



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR10/20

In the matter between:

MATSOPA MINERALS (PTY)LTD

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

JOSEPH MZWANDILE DLENGEZELE N.O

Second Respondent

AMCU obo JOSEPH LETSHESA MANOTO

Third Respondent

Heard: 02 July 2024

Delivered: 18 November 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 18 November 2024.

JUDGMENT

BALOYI, AJIntroduction

[1] This is an application in terms of which the applicant seeks an order reviewing and setting aside the arbitration award made by the second respondent (commissioner) acting under the auspices of the first respondent in which the commissioner found that the dismissal of the third respondent was substantively unfair but procedurally fair. In the alternative, that the award be reviewed and set aside, and the matter be remitted to the first respondent for hearing anew before another commissioner other than the second respondent

[2] The application is opposed by the third respondent (AMCU) who acts on behalf of Mr Joseph Lesthesa Manoto (Manoto).

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

Outline of the matter

[4] Mr Manoto was employed by the applicant as a semi-skilled welder from 1 September 2015 and was earning a salary of R10 684.06 per month.

[5] On or about 7 October 2019, Manoto was charged with two counts of misconduct which read as follows:

‘Gross insubordination in that:

1. On 28 August 2019, you refused to comply with two direct, reasonable, and lawful instructions, from the Mine Manger [sic] to attend the Department of Mineral Resources inspection, for which you are the organized labour representative.
2. On 3 September 2019 and 4 September 2019, you refused to comply with a reasonable and lawful instruction, given to you on both days by the mine, to attend recertification training for scaffolding.’

[6] The disciplinary hearing sat on 14 October 2019. Manoto pleaded not guilty to all the charges as set out above. On 14 October 2019, the third respondent was informed that Manoto was dismissed and that his dismissal would be effective from 23 October 2019.

[7] Manoto referred an unfair dismissal dispute to the CCMA. The commissioner found that the dismissal of the respondent was procedurally fair but substantively unfair. Before the CCMA, the applicant called three witnesses and Manoto testified himself without calling a witness.

[8] Mr Johannes Daffue (Daffue) was the main witness of the applicant. He testified that he was the mine manager at Koppies mine and the most senior person on site. That Manoto is a semi-skilled welder and sometimes he is also asked to do maintenance work. In relation to the facts that led to the first charge against Manoto, he testified that on the morning of 28 August 2019, he called him to come and join the meeting of the Department of Mineral Resources (DMR) inspection. Manoto informed Daffue that he was waiting for the other shop steward. Manoto did not join the meeting despite being asked on three occasions to come to the meeting. Manoto informed Daffue that he would not attend the meeting because his members instructed him not to attend. The meeting proceeded without Manoto.

[9] Daffue testified that Manoto was informed of the meeting with DMR two days before and Manoto did not raise any concerns with him. He testified that Manoto has attended inspection meetings with DMR many times before as an organised labour representative and as a NUM and AMCU representative.

[10] In relation to the second charge of the events of 3 and 4 October 2019, Daffue testified that he went to Manoto to ask him to attend recertification training. Manoto did not say a word to him and he did not attend the training.

[11] Daffue testified that on 4 September 2019, he went to Manoto and asked him to attend the recertification training. Daffue was accompanied by Malita Mokeki (the

second witness). Manoto informed Daffue that he would not attend and he did not give him any reason for refusing.

[12] Daffue testified that Manoto had previously attended the certification for scaffolding and forklift and that at the time, he had never refused to attend. Daffue referred to the certificates attached to bundles from 2017 to 2019.

[13] Daffue testified that the instruction that Manoto attends the recertification training for scaffolding was lawful and reasonable as it fell within the scope of his employment.

[14] Daffue testified that he was aware that one employee (Mkwanazi) was given a written warning after he refused recertification. When Mkwanazi refused again to attend recertification, he was called to a disciplinary hearing and he was dismissed.

[15] In cross-examination and in relation to the first charge (the event of 28 August 2019), Daffue confirmed that the position of Manoto was that of a semi-skilled welder and that he always attended the inspection meetings representing NUM and AMCU. He testified in cross-exam that Manoto did not inform him that he was not constitutionally elected by AMCU. Daffue testified that the instruction given to Manoto (to attend the inspection meeting with DMR) was in line with his duties.

[16] In relation to the event of 3 and 4 September 2019 (the second charge). Daffue testified that Manoto was aware of the recertification training long before 3 September as it was put on the notice board a week before. Daffue refuted the version that was put to him that he called Manoto to attend the training because there was a lack of attendance by the employees who were supposed to be trained on 3 September. Daffue testified that Manoto did not give him any reason for failing to attend the training on 3 September 2019. On 4 September, he requested Manoto to attend the training and Manoto said to Daffue that he would not attend without providing any reason.

[17] Daffue confirmed that scaffolding is part and parcel of Manoto's job description.

[18] Manoto testified that when he was a member of NUM, he was constitutionally elected, and at AMCU, he was just a member and not elected to any position. He confirmed that he had attended inspection meetings with DMR as an AMCU member before. Manoto emphasised that he was a member of AMCU but was not constitutionally elected to any position.

[19] He testified that the content of the minutes attached to bundles presented by the employer lacked information regarding what was discussed in those meetings. One of the issues that was discussed in the previous meeting was the issue of training and which members or employees were not appointed according to the Mine Health and Safety Act¹. He further testified that the DMR had emphasised that the parties (organised labour) must engage with the employer (the applicant). In short, there were grievances that were unresolved between the applicant and organised labour.

[20] In relation to the events of the 3 and 4 September 2019, he testified that Daffue came to him while he was working in the workshop and asked him to attend the re-certification training for scaffolding, he did not respond to his request and he did not attend.

[21] Manoto testified that on 4 September 2029, Daffue came to him and again asked him to attend the recertification training to which he told Daffue that he was not going to attend because of outstanding issues regarding training and further that since attending the scaffolding course, he had never been appointed as a scaffolding erector.

[22] Manoto testified that scaffolding is not part of his duties and since he attended the training, he has never used it.

[23] In cross-exam, Manoto confirmed that he was a member of AMCU and has previously been requested to attend meetings with DMR. When asked why he

¹ Act 29 of 1996.

unilaterally decided not to attend the meeting of 28 August, Manoto answered that he received instructions from members not to attend and that if the instruction was that he must not attend, he could not force himself.

[24] With reference to clause 4.2 of his employment contract, which states that “*in relation to the above, you will be required to carry out any lawful and reasonable instruction given to by any person acting on behalf of the company*”, and when asked whether he has complied with the instruction by Daffue to attend the meeting on 28 August, he answered that he complied with his employment contract, it was the members who should make the call as he was not going to represent himself.

[25] It was put to Manoto that his version that there was a grievance in relation to his failure to attend the DMR meeting and that scaffolding was not part of his job was not put to Daffue and the two witnesses of the applicant, Manoto replied that, that was the reason he brought the correspondences on page 21 and 22 of the bundle and that Daffue was aware of the grievance.

The grounds of review and the applicable law

[26] The applicant seeks to have the arbitration award reviewed and set aside on several grounds, including misconduct and irregularities in that:

26.1 the commissioner misconstrued the evidence in that the commissioner found that Daffue did not have the authority over Manoto to instruct him to attend the inspection as he was not a member of the union (AMCU);

26.2 the commissioner misconstrued the evidence in that the commissioner did not see the second refusal by the applicant (Manoto) to be persistent and deliberate as Manoto gave reasons why he did not attend the training.

26.3 The commissioner misdirected himself in finding that the actions of the applicant cannot go unnoticed.

26.4 The commissioner misdirected himself in finding that Manoto had provided a reason for why he refused to attend the recertification training (i.e. as a result of unresolved grievances).

[27] The test on review is well known. An applicant in review proceedings must establish that the decision arrived at by the commissioner was one that falls outside the band of decisions to which a reasonable decision maker could come to on the available material. Furthermore, it is now accepted that the inquiry is whether, despite the commissioner's reasoning, it can be said that the result is nonetheless capable of justification on the available material. In the end, material errors of fact on the part of the commissioner, as well as the weight and relevance to be attached to a particular fact or a failure to have regard to particular facts are not themselves sufficient grounds for review. Their effect must be as such as to render the outcome unreasonable.²

Analysis of the applicant's grounds of review

[28] In this case, it was common cause that an instruction was given to Manoto to attend the inspection with the DMR on 28 August 2019. Manoto said to Daffue that he would not attend the meeting as the members of AMCU instructed him not to. The commissioner found that Daffue (the Mine Manager) did not have the requisite authority to give such an instruction to the applicant.

[29] In my view, the commissioner's finding is not reasonable. It is common cause that Manoto has been attending these meetings since 2017 while he was a member of NUM and later as a member of AMCU. Manoto did not provide evidence corroborating his contention that he was not mandated to attend the meeting on 28 August 2019 and for what reason, I agree with the applicant's submission that, at best, Manoto should have attended the meeting and advised everyone concerned that he would not participate as an AMCU representative alternatively, informed Daffue that he had been instructed not to attend the meeting for whatever reasons he could provide from his members. In my view, to simply refuse and not provide a reason is insubordination. Even if I were to accept that he did not attend the meeting because of the grievances (which is not a reason he gave in this instance), it appears that the applicant was trying to resolve such grievances. This appears in the letter sent to the regional secretary of AMCU on 9 July 2019 by Jackie Cargen

² See: *Golds Fields Mining (Pty) LTD (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

requesting a meeting for 19 July 2019 to urgently discuss various grievances and further correspondences sent by the DMR late in October 2019, albeit at this time, Manoto was already dismissed. Unfortunately, Daffue was not cross-examined on the issues of the grievances and was not referred to the correspondences by Manoto's representatives. It would have shed some light on the grievances raised by Manoto.

[30] In relation to the second charge of the events of 3 and 4 September 2019, the commissioner found that Manoto's refusal was serious but not persistent and/or deliberate because he gave reasons why he was not going to attend the training. In the end, the commissioner ruled that the applicant was guilty of insubordination but that it was not gross insubordination.

[31] The commissioner's finding is not reasonable. The commissioner failed to consider the evidence of Daffue and Melitta Mokhethi (Mokhethi). They both testified that Manoto did not give any reason for not attending the recertification training on 3 and 4 September 2019. This version was not put to both of them during their cross-examination. Furthermore, Manoto did not refute Daffue and Mokhethi's evidence that scaffolding was part of his job and that he also did general maintenance. Evidence in the form of a certificate was presented that proved that Manoto had attended to scaffolding before. The following exchange between Manoto's representative and Daffue is relevant:

'AMCU -MR. MABASO: So, tell me Mr. Daffue, scaffolding, it is part and parcel of Mr Manoto's job description, job description?

JOHANNES DAFFUE: Yes, it's part of his work that he must do, yes. As a Welder he needs to be able to, if he needs to weld high up to get there, to build the scaffolding to reach the area where he needs to weld.

AMCU – MR. MABASO: I think that is all Commissioner.'

[32] Daffue was not challenged further in his evidence. The commissioner's finding that scaffolding does not form part of Manoto's core functions and that his evidence was undisputed is not substantiated and is unreasonable. In fact, the version that was put to Daffue as to why Manoto did not attend the recertification training on 3 and 4 September was that Manoto was not scheduled to attend any training because

the employees who were supposed to attend the scaffolding training, had had a breakdown, so they could not make it and that Daffue took Manoto and another employee to fill up the seats. This version is completely different from Manoto's version that he informed Daffue that he was not attending because of the unresolved grievances. In my view, Manoto gave contradictory versions and the commissioner failed to consider these facts.

[33] In *Exxaro Coal Mpumalanga Ltd v CCMA & Others*³, This Court held that: '...Should it be shown that the instruction was lawful, it would be the end of the enquiry. If it is found that the instruction was lawful, the expectation is that the employee to whom such an instruction was issued should have complied. It will have little, if any, to do with whether the instruction related to the 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] Even, if I were to accept that there were unresolved grievances, as stated above, and with references to the correspondences, the parties were, in my view, still engaging. There was accordingly no basis for Manoto not to attend the training on 3 and 4 September 2019. His conduct was gross insubordination, persistent and wilful.

[35] In *Sylvania Metals (Pty) Ltd v M.C Mello N.O and others*,⁴ the Labour Appeal Court held that:

'Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer,

³ Unreported judgment, case No: JR 269/11, delivered 13 January 2015 at para 15.

⁴ (JA83/2015) [2016] ZALAC 52 (22 November 2016) at para 17

as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given.'

[36] In my view, the sanction of dismissal was an appropriate sanction. Manoto's conduct amounts to gross insubordination.

[37] Accordingly, the following order is made:

Order

1. The arbitration award dated 29 November 2019 issued under case FSWK2952-19 by the second respondent is reviewed and set aside and replaced with the following order:

"The dismissal of Joseph Letshesa Manato was substantively fair."

2. There is no order as to costs.

F.I Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. S Swartz

Instructed by: Webber Wentzel

For the Respondent: Adv. A Cook

Instructed by: LDA Inc