IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA140/2018

In the matter between:

SAMACOR LIMITED

(EASTERN CHROME MINES) **Appellant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION LIMPOPO **First Respondent**

COMMISSIONER NICHOLAS SONO NO **Second Respondent**

National UNION OF MINEWORKERS obo

VIOLET MASHA & 4 OTHERS **Third Respondent**

Heard: **18 February 2020**

Delivered: **18 May 2020**

Coram: Davis, Musi and Sutherland JJJA

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns five members of the third respondent who were dismissed following events that took place on 19 October 2015. In his award, second respondent found these employees guilty on certain charges but nonetheless reinstated them because of the inconsistency of discipline on the part of the appellant. The appellant sought an order to review and set aside this award. Sitting in the court *a quo,* Basson AJ dismissed this application with costs. The appellant now approaches this court, with the leave of the court *a quo*.

The charges

[2] The five employees were charged with the following offences:

> 'Breach of company safety rules and procedures (contravening of s 22 and 23 of Mine Health and Safety Act of 1996) in that on 19 October 2015 you were found working at North 8 North tip area excavation without installing temporary support.
>
> Failure to carry out a lawful instruction in that on 19 October 2015, you were instructed by the Miner Overseer to stop and withdraw from tip N8N to fix sub-standard conditions observed.
>
> Breach of company strategy rules and procedures and/or gross neglect of duty in that on 19 October 2015 you failed to comply to support standard in that you were found drilling permanent support without installing temporary support.'

[3] The events which gave rise to these charges took place on 19 October 2015. All of the employees were part of a crew which was working at the North 8 North section of appellant's mine. Between 10h00 and 11h00, on 19 October 2015, the mine shift boss Mr Freek Duvenhage visited the North 8 North section and found the employees attempting to make the area safe. He instructed the miner, Ms Violet Masha, not to drill or blast in the so called tip area because, according to a rock-engineering report, this tip was affected by a vertical fault. Special attention had therefore to be given to this specific tip. When Mr Duvenhage left the site, the temporary support and safety net which was required in terms of basic security and safety standards had not yet been installed.

[4] Shortly thereafter, Mr Clement Madikwane, the mine overseer, visited this site and found the employees drilling without a temporary support and safety net having been installed. Mr Madikwane issued a verbal instruction to Ms Masha and to the crew to cease drilling and to install the temporary support and safety net before they could proceed to drill.

[5] According to Mr Madikwane, he then left the site. Some ten minutes later he heard the noise of drilling machines coming from the direction of the tip. He returned to the tip and found that the employees had continued working without installing the requisite safety measures. He testified that he then issued the employees with a written instruction. According to Mr Madikwane, this instruction was also disobeyed leading to the charges against the employees. The dispute proceeded to arbitration before second respondent.

The award

[6] After hearing evidence from both parties, the second respondent concluded that the appellant had proved, on a balance of probabilities, that the employees had been guilty of working without installing temporary support and safety net on 19 October 2015. Further, Ms Masha had allowed these employees to work in this area which was clearly not safe. However, second respondent found that one Simphiwe Maseko who was apparently the girlfriend of Mr Madikwane and who had been part of the crew on 19 October 2015 had not been dismissed. Accordingly, second respondent concluded that 'the employer has failed to justifiably differentiate between the employees and Simphiwe Maseko'. The employer had shown bias by not finding Simphiwe Maseko guilty and dismissing her from working without installing the temporary support and safety net on 19 October 2015.' For this reason, he found that the dismissal of the employees was substantively unfair and ordered their reinstatement.

The court *a quo*

[7] In dealing with an application to review the award of second respondent, Basson AJ found that Mr Madikwane had not returned to inspect the work on 19th after he issued the written instruction. In the view of the learned judge, Mr Madikwane's evidence did not show that the employees continued working in defiance of the written instruction of the 19 October 2015. The only evidence proffered on this point was that Mr Madikwane returned to the site some three or four days later and found the site to be in the same condition as before. However, he was not questioned on exactly what he found on the site when he issued the written instruction and what he found at the site when he returned three of four days later. On this basis, Basson AJ held that the appellant 'had failed to prove on a balance of probabilities that the employees had defied the written instruction given to them by Madikwane.' For this reason, he dismissed the application.

The appeal

[8] Critical to the submissions of appellant's counsel was the evidence of Mr Madikwane which requires further analysis. He testified that on 19 October. he inspected the tip and 'found the crew drilling without installing the safety nets and camlock jacks. He then took out his red stop card and 'blew the whistle because the machine was drilling they could not hear me and I called the crew back to come to me then I verbally instructed the crew to stop the activity that they were doing to fix the substandard condition observed.'

[9] Minutes after departing from the tip, he heard machines drilling. He returned and spoke to Ms Masha and 'asked her why are they drilling if the substandard conditions were not addressed or not rectified. I looked at my note book, I could not find it then I requested Ms Violet Masha to borrow me a note book, (sic) a note book, and I wrote instructions to withdraw the crew to fix the substandard conditions before they can continue with their normal duties. I wrote the instruction and I gave the book to Ms Masha.'

[10] There seems to be no dispute about this version. A series of statements supports Mr Madikwane on this point. In the first place, there is a handwritten note of 19

October 2015 where Mr Madikwane writes: 'I instructed the miner V Masha to stop the supporting of the tip and B8N of North section due to substandard installation of temp support and safety net not properly done. All work will resume when area is safe to do so.'

[11] On 22 October 2015, he deposed to a further statement which reads:

> 'On 19 October 2015 I went underground to do my inspection and follow-ups on the weekend work, I inspected the main belts and proceeded to North section to inspect the conditions of the road-ways as I was walking down I met the Mine Overseer of the North section Mr Soenki Selepe at belt north 7 north where the new cross under supposed to be blasted.
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> We then proceed to belt north 8 north tip where one of my crew are working to also inspect the condition of the ground as there was a fault that was running NE-SW (Rock-engineering report). On my arrival found the crew drilling support without installing temporary support accordance to the following procedures ECM-OP-MIN-M-006 and ECM-SOP-MIN-M-DRB010.
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> I therefore took out my whistle and red stop card called everybody involved with the task perfumed at 8 north tip trying to ascertain as to what prompted the crew to endanger their own life's (Section 22 of MHSA of 1996) working substandard the response was the area was too high and they could not install the jacks and the safety net was not installed because it was damaged but it was never being brought to the attention of the shift boss and myself (mine overseer). I therefore verbally instructed the crew and Miner to stop the drilling, do the ramp by means of a lhd, install the jacks according to procedure and the safety net.
>
> I therefore left the crew with the belief and trust that I had on them that they will carry out my instructions, I went to one (1) shaft with Mr Selepe to inspect the condition of cross under that was supposed to be blasted then I heard the machine drilling from the tip and was very surprised because the instructions that was issued to the crew could have not been completed within that short space of time, then I went back to investigate as to what transpired only to find the crew continuing with the drilling without fixing the sub-standard conditions that I have observed and not

> carrying out the instructions issued to them. I then took out the book wrote the instructions and let the Miner and Safety Rep to sign and acknowledging the instruction.'

[12] Mr Madikwane was accompanied on 19 October 2015 by Mr Selepe. Although Mr Selepe was not called to give evidence, he did depose to a statement which confirms the version of Mr Madikwane.

[13] Mr Madikwane also testified that he had returned to the site three or four days later. The site remained in exactly the same condition; that is the requisite safety net had not been installed and his instructions had not been carried out.

[14] The evidence of the chief safety officer, Mr Makitla, is also of relevance. He testified that, if a particular work place had been made safe, there would be a signed safety declaration form, of which in this case there was no evidence. Mr Makitla also testified in detail about the meeting on 21 October 2015 of which Mr Madikwane spoke about the events of 19 October. According to Mr Makitla:

> 'Clement advised us that he found this crew drilling for support without installing the safety net underground, and he spoken to them to install the support, then he went away but when he was going, he heard that they were continuing with drilling. When he went back, he found them drilling without the temporary support. Then he gave them a written instruction. Then Clement asked all the crew members to explain to us what was happening. Violet answered the question in saying that she is sorry, she does not have a lot to say.
>
> Then Clement continued asking questions more directed to the other crew members, "Why were you still drilling for support, without the necessary temporary support?" Then Mr Khoza answered and said they were forced by the miner. Then Clement said to the other guys, "What can you say about this?" Mr Pholwane answered and said he was not drilling. Then from my side I said, it was not a question, but what more can you tell us about the occurrence?'

[15] This account clearly supports Mr Madikwane's version as to what occurred on 19 October 2015. Second respondent noted that Mr Madikwane had made no effort to

go back to the site and check if his instructions had been implemented. This finding is at odds with the direct evidence which second appellant provided and which I have set out.

[16] In short, no rational basis was provided by second respondent to disregard this evidence that the employees acted in violation of an important safety instruction which had been issued to them. However, there is a far greater problem concerning both the award of second respondent and, following thereon, the judgment of the court *a quo*.

[17] Notwithstanding second respondent's finding regarding Mr Madikwane not returning to the site to check on whether his written instruction had been followed, second respondent concluded as follows:

> 'The employer has proved on a balance of probabilities that the employees were indeed guilty of working without installing temporary support and safety net on 19 October 2015. The employer has also proved on a balance of probabilities that Violet Masha has allowed employees to work in an area that was not safe on 19 October 2015.'

[18] However, critical to the justification of his order was second respondent's approach to the case of Simphiwe Maseko and the finding of the disciplinary panel that she was not guilty of the charges brought against her. On the strength of this finding he concluded that:

> 'The employer has failed to justifiably differentiate between the employees and Simphiwe Maseko. The employer was biased by not finding Simphiwe Maseko guilty and dismissed her for working without installing the temporary support and safety net on 19 October 2019.'

[19] It was on this specific basis that second respondent held that the dismissal of five employees was substantively unfair and that they should be reinstated.

[20] For some reason, however, the court *a quo* concentrated on the issue of the response by the employees to the instruction given by Mr Madikwane rather than

analysing the central finding of the second respondent, namely the inconsistency of discipline which justified a finding in favour of the five employees. In other words, the central finding of the arbitration award was that there was unjustifiable differentiation between the employees and Ms Simphiwe Maseko. Yet this received no examination for as Basson AJ made clear in his judgment:

> 'The dispute which I need to determine is whether he employees are guilty of failing to carry out a lawful instruction. The lawful instruction in question is the written instruction issued by Madikwane to the effect that the employees should have withdrawn, i.e. stopped what they were doing and fixed the substandard conditions before they could continue with their normal duties.'

[21] Ms Maseko was charged as is evident from a notification issued to her to attend a disciplinary hearing on 1 December 2015. The charges brought against her were similar (but not the same) as those brought against the other employees. As explained by Mr Madikwane, the charges brought against Ms Maseko were slightly different because, in the case of other employees, there was evidence of drilling and therefore an additional charge of being found to have drilled without installing the necessary temporary support was brought against these employees.

[22] Mr Madikwane stated, insofar as Ms Maseko was concerned, that:

> 'When I arrived at 8 knot, Ms Maseko was not there, hence in the first place there was no charge instituted against her. After a long discussion between the union and management, an instruction was issued that Ms Maseko, action must be taken against her as well, for her to prove her innocence.'

Ms Masha testified that she had sent Ms Maseko to fetch explosives that she had ordered. For this reason, Ms Maseko was not present when Mr Madikwane arrived on 19 October. Her absence from the site was also confirmed by Father Mandla Mhlongo, the drilling operator who also testified before second respondent.

[23] The basis for the second respondent's finding of inconsistency of discipline was not based on an error conducted at the disciplinary hearing of Ms Maseko. But, in any

event, that she was acquitted cannot form the basis by which the finding of inconsistency of discipline can come to the aid of the other employees. This court made this point clear in *SACCAWU & others v Irvin Johnson Limited* [2008] BLLR 869 (LAC):

> 'If a chairperson conscientiously and honestly, but incorrectly, exercise his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employee's profit from that kind of wrong decision. In a case of plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.'

[24] In summary, neither on the basis of the finding of inconsistency of discipline as found by the second respondent nor upon any absence of evidence that there were two warnings issued to the employees to comply with safety requirements which they disregarded can the finding of the second respondent be considered to be one that a reasonable decision-maker could have made in the circumstances of this case. Further, the decision of the court *a quo* not only adopts an opposing position to that of the second respondent with regard to the Madikwane's instructions but there is no basis by which to hold as the court *a quo* did that a reasonable decision-maker could find that the five employees did not disregard the instructions given by Mr Madikwane.

The appropriate sanction

[25] In his award, the second respondent recorded that 'the employees were aware of the rules that the rules were valid and reasonable and that the dismissal is an appropriate sanction for the contravention of the rules'. This was a concession wisely made in the light of 3 (4) of the Code of Good Practice – Dismissal. While

generally it is not appropriate to dismiss an employee for a first offence, this default position does not have to be followed if the misconduct is serious, which includes the wilful endangering of the safety of others. Where the conduct of employees carries a high risk of potential danger to the safety of others which is certainly the case when there is manifest disregard for safety regulations at a mine, dismissal based on the conduct of which the five employees have been found guilty is clearly justified.

[26] The importance of safety is captured in the following *dictum* in *Impala Platinum Ltd v Jansen & others* (2015) 36 (ILJ) 2359 at para 17:

> 'It is clear that the mining industry has been under tremendous scrutiny regarding safety measures due to the high risk in the nature of the work done. In order to have a safe mining environment, the regulations which were contravened by Jansen were promulgated to ensure that workers doing underground work underwent competency training, and declared competent before being allowed to do underground work. By his actions Jansen did not only undermine the regulatory framework and put in danger life and limb, he also placed his employer at risk of section for contravening the statutory regulations.'

[27] In my view, once a finding has been made that, on the available evidence, the five employees disregarded both a verbal and written instruction to ensure that adequate safety measures were to be installed, the sanction of dismissal was justified.

[28] In the result, the appeal must succeed. The following order is made:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is substituted as follows:

3. The arbitration award issued by second respondent on 17 March 2016 which was delivered to the applicant on 30 March 2016 is reviewed and set aside.

4. The dismissal of Violet Masha and four other former employees of the applicant is declared to have been fair both procedurally and substantively.

5. Third respondent is ordered to pay the costs of the application.

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Davis JA

Musi and Sutherland JJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv Watt-Pringle SC
	Instructed by Lebea Attorneys
FOR THE THIRD RESPONDENT:	Adv Q M Dzimba
	Instructed by Mothibi attorneys