THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA 103/2023

In the matter between:

STRADO REMANUFACTURING (PTY) LTD	**Appellant**
and	
SAME DIPHOKO N. O	**First Respondent**
THE DISPUTE RESOLUTION CENTRE FOR THE MOTOR INDUSTRIES BARGAINING COUNCIL	**Second Respondent**
NASECGWU obo SABTHA ANDREW MATLALA	**Third Respondent**

Heard: **4 March 2025**
Delivered: **20 March 2025**
Coram: **Savage AJP, Sutherland *et* Davis AJJA**

JUDGMENT

SUTHERLAND, AJA

Background

[1] The Third respondent, Andrew Matlala (Matlala) was employed by the appellant, Strado Remanufacturing (Pty) Ltd (Strado) subsequent to his dismissal on 9 November 2020 for refusing to obey an instruction issued by the appellant's General Manager, Philip "Flippie" Wall (Wall), on 20 October 2020. In terms of the instruction, Matlala was to cease leaving the workplace early, and to report to the office to give reasons as to why he was leaving work before the end of the workday.

[2] On 28 February 2022, an arbitrator, under the auspices of the second respondent, the bargaining council, held that the dismissal was substantively unfair and ordered Matlala's reinstatement with six months backpay.

[3] Strado's review application against the award, on the grounds that no reasonable arbitrator could reach that conclusion, was dismissed by the Labour Court. Strado now appeals against the order of the Labour Court.[1]

[4] There is a single material dispute of fact upon which the finding of misconduct on the part of Matlala turns: Was there an instruction?

[5] Disappointingly, the arbitration proceedings were conducted in an all too familiar manner, characterised by clumsiness, sometimes ineptitude and, with regard to the conduct of the union representative, emotively, and at times, unnecessarily antagonistic. These attributes are distracting to a presiding officer, but the distractions must, nevertheless, be overcome by an alertness to all the material evidence, despite the lack of constructive contribution by the parties or their representatives.

[6] In the arbitration hearing, Matlala's defence to Wall's allegation of an instruction was flatly to deny that an instruction was issued, and had there indeed been one, he would, of course, have complied.

[1] None of the respondents took part in the appeal hearing.

Evaluation

[7] The factual context is common cause: At around about 16h45 prior to the work-bell sounding at 17h00, Matlala and others were seen, in private clothing, walking to the exit to clock out. Wall observed this and, so he says, told Matlala to come to the office of the foreman, Venter, to discuss this breach. He repeated this "*about five times*". Venter offers a faint corroboration: he confirms that Wall called his attention to the early departures and that Wall wanted Matlala to come to the office, but his evidence about hearing the instruction was a bit wobbly. What is weighty in Venter's evidence is that Wall wanted Matlala to come to the office to discuss the early departure, a significant aspect relevant to the weighing of the probabilities of whether an instruction to that effect could have been given.

[8] There was a dispute of fact about whether it was a standard practice that the staff could knock off at 16h45 and leave the workplace to catch a 17h00 bus. Matlala says this was authorised by 'Vusi', the Human Resources Manager. Venter says he had never heard of such a practice during his time at the business, some seven to eight years. Wall says that Vusi Khumalo, who had left the employ of Strado in 2016, had indeed authorised such a practice but after his departure, that practice was stopped. This is not a material dispute as the gravamen of the allegation of misconduct was the defiance of Wall's alleged instruction to report to the office.

[9] Whose version about the instruction could be relied upon? The award is unhelpful in divining what rationale informed the arbitrator's decision to make a finding that no instruction was given. He invokes the onus of proof on Strado but does not explicate why it failed. The award contains a succinct narrative of some, but not all, of the evidence tendered but offers no analysis of that body of evidence.

[10] Critically, given that credibility was the key controversy, the arbitrator wholly ignored vital evidence directly affecting the credibility of the denial that an instruction had been issued. There are two pieces of such evidence:

8.1 Scholtz, who had presided over the disciplinary enquiry, testified and submitted a hand-written note of those proceedings. From this, the arbitrator

was informed that Matlala's explanation in that enquiry had been that there had indeed been such an instruction and that Matlala had indeed not complied because he was afraid "*Flippie would swear and scream at him*". The evidence that Matlala said this at the enquiry was unchallenged, although it was eventually put to Scholtz that Matlala denied there was an instruction.

8.2 The second piece of evidence in this vein is that given by Matlala himself at the outset of his testimony before the arbitrator. There he said that Wall had entered the dressing room after 17h00 and seeing that the workers were in private clothes told them to "*go to the office*". Matlala said further that they then went to clock out and "*Flip did not say anything to us*".

[11] The Labour Court held that Scholtz had merely testified about the disciplinary hearing and his evidence was therefore of no value – a bald finding. This was a misdirected perspective. It is true enough that the calling of a presiding officer to relate what occurred in an enquiry usually is superfluous but that is not universally true. In general, such evidence can be material to rebut an allegation of an unfair procedure. On substantive fairness, what the *view* of the chair of an enquiry was and why it was held is indeed irrelevant. However, in this case, evidence of a prior inconsistent statement critical to the controversy about credibility was adduced through the evidence of Scholtz. It was inappropriate to ignore it. Further, the self-contradiction by Matlala required assessment, albeit to determine why the contradiction occurred. That exercise did not take place.[2]

[12] The criticism is advanced that the arbitrator did not apply his mind to the totality of the evidence. This is a valid rebuke. Objectively, the conclusion that Wall had issued no instruction, as alleged, cannot stand. The probabilities favour it because why otherwise accost Matlala, which is not in dispute, and why rouse Venter to become involved? Moreover, why tolerate an overt breach of a workplace rule – as Wall would have it? That is not all. Although aware that an analysis of the contending versions was the case, the arbitrator did not weigh the evidence of a

[2] See: *South African Police Service v Magwaxaza and Others* [2019] ZALAC 66; (2020) 41 ILJ 408 (LAC) at para 31; and *Segona v Education Labour Relations Council* [2019] ZALAC 51; [2019] 12 BLLR 1327 (LAC) at para 17 – both examples of the implications on credibility findings of variant versions in different enquiries.

different version having been given in the disciplinary enquiry nor of the internal contradictions in Matlala's evidence.

[13] Therefore, the Labour Court's conclusion that the arbitrator could not be faulted is incorrect. In my view, a reasonable arbitrator would not, on the body of evidence adduced and after weighing the probabilities, have concluded that no instruction was given. It must follow that the appeal must be upheld and the award reviewed and be set aside. Matlala is indeed guilty of insubordination.

Appropriateness of sanction

[14] An aspect of the case not addressed in the proceedings *a quo* is the sanction for that finding of misconduct. What is appropriate? Matlala had ten years of service, and no disciplinary record was tendered except that Wall had said that he had orally 'warned' Matlala over time. This is too vague to be useful in the exercise of assessing the appropriateness of the sanction.

[15] At the time that this appeal was heard, about five years had elapsed since the misconduct occurred. That is a sound reason not to refer this matter back to the bargaining council for a hearing *de novo*. Much to be preferred is that this Court disposes of this dispute at once, rather than engender further delay.

[16] Is dismissal for insubordination an appropriate sanction for what seems to be a first offence? *Prima facie*, insubordination can indeed be a serious transgression, but there are several degrees to weigh. Matlala's long service suggests a degree of mitigation. In my view, a final written warning would have sufficed.

[17] This sanction would consequently mean an order of reinstatement is appropriate. However, given the long delay and the misconduct of Matlala, to simply order retrospective reinstatement of some five years would be a violation of common sense and fairness to the appellant, an outcome inimical to the tenets embodied in

the Labour Relations Act[3]. Thus, Matlala's reinstatement shall not be with retrospective effect.

[18] It is also sensible, given the inordinate lapse of time, to frame an order to facilitate a return of Matlala to Strado in an orderly fashion.

[19] In the circumstances, the following order is made

Order

1. The appeal is upheld with no order as to costs.
2. The judgment of the Labour Court is set aside and substituted with the following order:

"1. The arbitration award is reviewed and set aside;

2. Mr Matlala is reinstated on these terms:

2.1 A final written warning for insubordination is issued in accordance with the terms of the disciplinary code;

2.2 Reinstatement shall take effect from the date upon which the third respondent reports to the appellant in order to resume work;

2.3 The order of reinstatement must, within 15 days of the date of this judgment, be served, in terms of the Rules of Court, on the third respondent (the Union) whereupon Mr Matlala must, within 90 days of such date of service on the Union, tender to resume work, failing which the order shall automatically lapse.

2.4 The first respondent shall communicate the order to Mr Matlala.

SUTHERLAND AJA

Savage AJP and Davis AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv. A J Postuma

Instructed by Snyman Attorneys

[3] Act 66 of 1995, as amended.

FOR THE THIRD RESPONDENT: No Appearance