relate to the times at which the Third Respondent is conducting its business. Therefore, I am of the view that the Third Respondent was conducting its business before, during, and after the shift allocations. Despite the allegations made by the Applicants that they were not on shift, the Third Respondent was operating its business and therefore, whilst on the Third Respondent's premises, the Applicants were, without doubt, obliged to comply with the Third Respondent's regulations and policies, which included obeying lawful instructions and not being insubordinate.

[31] In the Third Applicant's testimony, he conceded that, in his mind, when he is not on duty, he is entitled to disobey his employer's instructions.[3]

[32] The Third Respondent's Disciplinary Rules and Regulations do not state that employees shall obey all lawful instructions issued only during the shift allocation by their work superiors and I, therefore, reject this notion which threatens maintaining discipline at the workplace.

[33] In *Exxaro Coal Mpumalanga Ltd v CCMA & Others,*[4] the court held as follows:

> '…Should it be shown that the instruction was unlawful, it would be the end of the inquiry. If it is found that the instruction was lawful, the expectation is that the employee to whom such instruction was issued should have complied. It will have little, if any, to do with whether the instruction related to the

[3] The CCMA record at page 216 line 2-11.
[4] Unreported case JR269/11.

employee's job description because it will never be a justification for an employee to refuse lawful instructions merely because the instructions are not his or her direct functions.'

[34] Therefore, even if the Applicants advised their supervisors that they were not returning to work as they were off duty, that does not negate the overarching duty to abide by and obey your supervisor's lawful instruction which required them vacating the canteen and also not to be insubordinate towards their supervisor by effectively not allowing them to address the Applicants who were in the canteen of the Third Respondent.

[35] In accordance with the Third Respondent's Disciplinary Code, clause 8.3. states that:

'No employee shall behave in a manner which is disrespectful or insolent, nor may he or she be insubordinate to any manager, supervisor, customer or supplier.'

[36] The Labour Court in *Independent Risk Distributors SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[5] stated that in order to be found guilty of insubordination, an unrepentant intransigence against a good instruction issued by a superior must be present. Moreover, for such obstinacy to be dismissible, it must be gross (serious, persistent and deliberate). It is my view that the insubordination of the Applicants met the aforementioned criteria as they disobeyed instructions from their superiors from 07h00 on the 12th of March 2018 up and until at least 12h00.

[37] The above matter established the principle that acts of insolence and insubordination do not justify dismissal unless they are serious, persistent and deliberate. Therefore, the sanction of dismissal is reserved for instances of gross insubordination, or the willful flouting of the employer's instructions.[6] Further to this, the Code of Good Practice on Dismissals lists gross insubordination as a permissible ground for dismissal. I am of the view that the Applicant's actions were serious due

[5] [2022] ZALCJHB 282.
[6] [2022] ZALCJHB 282. See also Code of Good Practice Schedule 8 Section 3(4).

to the fact that they had alternatively could have interrupted the on the job training they were to undertake and thus a serious assault on the authority of the Third Respondent and the operation of its business.

[38] In the case of *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,[7] the same instructions were repeatedly explained to the employee, and he was afforded ample time to comply, yet he willfully defied the instruction. This is analogous to the conduct of the Applicants in this matter who were given the same instruction multiple times as well as in the form of two written Ultimata, however, same were not heeded by the Applicants who essentially disregarded such Ultimata.

[39] In *Sylvania Metals (Pty) Ltd v Mello N.O. and Others*,[8] the LAC held that insubordination in the workplace includes a willful and serious refusal by an employee to adhere to lawful and reasonable instructions of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority. I am of the view that this description fits the misconduct of the Applicants.

[40] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*,[9] the court held that when one of the parties allege that a commissioner has misconstrued the nature of certain evidence, as is the case in the present matter, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings but extends to whether the result that flowed from the misconception was unreasonable.

[41] It is trite that the failure by the Commissioner to apply his mind to material facts will only constitute a gross irregularity, where it leads to an unreasonable result.[10]

[42] The Supreme Court in the decision *Herholdt v Nedbank Ltd* (Congress of South African Trade Unions as *amicus curiae*) held that,[11] "*The general principle is*

[7] [2019] 2 BLLR 142 (LAC); [2018] ZALAC 36.
[8] [2016] ZALAC 52 at para 17.
[9] [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).
[10] Respondent's Heads of Argument at page 9.

that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed when decision-makers misconceive the whole nature of the enquiry and as a result, misconceives their mandate or their duties in conducting the enquiry". I do not believe that the Second Respondent misconceived his duties whilst conducting the Arbitration proceedings.

[43] However, in *Head of the Department of Education v Mofokeng and others*,[12] the court held that irregularities or errors in relation to the facts or issues may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. "*In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result*".

[44] Essentially what has been crystallized is that in order for it to be held that the Commissioner misconceived the inquiry, it must be established that the errors of fact or law committed by the Commissioner caused him to divert from the correct path and to have failed to address the question raised for determination with the effect that at least one of the parties were deprived of a fair trial.[13] This explanation in effect states that if the Commissioner would have arrived at a different outcome, but due to his/her error of fact or law, the Commissioner diverted from the correct path, then it would be clear that the Commissioner misconceived the inquiry. This is not the case in the present matter.

[45] Lastly, the Applicants rely on the fact that an unlawful and unenforceable instruction can never be reasonable.[14] In my view, the mere fact that the Applicants were not on duty, does not render the several instructions given by management to return to work *"unlawful and unenforceable"*. It also did not entitle the Applicants to refuse to engage with Van Rensburg and Ntladi. It is irrelevant whether the Applicants were on shift or not, as it was made clear to them that the Third Respondent was unaware of any meeting which had been arranged with Futshane

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[11] [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (LAC).
[12] [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC).
[13] A Myburgh & C Bosch Reviews in the Labour Courts (2016) LexisNexis 77.
[14] *Maripane v Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome)* [2019] 8 BLLR 750 (LAC); (2019) 40 ILJ 1999.

and was of the view that they could not remain in the canteen. This notwithstanding the Applicant's obstinately remained in the canteen and ignored their supervisor.

[46] On an analysis of the evidence led before the Second Respondent, there was a dispute of fact as to whether the Applicants were on shift or not and the Second Respondent therefore, found on a balance of probabilities that they were on shift as at least two were wearing their work suits and that they had not informed the Third Respondents that they were not on shift. I am of the view that the Second Respondent's finding on the probabilities is not irrational or unreasonable.

[47] The Second Respondent, in my view, properly considered the dispute which arose with regard to whether the Applicants were on shift and the effect of the instructions given to them by the Third Respondent.

[48] The Second Respondent did, in my view, not commit a gross irregularity at all and furnished rational reasons for his findings with regard to the events which are the subject matter of the 1st and 2nd grounds of review.

[49] Despite the law to the effect that a gross irregularity committed by a Commissioner must render the eventual outcome unreasonable, having become settled, parties before this court, such as the Applicants in this matter, continue to focus on every single perceived irregularity committed by the Commissioner in arbitration awards in a piecemeal fashion, without considering their effect on the eventual outcome which has no doubt resulted in many matters coming to this Court through the review route which properly considered, should not be before the court.

[50] Therefore, on the evidence, the Second Respondent did not misconstrue the nature of the 2nd allegation preferred against the Applicants as he considered the fact that the Applicants were defiant in a number of respects including refusing to engage with the managerial and supervisory employees of the Third Respondent.

Ground 3 of Review

[51] Ground 3 centers around the submission that the Commissioner erred in finding the Applicants guilty on charge 1 (Ground 3). Alternatively, even if the guilty finding is upheld in this application, dismissal was wholly inappropriate.

[52] Charge 1 reads as follows: "*Partaking in riotous behaviour, in that, on 12 March 2018, you took part in an unauthorized meeting on company premises".*

[53] Clause 8 of the Third Respondent's Disciplinary Rules and Regulations outlines the rules relating to behaviour, which has been marked as a level 2 transgression.

[54] Clause 8.10, defines Riotous Behaviour as:

"Any employee shall be subject to disciplinary action should he behave in a riotous manner. Riotous behaviour shall include:

a) Incitement and intimidation;

b) Creating or furthering labour unrest (inciting illegal industrial action);

c) Throwing dangerous objects;

d) Possession, wielding or use of an offensive weapon;

e) Conducting unauthorized meetings on Company property (a meeting is a gathering of more than three people);

f) Displaying or distributing unauthorized literature or posters;

g) Defacing of Company property (i.e. with slogans/graffiti, etc.) (Own emphasis)

[55] On the 28th of February 2018 as well as the 7th of March 2018, meetings were conducted between the Third Respondent and the union representatives informing them of their decision to abandon the section 189 retrenchments and undertake to absorb the effected Applicants in other departments within the Third Respondent.

[56] I am of the view that as it appears uncontroverted that the Applicants were already being trained to perform duties within other Departments of the Third Respondent, this, therefore, is a clear indication that the Applicants would not be dismissed based on the operational requirements. This in my view seriously calls into question the Applicant's stated reason for the meeting which was to take place

on the 12th of March 2018. It is highly inconceivable that if a meeting was indeed scheduled to take place between the Applicants and Futshane on the 12th of March 2018, that he being the union organizer at the Third Respondent, would not have confirmed that a meeting was indeed scheduled, yet he remained silent and did not testify at the internal disciplinary hearing where the Applicants were represented by a shop steward of NUMSA, Mr Baloyi. I am therefore of the view that the probabilities favour the view that no meeting was scheduled.

[57] It appears undisputed by the Applicants that at least 4 (four) of them were gathered in the Third Respondent's canteen.

[58] In a further demonstration of serious inconsistencies surrounding the reason for the unauthorised meeting held on the 12th of March 2018, the first Applicant under cross-examination states that the reason for the meeting was incorrectly captured. The record is as follows:

> 'Ms Haywood: And I am referring to page 18 point 6 with the statement that starts with; "They" meaning you, the Applicants:
> "Further submit that on the 12th of March 2018, they gathered with a view to meet with their manager, in order to address grievances regarding the short time that they were subjected to, the requirement to perform tasks which ordinarily did not form part of their duties and c) they were not offered adequate training to perform the aforesaid tasks."
> This is your bundle sir, the applicant bundle, what you have told us is that you were instructed by Mike to gather in order for Mike to address you. So, in your own bundle you saying *(sic)* you wanted to meet with your managers regarding short time, tasks and training, can you please clarify that for us?
> Mr Dladla: The person who typed here made a mistake *(sic)*. These grievances we were going to tell them to Mike, and he was the one who was going to take it to management *(sic)*.'[15]

[59] I am not persuaded by the evidence led by the Applicants at the arbitration proceedings before the Second Respondent that they were unaware that the

[15] The CCMA record at page 262 line 3-18.

meeting was unauthorized as firstly, they were advised by Van Rensburg and Ntladi that they were unaware of such meeting. Even the shop steward Mr Sebopelo was unaware of the meeting. Being a shop steward, I am of the view that if there was a meeting scheduled with Futshane, the shop stewards would have known about it but were clearly unaware of it. On all accounts, I am of the view that the meeting was unauthorised.

[60] The Second Respondent correctly considered and evaluated the evidence before him regarding whether the meeting that took place on the 12th of March 2018 was authorised and whether such conduct amounted to riotous behaviour as set out in the Third Respondent's Disciplinary Code and Procedure, and correctly found that the Applicants had correctly been found guilty of riotous behaviour by the Chairperson of the disciplinary enquiry.

[61] Both allegations preferred against the Applicants were of a serious nature as they constituted a direct challenge to the Third Respondent's authority. The Second Respondent, therefore, correctly found that he could not interfere with the sanction of dismissal imposed by the Third Respondent.

Conclusion

[62] In light of the above, I am of the view that the award of the Second Respondent is not one which a reasonable commissioner could not have made, therefore, the Applicant's application for review must fail.

[63] In the premises, I make the following order:

Order

1. That the Application for Review is dismissed.
2. I make no order as to costs.

D. Short

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Ngobeni

Instructed by:

For the First Respondent: Mr Maeso

Instructed by: Shepstone & Wylie