



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C880/14

In the matter between:

STOCKLUSH (PTY) LTD T/A MEADOW MEATS

Applicant

And

FAWU obo SETOUTO & OTHERS

First Respondent

TSILISO SHASHA N.O

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

Third Respondent

AND ARBITRATION

Date heard: June 2 2015

Delivered: 8 October 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an unopposed application to review and set aside an arbitration awarded under case number FSWK486-14. The second respondent (the Commissioner) found that 48 employees who were dismissed for misconduct during a legal strike were substantively unfairly dismissed and reinstated them all.
- [2] The strike started on 22 September 2013 and the employees were dismissed on 26 February 2014 after a disciplinary hearing on allegations of intimidation, assault and blockading the entrance of the applicant company.
- [3] There are a number grounds of review set out in the application before me. One of these is directed at the following statement by the Commissioner in his Award:
- “[63] The notion that all members of a group can be punished for a misconduct of some is repugnant to law and the rule of natural justice. Most especially where common purpose was not proven.”
- [4] This it is submitted on behalf of the applicant is a mistake of law. I agree. It appears that the Commissioner did not understand the distinction between 'collective guilt', which assumes that all members of a group were guilty simply because the perpetrator belonged to that group, and 'collective misconduct' in which employees took part for a common purpose, and which involved individual culpability. As John Grogan *qua* arbitrator¹ has pointed out:
- “The term 'collective responsibility',refers to situations in which all members of a group are punished because of the actions of some of them. The term 'collective misconduct', as I understand it, refers to misconduct in which a number of employees participate with a common purpose. The term is generally used with reference to illegal work stoppages and stay-aways: see, for example, SACTWU & others v Nylon Spinners (Pty) Ltd [1999] 11 BLLR 1157 (LC). In such cases, although the individual members of the group act in concert, they are liable for the consequences of their collective action because each is individually culpable.

¹ Federal Council of Retail & Allied Workers and Snip Trading (Pty) Ltd (2001) 22 ILJ 1945 (ARB)

Used in this sense, the term 'collective misconduct' is to be distinguished from the notion of 'collective guilt', which assumes that all members of a group are guilty (and deserving of punishment) simply because the perpetrator belonged to that group. The notion of 'collective guilt' is a method of ensuring that a guilty person does not go unpunished. As was point out in *Pep Stores* (1) , its application is unfair because it inverts the maxim that it is better for a guilty person to go free than to punish an innocent person. The notion of 'collective guilt' is conceptually flawed because it is not possible in law or logic to attribute criminal liability to a group. The only way in which individuals can be held accountable for the wrongful acts of members of a group of which they form a part is by virtue of the doctrine of common purpose, in terms of which the actions of one or more members of a group (the actual perpetrators) are attributed to others by virtue of their association in the common goal (*S v Safatsa & others* 1988 (1) SA 868 (A)), or by virtue of the concept of 'derivative misconduct', which locates the misconduct not in the primary misconduct of the perpetrator, but in the refusal by his colleagues to inform the employer of the identify of the actual perpetrator: *Chauke & others E v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC). However, the doctrine of common purpose rests in the final analysis on individual culpability: *S v Singo* 1993 (1) SACLR 226 (A); *NSCAWU & others v Coin Security Group (Pty) Ltd t/a Coin Security* [1997] 1 BLLR 85 (IC) at 90G-91B. So, too, does the notion of derivative misconduct."

- [5] The above passage was quoted with approval in **Foschini Group v Maidi & others (2010) 31 ILJ 1787 (LAC)**, a judgment dealing with team misconduct in which dismissal was found to be justified because each individual as a component of the group culpably failed to ensure that the group complied with rule in question.
- [6] Over and above this latent defect in the Award, the Commissioner reinstated all of the employees despite the fact that they were not all present at the arbitration. Further he reinstated some of them who he found to have been guilty of the misconduct alleged, without any explanation therefore.

- [7] The quality of his assessment of the evidence of the company's witnesses is well reflected in the following paragraph of his Award:

"Shadrack Sekwati Rakwata testified that he was attacked by a group of four striking workers. In his statement (page 57 of Bundle A) he stated that he was hit with sticks (kirries) and stones. In his evidence in chief he only identified Matolong as the one who hit with a stick and could not identify who hit him with a brick. His statement was inconsistent with what he was testifying in chief. He further implicated William Nkone as one of the people who assaulted him, but apparently this person was not even part of the striking workers or near the Respondent's place. I found his testimony unreliable and inconsistent. No medical report or certificate or SAPS case number was submitted to substantiate the assault"(my emphasis)"

- [8] It is clear from all of the above that on its face this Award is susceptible to review at the very least, on the basis that that the Commissioner reinstated all the employees who referred the dispute when some of them were not even present at the arbitration. He further failed to distinguish or consider why even those he himself found guilty of serious misconduct should be reinstated along with everybody else. The Award is one that a reasonable decision-maker could not make.

- [9] I therefore make the following order:

Order

1. The award under case number FSWK 486-14 is reviewed and set aside.
2. The dispute is remitted back to third respondent for hearing de novo before an arbitrator other than second respondent.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adv Venter instructed by Du Randt Attorneys

LABOUR COURT

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

For the Applicant:

LABOUR COURT