IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO. J3721/00

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

LEFU NOOSI **Second Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION, AND ARBITRATION **First Respondent**

J HEIMSTRA, N.O. **Second Respondent**

MATLA COAL LIMITED **Third Respondent**

JUDGMENT

NDLOVU AJ

Introduction

[1] This is a review application served in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA"). The First Applicant ("the Union") was the collective

bargaining agent of the Second Applicant (“Noosi”) who was formerly employed by the Third Respondent (“the employer”).

[2] Noosi commenced his employment with the employer on 8 March 1991. He was dismissed in or about February 2000 (exact date not stated) upon a conviction for misconduct by the internal disciplinary hearing. The misconduct involved Noosi’s refusal to carry out a reasonable and lawful instruction given to him by his superior, in violation of the employer=s Disciplinary Code. His appeal against the dismissal failed. Hence, he referred the dispute to the First Respondent (“the CCMA”), which culminated in the arbitration proceedings, being conducted before the Second Respondent (“the Commissioner”) on 7 July 2002.

[3] On 19 July 2002 the Commissioner issued his award in terms of which Noosi’s dismissal was declared to be procedurally and substantively fair. It is this award which the employer seeks to be reviewed and set aside.

The Facts

[4] Whilst employed by the employer, Noosi was engaged as a qualified or licensed continuous miner operator at the employer’s coal mine, since 1 June 1995. The continuous miner was described as a huge mine coal-cutting machine, which was driven or operated by two operators - being the first operator (“the operator”) and the second operator (“the assistant”).

[5] Each continuous miner operator was subjected to training and evaluation for the purpose of obtaining the operator's licence. This licence was renewable periodically after further evaluations which were conducted from time to time by the appropriate evaluation authority of the employer or its agent, called Joy Mining Machinery ("Joy"). It would appear, however, that Noosi disputed the averment that Joy was undertaking the training and evaluation of operators. According to him this was done only internally by the employer's instructors.

[6] Evidence was led at the arbitration hearing that on 29 September 1998 Noosi was evaluated by the internal instructor and found to be competent, albeit a remark was made in the evaluation report that he required to improve on his cutting tempo. The cutting tempo was described as "the performance that a machine operator for the available time can produce during a shift". *(See: Transcript of Arbitration record, at page 33 line 18 of the court bundle)*. It was about how many tons per minute an operator cut during a particular shift. The average cutting tempo was 3.25 tons per minute. *(See: page 34 line 18 of the Transcript).* To the employer the cutting tempo was, therefore, a very

important production factor and it was ensured that each operator's cutting tempo was monitored regularly.

[7] During the period 4 to 10 January 2000 it was noted that Noosi's cutting tempo had dropped significantly. As a result, his immediate supervisor, a Mr Pretorius, decided to relieve him of the operator's duties and relegated him to the position of assistant. Another employee, known only as James, was elevated to the status of operator and operated Noosi's machine. An improvement was soon noted in the cutting tempo after James had taken over. At that time Noosi was working as James's assistant.

[8] On 18 and 19 January 2000 were the days when a Joy instructor was expected by the employer to visit the mine for the evaluation of operators. All other operators were evaluated without any objection or problem. When the Noosi's turn for evaluation came, he refused to be evaluated. The employer's evidence (before the Commissioner) was that Pretorius instructed Noosi to get onto the continuous miner and operate it for the purpose of his evaluation and training. Noosi declined to obey the instruction, holding that since he had, a few days earlier, been instructed not to touch the machine, he would not operate it. Thereupon,

Pretorius reported the matter to his (Pretorius's) own supervisor a Mr du Plooy, who held the position of shift boss.

[9] Du Plooy then confronted Noosi with the same instruction. Twice du Plooy instructed Noosi and twice Noosi defied the instruction. When du Plooy threatened Noosi with disciplinary action the latter simply retorted*: "I don't care".*

[10] It was this behaviour by Noosi which led to him being brought before a disciplinary enquiry and charged with refusing to carry out a reasonable and lawful instruction given to him by a superior. He was found guilty and summarily dismissed. He took the matter on appeal, which failed.

[11] Noosi denied that on the day in question he was ever instructed by Pretorius to operate the machine. He said that he was instructed only by du Plooy whom he (Noosi) did not consider to have had the authority to give him instructions. As far as he was concerned the only person who had the authority to instruct him was his supervisor, Pretorius, who however, a few days earlier had instructed him not to operate the machine.

[12] Further, Noosi contended that he had never been evaluated by a Joy instructor before. In this regard, the Union also argued that if there was to be any change in its member's evaluation process it had to be first consulted by the employer on the matter.

The Law

[13] The Court would not lightly interfere with a commissioner's award unless it was satisfied beyond a balance of probabilities that the award was not rationally justifiable in relation to the reasons the commissioner gave therefor taking into account the material properly made available to the commissioner. ***(See: Carephone (Pty) Ltd v Marcus NO and Others [1998]19 ILJ 1425 (LAC), at 1434 B-E; 1435 A-B), Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others [2001] 22 ILJ 1603 (LAC) at paragraph 82 D-E; Toyota Motors SA (Pty) Ltd v Radebe and Others [2000] 3 BLLR 243 (LAC), at paragraphs 52 - 53; Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others [2003] 7 BLLR 676 (LAC) at paragraph 19.***

[14] In ***Carephone,*** *supra*, the Labour Appeal Court noted that an arbitration award, albeit resembling a judicial

decision, was infact an administrative decision, taken by a public functionary (a commissioner) in the performance of a public function and in the exercise of a public power, assigned to and conferred upon the functionary by relevant Legislation or the Constitution ***(at page 1430 D-G and 1431 E - G). (See also: sections 133 - 150 of the LRA and section 32 of the Constitution of the Republic of South Africa Act 108 of 1996).***

[15] In ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services [2003] 24 ILJ 803 (LC) at 820 C - F; [2003] 4 BLLR 341 (ILC) at 355 I - J/356 A - B***, the Court held that:

> "The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by the executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions.
> These administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive "

Application of the Law to the Facts and

Evaluation of the Application

[16] In terms of Item 6 of the Employer's Disciplinary Code (of which the Union was a co-signatory) the sanction for the misconduct of "***Refusal to obey any reasonable instructions which fall within the scope of the employee's duties"*** may be a "***Dismissal"*** even for a first offender. However, the Code further provides that ***"it does not mean that the suggested penalty is mandatory"***, and that the "***Code should (only) serve as a guideline".***

[17] The Applicant's founding affidavit listed a total of some 26 points of criticism of the Commissioner's award. However, virtually all of these points do not allege any grounds for review in terms of section 145 of the LRA, nor do they comply with Rule 7A(2)(c) read with Rule 7(3)(b) and (c) of the Rules of the Court. For instance, some, if not most, of these allegations are couched in such generalised form as to render the other party unable to respond thereto. Other allegations would appear to have relevance only in appeal procedure and not reviews. As such they are irrelevant to the present proceedings. As the

Labour Appeal Court noted in ***Shoprite Checkers***, *supra,* that "[o]ne must ... bear in mind the importance of maintaining the distinction between appeals and reviews" (at paragraph 82 F - G).

[18] The Commissioner accepted the employer's evidence that on the day in question Noosi was instructed by both Pretorius and du Plooy. As alluded to earlier, Noosi disputed that he was instructed by Pretorius. He acknowledged only being instructed by du Plooy, which instruction he declined to carry out. The Commissioner's decision to accept the employer's version in this regard involved a factual finding by him on a credibility issue. Such finding would not, to my mind, be subject to judicial scrutiny, unless there was sufficient evidence to show that the Commissioner was clearly wrong, as to be misdirected, or committed a gross irregularity when he made the finding. There is no evidence in the present case pointing to either of these occurrences. I am accordingly inclined to accept the Commissioner's finding that both Pretorius and du Plooy gave the same instruction to the employee, which the employee blatantly defied. In any event, du Plooy, being Pretorius's

supervisor, would, in my view, have had the authority *ex officio* to issue instructions to Pretorius's subordinates (including the Applicant) which Pretorius would have lawfully given.

[19] It is not clear, in the first place, why Noosi objected to being evaluated by the Joy instructor on 19 January 2000. Evidence was adduced (for the employer) that Joy had started as early as in 1998 to train and evaluate the employer's continuous miner machine operators. The evidence had further established that, indeed, in 1998 Noosi himself was evaluated by a Joy instructor, Mr Nxumalo and he (Noosi) had not objected thereto. This aspect came up clearly during the evidence-in-chief of the employer's witness at the arbitration hearing (du Plooy). Documentary evidence was produced (*at page 134 of the bundle*), of a "Field Service Report" issued in the printed letterheads of "Joy Mining Machinery", on 16 October 1998, to the effect that on that date Noosi (Company No. 5837) was evaluated by Joy instructor, Ernest Nxumalo. It was therefore beyond my understanding why Noosi persistently denied any knowledge of Joy instructors being involved in the training and

evaluation of the continuous miner machine operators.

[20] Obedience and loyalty on the part of an employee constitute the core and nucleus of a successful and sustainable working relationship between employer and employee. Flagrant defiance by an employee of a reasonable and lawful instruction given by a competent authority of the employer, within the ambit and scope of the employee's employment, is therefore both abhorrable and untenable. Indeed, such behaviour also constitutes resentment and insubordination of the employer's authority.

[21] It is clear however that, in terms of the Disciplinary Code, the employer had discretion either to dismiss an offending employee or to impose any other penalty short of dismissal. In this regard, the employer should be expected to exercise its discretion in a manner which is objectively fair and just, each case being be treated on its own merits.

[22] It was submitted on behalf of Noosi that he (Noosi) was a 62 year-old man who had worked for the

employer for almost 9 years. However, it did not appear that the issue of Noosi's age was a factor which was brought to the attention of the Commissioner. It cannot therefore be considered at the review stage.

[23] The employer submitted that Noosi had previously been convicted of a similar transgression and given a final written warning. During the arbitration proceedings, however, Noosi appeared to dispute the alleged previous conviction, or, at least, not to be aware of it as described. The onus was on the employer to prove that Noosi did have such previous conviction and the final warning.

[24] In the attempt to prove the previous conviction aforesaid, it was submitted on behalf of the employer that in terms of paragraph 2.3 of the pre-arbitration minutes it was recorded as a common cause issue that on 6 January 2000 Noosi was served with a "Final Warning" for a misconduct conviction involving "***Neglect to carry out a reasonable instruction*** "and ***"'Non-adherence to Policy, Regulations and Standards".*** This was less than 2 weeks before the date of the incident under consideration

(which occurred on 19 January 2000). It was, according to the employer, surprising therefore how Noosi should not know about it. (The pre-arbitration minutes concerned appeared at pages 154 and 155 of the court bundle). What was remarkable, however, was that the minutes were not signed by the parties to it or their representatives. It appeared that the page which would have borne the parties' signatures was missing or simply not included in the court file.

[25] Furthermore, elsewhere in the court file, the final warning aforesaid was recorded to have been issued to Noosi on 2 February 2000, which was a date already after Noosi had committed the present misconduct, in respect of which he was dismissed. It seems this could not possibly have been an inadvertent clerical error on the part employer because the entry appeared at two separate places in the court file. *(see: pages 26 and 33 of the court bundle).*

[26] This apparent confusion as to the alleged Noosi's previous conviction, coupled with his denial of that conviction, was a matter which, in my view, mitigated in his favour, in the sense that he

thereby deserved to be treated as a first offender. It would appear, however, that the Commissioner merely focused on the fact that the Code permitted the sanction of dismissal even for a first offender. That being so, it did not appear from the Commissioner's award that he ever took into account the fact that the sanction of dismissal was not mandatory, but discretionary. This, it seems to me, was a misdirection on the Commissioner's part.

[27] Another consideration which, in my view, deserved to have been taken into account was the timing of the incident in question. The state of affairs in relation to Noosi's working condition was not normal at the time. A few days earlier he had been taken out of the more senior position of operator and relegated to the lower position of assistant. James had then been placed in his position. In other words, Noosi's charge of the machine (an apparently high profile position in the employer's workplace) was deprived of him. Even if this was meant to be a temporary measure (which there was no evidence it was), Noosi probably regarded it as a demotion or punishment. If he did so, it would be understandable. He had not been

accorded any proper hearing, if at all, before a decision was taken to remove him and replace him with James. He clearly felt aggrieved about it and, as I have observed already, his concern was understandable.

[28] Further, there did not seem to be any evidence before the Commissioner that the trust and work relationship between Noosi and the employer had irretrievably broken down to the extent that the sanction of dismissal was the only option.

[29] At this juncture it may be mentioned that the transcript of the record of arbitration proceedings was interspersed with a lot of "inaudible" recording. It would appear some crucial aspects of the record may have been omitted. For instance, the transcript reflects, among others, an incomplete sentence: "*The second applicant was dismissed ..... (inaudible)* (at page 24 line 26 of the bundle). This apparently related to the employee's date of dismissal, which, as a result of the inaudible part of the cassette, remained unrecorded.

[30] Whilst the evidence before the Commissioner appeared to support Noosi's conviction of misconduct as charged, the sanction of dismissal was not, in my view, rationally justifiable in

relation to the evidence and material properly before the Commissioner. It seems to me fair and equitable to remit the dispute to the CCMA for the Commissioner to reconsider the question of sanction in the light of this Judgment.

Order

[31] In the result, the Court makes the following order:

(1) The arbitration award issued by the Commissioner on 19 July 2000 under Case No. MP15742 is hereby reviewed and set aside.

(2) The dispute between the Second Applicant (the employee) and the Third Respondent (the employer) is referred back to the CCMA for the Commissioner to reconsider the question of sanction in the light of this Judgment.

(3) There is no order as to costs.

NDLOVU AJ

Appearances:

For the Applicants	:	Ms T H Sethosa c/o Nomali Tshabalala Attorneys Johannesburg
For the Respondents	:	Adv A T Myburgh
Instructed by	:	Leppan Beech Attorneys Johannesburg
Date of Hearing	:	12 September 2003
Date of Judgment	:	25 September 2003