REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA ,JOHANNESBURG

JUDGMENT

Not reportable

Case number: JR2016/2009

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
TEMBA MANANA	**Second Applicant**
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
MARK HAWYES N.O	**Second Respondent**
MIDDELBURG MINE SERVICES (PTY) LTD	**Third Respondent**

Heard: 18 January 2013

Delivered: 20 March 2012

Summary:

JUDGMENT

PRINSLOO AJ

Introduction:

[1] The Applicants are seeking the review and setting aside of an arbitration award wherein the dismissal of the Second Applicant was found to be fair and his case was dismissed.

[2] The review application was to be filed within six weeks from 26 May 2009, which means that it was to be filed by 7 July 2009. The review application was filed on 28 July 2009 and is therefore filed fifteen Court days late and the Applicants sought condonation for the late filing of the review application. The application for condonation is opposed, which opposition was persisted with at the hearing of this matter.

[3] The Third Respondent submitted that the Applicants did not set out proper grounds for condonation in the founding affidavit and that the explanation tendered for the lateness, is not a plausible explanation as no explanation is tendered for the delay between the expiry of the six week period and the date of actual filing.

[4] The explanation tendered by the Applicants is that upon receipt of the arbitration award, which I accept was on 26 May 2009, the award was sent to the Witbank regional office for the purpose of review and this was done in accordance with the Union's rules and procedures. The region delayed the process as the responsible legal officer was not at work and the award was sent to head office on 24 July 2009. The award was received on the same date and a consultation was arranged with the Applicants' attorney. Consultation took place on 27 July 2009 and the review application was filed on 28 July 2009.

[5] It is evident from the application for condonation and the averments made in this respect that the arbitration award was received on 26 May 2009, forwarded to the regional office in Witbank and that the award was only forwarded to the head office on 24 July 2009, 17 days after the six week period lapsed and almost two months after the award was forwarded to the regional office. There is apart from stating that the responsible legal officer was not in the office, absolutely no explanation tendered as to when he or she was not in the office, why no one else attended to the matter in his or her absence and why the award was only forwarded to the head office on 24 July 2009. I would be hesitant to accept that a well-established union, as the First

Applicant is, does not have the capacity to deal with matters and is not able to make alternative arrangements in the absence of a single official.

[6] I am inclined to agree with the Third Respondent that there is simply no detailed explanation provided for the delay and it was necessary for the Applicants to provide a better explanation.

[7] However, the granting of condonation is within the discretion of this Court and I am of the view that 15 court days is not so excessive that the Second Respondent should be prejudiced to an extent that his application for review is not considered at all.

Condonation is therefore granted for the late filing of the review application.

Background facts**:**

[8] The brief history of this matter is as follows: the Third Respondent employed the Second Applicant, Mr Manana, since February 2008 as a sectional engineer. Mr Manana's appointment was in terms of section 7(4) of the Mine Health and Safety Act No 29 of 1996 ('the MHSA') read with Regulation 2.13.3.1. In the contract of employment of Mr Manana it was specifically stated that he was responsible to assist the Manager, as appointed in terms of the provisions of section 3 of the MHSA, to carry out his duties, it was his responsibility to ensure compliance with the provisions of the MHSA and Regulations and to report any contraventions thereof, further to observe and enforce any codes of practice, instructions, procedures, directive, permissions and exemptions issued by the mine. Mr Manana held a senior position at the mine.

[9] In October 2008, one charge of misconduct was levelled against Mr Manana. The charge was "breach of life preserving rules (FRCP-8) (isolation) in that on 17 September 2008 you failed to lock out when inspecting D/Line 012 hoist drum pedestal." A disciplinary enquiry was subsequently held and Mr Manana was found guilty on the count of misconduct and dismissed on 10 October 2008. The Applicants referred an unfair dismissal dispute to the First Respondent.

[10] The misconduct related to an incident that occurred on 17 September 2008 when Mr Manana, Mr Venter, an engineer and Mr Manana's supervisor, Mr de Villiers, a maintenance engineer and others went to investigate a fault that was reported on a dragline hoist drum pedestal. Mr Venter described the device as being utilised in open cast mining and weighing approximately 3 500 tons, with a 120 metre high boom that held hoisting cables. The cables weigh approximately 100 tons. The fault that was to be inspected was a crack on the hoist pedestal that was linked to a massive drum.

[11] The Third Respondent has a 'Code of Practice for de-Energising and Lockout of Machinery and Plant' that applies to all employees and contractors working at the Middelburg Mine. The purpose of the code is to eliminate or minimise the risk of fatalities, injuries and incidents arising from uncontrolled release of energy or hazardous materials, which could result in an accident. Compliance with the code and practice is required and Mr Manana was expected to understand and adhere to the mine's lockout procedures.

[12] The protocol and life preserving rules, FRCP-8 (Fatal Risk Control Protocol), Mr Manana failed to comply with on 17 September 2008, stipulate the process to be followed and it applies to the isolation of all sources of energy, all controlled sites and activities and to all employees when involved in controlled activities. Isolation intends to provide positive protection and is to be achieved by the use of locking devices.

[13] Every employee working on the plant was issued with a personal locking device and the rules prescribe that the personal locks are to be kept under the exclusive control of the owning individual. The mine has a lockout and tag system in terms whereof a positive registration process is implemented for people working on the isolated equipment. It is used to know who the employees are who are present on the isolated equipment and to ensure that no person is present if and when the equipment is to be energised. Each lock represents a person and the equipment could not be energised as long as a personal lock remained on the lock out box. It is not only for the protection of the individuals, but also to ensure that the mine carries out its duty to ensure the safety of every employee.

[14] On 17 September 2008, Mr Manana did not have a personalised lock and he was unable to lock out whereupon Mr Venter told him to leave the machine and only return once he has his personal lock to be able to lock out. Mr Manana left and did not return to the machine with a personal lock.

[15] Subsequent to the incident, Mr Venter adopted an informal approach of correcting the behaviour of Mr Manana and he held two counselling sessions with Mr Manana. However, Mr Manana insisted that he has not done anything wrong, he denied any violation of the safety procedures and stated that no one was injured and there was no potential that any one could be killed or injured. After Mr Manana displayed aggressive and unrepentant behaviour, the Third Respondent decided to initiate a formal disciplinary process.

[16] It was the Third Respondent's case that Mr Manana was a senior manager, responsible to ensure compliance with the MHSA, and his flagrant disregard for the provisions of the MHSA and the applicable safety codes and his unwillingness to admit his mistake and to correct his behaviour, breached the trust relationship to such an extent that dismissal was justified.

[17] Mr Manana's version of events is that on 17 September 2008 Mr Venter approached him and asked him if he has locked out and after he replied no, Mr Venter told him that he was not allowed to go inside the manhole as he has not placed his personal lock on the machine, whereupon he left and waited in the car, as he did not want to argue with Mr Venter that there was no real danger.

[18] It was also the Applicants' case that the Third Respondent was inconsistent in applying disciplinary measures as Mr de Villiers also committed a breach of the safety rules on the same day and he was not disciplined for such breach. The Applicants also raised procedural defects and challenged the fairness of Mr Manana's dismissal in that regard. The first ground was that clause 12.3.4. of the disciplinary code and procedure stipulates that the presiding officer should generally be one level higher than the complainant. In the disciplinary enquiry of Mr Manana the chairperson and the complainant were on the same level. The second ground was that the general manager should have been precluded from the appeal hearing as he had prior knowledge of the case.

The arbitration award:

[19] The arbitrator and Second Respondent in this application, considered the charge of misconduct levelled against Mr Manana. He found that Mr Manana was required to have his own personal lock and tag and to attach it to the multi-lock before working on the machine. It was common cause that Mr Manana did not do that and he breached the code of practice for de-energising and lockout. Given the position of Mr Manana, his training and legal appointment, it is reasonable to expect him to have known the rule.

[20] The arbitrator rejected the contention that the rule was inconsistently applied and he stated that when De Villiers breached the safety rule by stepping into an unsafe area, he immediately acknowledged his mistake and stepped back when instructed to do so. Mr Manana on the other hand refused to acknowledge his error. The Third Respondent initially decided to counsel Mr Manana, the same approach taken in respect of De Villiers. Only when Mr Manana refused to acknowledge any wrongdoing and persisted with that attitude, was formal disciplinary action taken. The arbitrator found the adamant refusal of Mr Manana to admit that he has breached the internal codes and procedures and legislative requirements to be "startling and disturbing at the same time". The issue was not whether the machine was safe or not or whether there was a danger for anyone, but the potential consequences that could follow if a person did not affix a personal lock and remained inside the machine.

[21] The arbitrator considered the uniqueness of the mining environment and the fact that even a seemingly insignificant breach of procedures could result in a major incident, resulting in the loss of life or serious injury and liability of the mine.

[22] The arbitrator found Mr Manana's dismissal substantively fair and held that the sanction of dismissal was appropriate. In justifying this finding the arbitrator stated that Mr Manana demonstrated a lack of insight, he had no appreciation for the rules he was breaching and the possible consequences of those breaches, as a leader he was required to set an example of how the safety rules should be complied with, he was legally and contractually bound to ensure compliance, his lack of insight and leadership casts doubt on the

suitability of Mr Manana to occupy the position he did and the mine indicated that he could no longer be trusted to shoulder the enormous responsibilities if occupying a managerial and professional engineering role in a mining environment.

[23] The arbitrator found the dismissal of Mr Manana procedurally fair and rejected the issues raised in respect of procedural fairness. These grounds were dismissed mainly because of the evidence adduced and concessions the Applicant made during his testimony.

The test on review:

[24] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*:[1] [w]hether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[25] The reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and Others* [2] as:

> '[T]he question that I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable.'

[26] In *S A Breweries Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Court considered the test on review and held that:

> 'As Waglay DJP recently pointed out in National Commissioner of the SA Police Service v Myers and Others:
>
> > "Whatever one's personal view may be, the test as set out in Sidumo ... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision maker could reach."

[1] 2007 28 ILJ 2405 (CC).
[2] 1999 20 ILJ 342 (LC) at para.346D.
[3] (2012) 33 ILJ 2945 (LC) paras. 17-20..

Having considered the evidence at arbitration, the learned DJP held:

> "I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come."

In *Fidelity Cash Management Service v CCMA and Others* Zondo JP applied the *Sidumo test* thus*:*

> "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently."

And:

> "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached."

It is against this background that the applicant's grounds of review must be assessed.'

<u>Grounds of review:</u>

[27] The Applicants raised a number of grounds of review in their founding and supplementary affidavits, some of which were repetitive.

[28] In his argument before this Court, Mr Makinta's submissions could be summarised as follows: the charge of misconduct levelled against Mr Manana is limited to isolation and if the charge and the applicable regulation is read together and in context, the alleged misconduct relate to the de-energising of the machine. On the date of the misconduct, the machine was indeed de-energised and therefore Mr Manana has complied with the rule. He further submitted that Mr Manana did not have a personal lock at the time and that it was impossible for him to comply with the rule, no damage was caused whatsoever, Mr De Villiers did the same and was not dismissed, Mr Manana was not prepared to accept a final written warning but he was prepared to accept a lesser sanction. A reasonable commissioner should have considered that the Third Respondent was prepared to give a final written warning for the misconduct and no reasonable person could find that the only reasonable sanction was dismissal.

[29] The submissions made in respect of the limitations of the charge and the nature of the misconduct to be related to de-energising and the fact that the machine was indeed de-energised and therefore Mr Manana has complied with the rule on the date of the misconduct, were not part of the issues raised at the arbitration and were not included in the grounds for review in the papers before this Court. These are new submissions not raised before and this Court cannot consider these as if it were part of the Applicants' case on review.

[30] The grounds for review as set out in the affidavits filed in support of the Applicants' review application are repetitive to an extent and I will deal with the grounds in summary.

[31] The first ground for review is that the arbitrator failed to identify the content of the Third Respondent's policy on de-energising and lockout. This ground cannot be sustained in view of the evidence before the arbitrator and his analysis of the evidence so presented. The arbitrator summarised the evidence that was adduced, and correctly so, made reference to the applicable code of practice. Even if it were correct that the content of the policy

was not identified, this ground for review does not *per se* justify a review and setting aside of the entire award.

[32] The second ground for review, and one that had been repeated, is that the arbitrator made findings not supported by the evidence before him. This ground relates *inter alia* to the arbitrator's findings that the Applicant was guilty of misconduct by not attaching a personal lock and that such failure constituted a dismissible offence, his findings on the counselling process were based on assumptions, the finding that Mr Manana did not admit that he was wrong and his refusal to accept corrective advice and the finding that the Third Respondent explained why Mr Nel should chair the hearing.

[33] During the arbitration proceedings, Mr Manana conceded that breaching the rule was serious, he never disputed the existence of the rule or the procedure to be followed to lock-out, he merely stated that his non-compliance posed no danger to any person and therefore it was not serious to an extent that warranted his dismissal. The Third Respondent presented evidence to explain what corrective steps were taken and what the attitude of Mr Manana was towards accepting corrective advice. I cannot find that the arbitrator made findings not supported by evidence and this ground for review cannot be sustained.

[34] A further ground for review is that the arbitrator's findings that the rule was not inconsistently applied, demonstrates misconduct and a misunderstanding of the Applicants' case on inconsistency. The Third Respondent provided an explanation of the incidents that occurred on 17 September 2008 and the reasons why De Villiers was not dismissed. A full exposition of why the case of De Villiers and the Second Applicant could not be compared and the reasons why it was treated differently had been placed before the arbitrator for consideration. Based upon the evidence adduced and the basis the Applicants attempted to lay for inconsistency, the arbitrator was not persuaded that the rule was inconsistently applied. This finding cannot be faulted.

[35] The Applicants also take issue with the fact the arbitrator failed to appreciate the full extent of the Applicants' case and that he failed to assist Mr Manana to present his case in full. The arbitrator also failed to decide the issue of racial discrimination, so the Applicants alleged. Firstly, Mr Manana was represented

by a well-established and experienced trade union, the National Union of Mineworkers and he was not in the same position as an unrepresented, unsophisticated layperson. The arbitrator's duty to assist an unrepresented layperson is not a duty he has to fulfil when a party is represented by a well-seasoned trade union. The allegation that the dismissal was racially motivated was never put to any of the witnesses, nor did the Applicants raise it during the proceedings. It was raised for the first time in closing argument and the arbitrator quite correctly did not deal with the allegation as part of the Applicants' case, as it was introduced at the eleventh hour in closing argument. Had it been raised during the arbitration, it would have no doubt raised jurisdictional issues. This ground for review is without merit and cannot be sustained.

[36] The Applicants raised grounds for review relating to the finding that the conduct of Mr Manana impacted on the trust relationship and the appropriateness of the sanction of dismissal. The issues raised by the Applicants are *inter alia* that the arbitrator considered the irrelevant evidence about the attitude of Mr Manana after the incident, the arbitrator found that the conduct of Mr Manana impacted on the employment relationship, but did not indicate whether the impact was positive or negative and the arbitrator failed to determine an appropriate sanction. The arbitrator specifically considered the uniqueness of the mining environment and the fact that a small breach of codes and procedures could result in a major incident, resulting in the loss of life or serious injury. He then considered the appropriateness of the sanction. The arbitrator found that Mr Manana had an alarming lack of appreciation for the rules he was breaching and the possible consequences of breaching the rules. Mr Manana was expected to set an example and he was legally and contractually bound to ensure compliance with safety regulations and procedures, but his lack of understanding, leadership and insight meant that he could no longer be trusted to shoulder the enormous responsibilities of the position he held.

[37] It is evident to me that Mr Manana is not a candidate for corrective discipline as acknowledgment of wrongdoing is the necessary first step in correcting behaviour. The issues raised by the Applicants relating to the arbitrators findings on the sanction and the impact of the misconduct on the trust

relationship, are unsubstantiated and without merit. The arbitrator's findings cannot be faulted and most certainly do not call for interference from this Court.

[38] In *S A Breweries Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Court considered the role of an arbitrator and held that:

> 'In my view, the commissioner's role can best be summarized thus: The employer decides to dismiss. The commissioner conducts an arbitration de novo. In the light of the totality of circumstances, established by the evidence at arbitration, the commissioner must then decide whether the decision to dismiss was fair. In doing so, it is the commissioner's own sense of fairness that must prevail. There can be no deference to the employer'.
>
> It should be clear from my understanding of the commissioner's role that I do not agree that the commissioner's role with regard to the employer's decision to dismiss is akin to the role of this court sitting in review of the arbitrator's decision. The commissioner must decide whether the decision to dismiss was fair; this court may only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. Even if the court's own sense of fairness may dictate a different outcome, it cannot interfere with the decision of the arbitrator. The converse applies to the arbitrator when deciding whether the employer's decision to dismiss was fair.'

Conclusion

[39] In reviewing the arbitration award, the grounds for review as raised by the Applicants must be assessed and this Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[40] Having considered the evidence adduced at the arbitration proceedings and the probabilities as they presented themselves to the arbitrator, the findings made by the arbitrator and the grounds for review raised by the Applicants, I cannot accept that the arbitrator's decision fell outside of the band of decisions to which a reasonable decision maker could come. The conclusion that the arbitrator reached is one that a reasonable decision maker could have come to and it is not open to review.

[4] **(**2012) 33 ILJ 2945 (LC).

[41] The Third Respondent argued that costs should follow the result. I can see no reason to disagree.

Order

[42] 1. Condonation for the late filing of the review application is granted.

2. . The application for review is dismissed with costs.

_____

Prinsloo AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants: M. E. S. Makinta Attorneys

For the Third Respondents: Webber Wentzel Attorneys