REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

CASE NO **J712/2000**

[Matter argued and judgment
reserved on 4/10.2001]

In the matter between:

RUSTENBURG PLATINUM Applicant

and

CCMA & OTHERS Respondents

ON BEHALF OF APPLICANT A T MYBURGH

ON BEHALF OF RESPONDENT F A BODA

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

NG AJ

[1] This is one of those cases where a commissioner of the CCMA has made a finding in arbitration proceedings as to the existence of misconduct, but has decided that the sanction of dismissal imposed by the employer was too harsh and has imposed a lesser sanction.

[2] The issue in this case is whether the commissioner's award that dismissal was too harsh and was not an appropriate sanction, should be set aside by the Court pursuant to an application by the employer (the applicant) under section 145 of the Labour Relations Act 66 of 1995 (the "Act").

[3] The award appears in a paginated bundle of papers contained in a lever arch file (the Bundle) at pages 61 - 73. (Page references to the Bundle will be referred to as "B" followed by the relevant page number).

[4] The commissioner (Mr E R Mafolo) is the second respondent, the employer is the applicant, and the three employees who were dismissed by the employer, are the third, fourth and fifth respondents. At times they will be referred to simply as the three employees.

[5] The lesser sanction imposed by the award appears on B73:

"1. that the employees be issued with final warning notices valid for a period as determined by the employer's disciplinary procedure;

2. that the employer pays compensation to each employee the amount that equals to six months' salary calculated at the rate of pay each received prior to their

termination of service;

3. that the employer complies with section 195 of the Act;

4. that the employer to comply with the terms of this award within fourteen days after receipt thereof."

[6] Helpful heads of argument were filed and the matter was argued by Mr *A T Myburgh* for the applicant and Mr *F A Boda*, counsel for the three employees. I was referred to three articles in Law Journals, namely:

(a) "*Dismissal as a Penalty for Misconduct*" [2000] 21 ILJ 2145, by Myburgh and van Niekerk;

(b) "*More Reasonable than Others*" [1999] 15(2) Employment Law 15, by Grogan; and

(c) "*Dismissals and the 'Reasonable Employer'*" [1999] 8(12) Contemporary Labour Law 101, by Le Roux.

See also *Employment Law* [2000] 16(2), "*Death of the Reasonable Employer*" and [2000] 16(5) "*Who is the Fairest*", by Grogan.

[7] In the applicant's heads, paragraph 44, the following is stated:

"Once it is accepted that the reasonable employer test is the correct approach to be adopted, it is submitted that it follows that the commissioner *in casu* committed a reviewable irregularity in failing to adopt the aforesaid approach."

In my view this submission is unsound and is clearly contrary to the decision of the Labour Appeal Court in *Toyota SA Motors Ltd v Radebe* [2000] 21 ILJ 340.

[8] In the *Toyota* case NICHOLSON JA stated:

"I do not believe that the 'reasonable employer test' is part of our law." [At 354, para 50.] He went on to state that he believed:

"... that the application of the reasonable employer test was a palpable mistake."

[At 354, para 50.]

ZONDO AJP (as he then was) agreed with his conclusion, as well as with his reasons for that conclusion [At 341, para 2.]

MOGOENG AJA agreed with both judgments.

[9] In my respectful view, the rejection of the 'reasonable employer' test as part of our law is part of the *ratio decidendi* in the *Toyota* case.

[10] A commissioner in giving an award in a dispute about the fairness of a dismissal must comply with the provisions of the Act.

[11] Section 188(2) of the Act expressly provides that:

"Any person considering whether or not the reason for dismissal is a fair reason..." must

"... take into account any relevant code of good practice issued in terms of this Act."

This refers to Schedule 8, entitled "*Code of Good Practice: Dismissal*". Item 2(1) thereof expressly states:

"Whether or not a dismissal is for a fair reason is determined by the facts of the case and the appropriateness of dismissal as a penalty."

Item 3(4) states:

"Generally, it is not appropriate 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."

Item 7 provides that:

"Any person who is determining whether a dismissal for misconduct is unfair should consider the provisions of paragraphs (a) and (b)."

These paragraphs provide as follows:

"(a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not

(i) the rule was a valid or reasonable rule or standard,

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

[12] In the *Toyota* case, NICHOLSON JA stated:

"It seems to me to be significant that a statutory arbitrator is also required to find if a sanction is fair." [At 354 para.50]

In my respectful view this statement is fully supported by the provisions of the Act set out above, and accordingly I differ, with respect, from the contrary view of WILLIS JA in *De Beers v CCMA* [2000] 21 ILJ 1051 at 1064 para. 57).

[13] Indeed, as stated in *Mzeku v Volkswagen* [2001] 8 BLLR 857 (LAC) at 863, para. 15:

"Where the conduct for which the employees are dismissed is unacceptable but the sanction of dismissal is, in all the circumstances, not a fair sanction, the dismissal cannot be said to be substantively fair."

This was the conclusion reached by the commissioner in the present case.

[14] NICHOLSON JA quoted with approval the statement by John Brand in which the latter rejected the 'reasonable employer' test in "ringing terms" (at page 353, para. 49). The statement by John Brand included the following:-

"The correct approach it seems to me is to consider whether the sanction is fair, having regard to existing industrial relations common law and norms. Now applying this to the present case, it was common cause that the rules were fair. I, therefore, have to determine whether the grievants have been proved on the evidence presented to me to have been guilty of the offences charged and whether dismissal was the appropriate sanction." [See also [2000] 21 ILJ 2145-46.]

[15] In sharp contrast to the position in the above cited passage, in the present case it was not common cause that the rules were fair.

[16] As it was common cause that there had been a dismissal the *onus* was on the employer, in terms of section 192(2) of the Act to prove that the dismissal was fair, including whether it was an appropriate sanction, having regard to the provisions of the *Code of Good Practice* set out above and "the rule that each case should be judged on its merits". [Item 3(4) of Schedule A.)

[17] There is much confusion in the evidence of the employer's witnesses as to which were the applicable rules, and there is reference to (a) the SAFA rules; (b) the tournament rules; and (c) the workplace rules. I refer to the following passages in the bundle of documents. [B265/266, B269, B289, B296-98, B303, B304, B474/5 para. 10, B491/2 para. 491, B493 paras.78-80.]

[18] The misconduct in question took place on the morning of Saturday, 24 October 1998, not in the workplace nor even on the employer's premises but on the soccer field in the course of a soccer tournament held at the West Driefontein Mine. [See B15, para.18.]

[19] The third respondent was a senior welfare assistant at the applicant's B Hostel; this was the normal scope of his duties [See B506 para 130.2.1]. He was the sports organiser at the applicant mine, and was the team manager of the Amplats soccer team. This was the first time he had been the team manager [See B301, B330]. He was described as a "great sportsman" [See B272, B327]. He had been employed since March 1991 [See B11 para.6].

[20] The fourth respondent was employed by the applicant as a chief clerk at the applicant's Phula Hostel; that was the normal scope of his duties [See B506 para.130.2.2] and he was the senior coach of the Amplats team. He had been employed since March 1997 [See B11 para.7].

[21] The fifth respondent was employed by the applicant as a clerk at the applicant's B hostel; this was the normal scope of his duties [See B506 para.130.2.3] and he was the assistant coach. This was the first time he had acted in this capacity. [See B331]. He had been employed since April 1990 [See B11 para.8].

[22] These three employees were part of the management team of the Amplats soccer team together with one Saayman [See B325]. As stated by Saayman [B299] in answer to the question:

'Was these responsibilities in writing given to each one of them [the three

employees]? --- No.

Was it part of the tournament rules? --- No."

Mr Saayman's evidence appears at B265 - B275 and B288 - B336.

[23] The problem that gave rise to the dismissal was the belief by the three employees that their team qualified to play in the semi-finals and that the SAFA rules applied and governed this question [See B152, B190, B267, B499 para. 105, B501 para.112]. Under the SAFA rules the Amplats soccer team qualified but under the tournament rules it appeared that the Amplats soccer team did not qualify. I may add that the relevant page of the tournament rules dealing with this was not placed before the commissioner [See B306 - B307].

[24] The tournament rules were decided at a meeting in August 1998 without any of the three employees being present [See B333]. It is clear from the evidence of each of the employees that they believed that the SAFA rules applied and they were unaware that the tournament rules led to a contrary result. Nowhere on the evidence does it appear that prior to the scheduled start of the semi-final match on the morning of 24 October 1998 did Mr Saayman (or anybody else) draw the attention of any of the three employees to this material point [See B325 and B496 para.91].

[25] It is interesting to note that it is stated by the applicant in the affidavit filed on its behalf that, "the rules of the game are paramount" [See B16 para.26.3].

[26] The result of this was the Amplats team remained on the field until a clear explanation was given to the effect that under the tournament rules the team did

not qualify for the semi-finals. According to a report in the Mining News the other team qualified on a technicality [See B 313].

[27] The Amplats team remained on the field for approximately two and a half hours until they received a clear explanation.

[28] It seems to me that the belief of the three employees that the SAFA rules governed was most material in considering whether or not the sanction of dismissal imposed by the employer was an appropriate sanction. This is not referred to anywhere in the applicant's founding affidavit.

[29] It is of course clear that there are some unsatisfactory features in the award. Thus it is stated that the employees' behaviour was "not one of the best" [See B71] without specifying any particularity in relation to each particular employee; in regard to the allegation of assault (which related only to the fifth respondent) he stated it had not been "conclusively" proved, whereas the test is proof on a preponderance of probabilities; he refers in a general way to the need for the rules to be valid and clear without specifying which rules were applicable and whether each of the three employees knew or could reasonably have been expected to have been aware that the rules were applicable and that under the rules the team in question did not qualify for the semi-final.

[30] As stated in *Shoprite Checkers (Pty) Limited v Ramdaw N.O.* [2001] 9 BLLR 1011[LAC] at 1043 para.101:

"In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are

unsatisfactory in many respects but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustifiable when regard is had to all the circumstances of this case and the material that was before him."

In my view this statement applies equally to the present case.

[31] There are a number of factors which support the view that dismissal, which has been described as "the supreme penalty" [See *Toyota* case cited above, page 352, para. 44] or "the ultimate sanction" [See *Orange Toyota v van der Walt* [2001] 1 BLLR 85 at 88, para. 17] was not appropriate in the present case. I would mention the following:

(a) The belief by the three employees, on the basis of the SAFA rules, that their team qualified for the semi-finals, and they were never informed prior to the match that the tournament rules led to a different result.

(b) This was the first time that the third respondent acted as the team manager [See B301, B330].

(c) Their duties in relation to the soccer tournament were outside the normal scope of their duties in the workplace.

(d) There was no evidence of the rules applicable in the workplace and that the three employees were informed that the work rules would apply during the tournament [See B508 para.138].

(e) The three employees were singled out even though other employees, who were members of the team, had been guilty of misconduct [See B472]. No disciplinary action, however, was taken against any other team members who were

employees of the applicant.

(f) The three employees were banned pursuant to a decision by the tournament [See B472]. The three employees were banned for life.

(g) That the employer's witnesses exaggerated the evidence, for example stating that the players' "invaded" the field.

(h) There was no physical damage or injury caused.

(j) These were first offences.

(k) The length of service of each of the three employees.

[32] I may add that there was no attack on the arbitrator's award on the basis of his finding that there was no procedural unfairness. The commissioner found that the dismissal was procedurally fair and the applicant obviously took no issue with that finding [See B29 para.77.1, B30 para.79].

[33] In my view there was a reasonable and objective basis on the evidence for the commissioner to come to the conclusion that dismissal was too harsh in relation to the gravity of the offence and was not a fair sanction, and no grounds have been established under section 145 of the Act to warrant the setting aside of the commissioner's award.

[34] I, accordingly, order that the application for the review and setting aside of the commissioner's award be dismissed with costs.

_____

GERING AJ
ACTING JUDGE OF THE LABOUR COURT