IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 881/04

In the matter between:

ANGLO OPERATIONS LIMITED
(BANK COLLIERY) Applicant

and

TOKISO DISPUTE RESOLUTION
(PTY) LTD 1st
Respondent

K SAVAGE N.O. 2nd
Respondent

SGUNTSE TYUMSE 3rd
Respondent

NATIONAL UNION OF MINEWORKERS 4th
Respondent

JUDGMENT

REVELAS J

[1] This is an application for review of an award made by the second respondent ("the arbitrator") in a private arbitration held under the auspices of the first respondent.

[2] The arbitrator held that the dismissal of the third respondent ("Tyumse"), following a charge of assault, was substantively unfair and substituted the applicant's sanction of dismissal with a final warning, valid for twelve months. In particular, the arbitrator held that Tyumse either acted in self-defence, or was provoked.

[3] Tyumse was employed by the applicant as a continuous miner operator. The person, whom he allegedly assaulted, was one Samson Mashiloane ("Mashiloane"), who was employed by an independent contractor, that has an agreement with the applicant to carry out certain mining production work at the mine.

[4] The incident which gave rise to the assault charge occurred on 12 August 2003 at the applicant's premises. (The applicant is a mine and I will refer to it as "the Mine"). Mashiloane maintained that he had been assaulted on a mine bus by Tyumse, who thereafter had hit him with a mine belt. The two had an argument about the whereabouts of a two litre bottle of Coca Cola, which had been bought by another employee for his crew. According to Mashiloane, he had left the bottle in question in the bus some time before, whereafter it had had gone missing. Tyumse felt Mashiloane was responsible for the loss, and the latter denied any responsibility. That led to the assault.

[5] Tyumse admitted to the chairperson of the disciplinary enquiry that he was in the wrong, but said he had lost control. He said Mashiloane caused him the predicament of him not knowing what to tell his crew members about the missing bottle. He said Mashiloane had humiliated him. He asked for clemency, which was denied him, since the chairperson was of the view that the

assault was far too serious (Mashiloane received stitches) and warranted the severe sanction of dismissal.

[6] These findings were upheld in an appeal hearing during which the mine led evidence on employer consistency. At the arbitration hearing also, evidence was led about a specific incident where two other employees had been dismissed for an assault. One of them had grabbed a third employee (van der Merwe) from behind, where he was sitting on a bar stool in the Mine's club and caused him to fall on the floor, where he was kicked in the face by the other employee. A work related issue had caused the two dismissed employees to act in this way. Another example was also given of an employee who was dismissed for pointing a fire arm at one of his co-employees.

[7] In his request for the appeal, Tyumse stated as follows:

> "**This was not deliberate. I was provoked by the way in which Samson (Mashiloane), the affected (victim) shouted, insulted, humiliated and grabbed me by my overall before my co-workers.**
>
> **I therefore ask management to be lenient and consider the fact that I am a family man. I have dependants to support. Although what I committed was totally wrong, but (*sic*) would like management to give me another chance to redeem myself. I don't mean that my actions should be condoned but, I say I ask for forgiveness because it just happened"**.

[8] The appeal chairperson considered that assaults are viewed more

seriously when committed in public and particularly as Tyumse was a shaft steward, he had set a bad example with his conduct. He further stressed that lenient sanctions, such as written warnings for assault, would be imposed only where the assault consisted of offensive language or threats of assault. In other words, where no physical violence had occurred, as had occurred in the case in question. The chairperson of the appeal hearing also observed, along the aforementioned lines, that Tyumse's conduct was unacceptable, especially because he inflicted injuries which required medical attention and treatment.

[9] When the ensuing dispute about Tyumse's alleged unfair dismissal was placed before the arbitrator, the Mine placed on record that it took the issue of assault seriously and mentioned the fact that in the recent examples of employer consistency (referred to above), none of the decisions to dismiss were overturned by anyone. In effect, it was argued that all the Mine's decisions to dismiss are immune to interference.

[10] I do not wish to summarise in any precise detail the evidence which was lead before the arbitrator. It is not necessary. An arbitration hearing is generally accepted in this court, as a hearing *de novo.* During this arbitration hearing, the arbitrator heard different accounts of the incident in question, form two witnesses who did not testify before the Mine's chairpersons who earlier pronounced on the charges in the disciplinary hearing and the appeal hearing. They contradicted the evidence of Mashiloane, and

he contradicted his own statement made at the disciplinary hearing.

[11] The Mine led the evidence of two eyewitnesses to the incident at the arbitration hearing. The one was Mr Mthetho Nqawe ("Nqawe") who was like Mashiloane, not employed by the mine. The other witness, Mr Sam Masuku was a mine employee. On their evidence Mashiloane was not the totally innocent victim of a brutal assault. According to both of them, they initially, (before Mashiloane started crying), had the impression that the two were only playing, since they were in the habit of doing so prior to the incident.

[12] Nqawe specifically said during his evidence in chief, that he would not agree with the statement that what he saw was not a fight, but an assault. Neither of the two witnesses saw Mashiloane being hit with a belt (which Tyumse denied he did). That is understandable because Mashiloane said that the belt incident occurred at South Shaft. Nqawe saw blood on Mashiloane only later and then the latter had told him that he had been hit with a belt by Tyumse.

[13] Masuku separated the two. According to him, Mashiloane put an open hand on Tyumse's chest and then the fight began. Mashiloane said he never grabbed Tyumse, but only touched him as he was "**throttling**" him, which neither Nqawu nor Masuku mentioned. They also did not hear Mashiloane swear at Tyumse, which was part of the latter's testimony.

[14] The arbitrator held that, given the burden of proof which rested on the mine, it was material that the respondent's witnesses presented contradictory statements. One of the most important contradictions was that, in his statement made on 13 August 2003 (a day after the incident Mashiloane said **"(b)y then he said I should disembark from the bus. I did not get out. He eventually started red with rage he started beating me with a belt (cap lamp) belt. Then it was then that Sam and other passengers started to calm Sguntse down. And finally he stopped beating me"**.

[15] The aforesaid statement places the belt assault squarely in the bus, whereas the evidence of Mashiloane at the arbitration was that it occurred at South Shaft. The arbitrator said that because of this serious deviation, it was difficult to accept Mashiloane as a reliable and entirely honest witness. She did, however, find that Mashiloane had sustained injuries, which were inflicted by the applicant and that the Mine had **"accordingly discharged the onus to prove that the applicant [Tyumse] is guilty of assault".**

[16] The arbitrator then, having found that Tyumse was correctly found guilty of assault, turned to the second part of her enquiry, namely the question of an appropriate sanction. In this regard she found that the Mine did not discharge the onus of proving that dismissal was appropriate. She found that Tyumse was probably provoked or acted in self-defence and that a sanction short of dismissal was appropriate, because the evidence presented at the hearing bore out such a conclusion.

[17] At this stage I may just mention that a finding of self-defence and a finding of guilty on an assault charge, are mutually exclusive. In my view, none of the testimonies supported a finding of self-defence, not even Tyumse's testimony. However, I do not think there was an understanding on the part of anyone, that the self-defence alleged by Tyumse, was an absolute defence as it is in criminal law. It was rather meant as an explanation for his conduct, in circumstances where Mashiloane was a participant in the assault, and not a mere victim thereof. I cannot fault the finding of provocation.

[18] The overall impression I gained from the evidence was that Tyumse was probably the aggressor and had overreacted to the provocation. He acted in anger. He had lost his temper. However, the arbitrator had the benefit of physically observing and listening to witnesses who did not testify before me or before the disciplinary enquiry. The record also does not seem to be a verbatim account of what was said by the witnesses. That in itself diminished any accurate assessment of the witnesses substantially. I am therefore reluctant to interfere with the arbitrator's credibility findings. In any event, her findings on the nature of the assault were not the only factor which she took into account in determining the appropriateness of the sanction. The arbitrator also took into account that Tyumse had a clean service record of more than twenty years. She deemed these factors to be **"strong mitigatory factors which should have been considered when determining sanction against the backdrop of the evidence available at the disciplinary hearing".**

[19] In terms of the Individual Dismissal Dispute and Adjudication Procedure ("the Dispute Procedure"), entered into by the applicant and the fourth respondent, an arbitrator's award is reviewable in circumstances where the arbitrator:

1. did not apply his/her mind to the dispute;
2. acted unreasonably;
3. committed an irregularity;
4. gave an award which is unjustifiable, given its reasons;
5. exceeded the powers conferred in terms of the agreement or terms of reference of the dispute; or
6. acted in a biased manner or committed misconduct, but not limited to fraud'.

[20] The arbitrator was obliged to consider the nature of the assault and the personal circumstances of the employee. Although I do not share her impressions of the nature of the assault, I am not able to find that she acted unreasonably or did not apply her mind to the evidence made available, or that she fell in any way foul of the grounds for review contained in the Dispute Procedure.

[21] There are two further aspects of this matter which prevented me from interfering with the award. Firstly, the fact that the chairperson (Mr Kotze) of the disciplinary hearing, did not hear the testimony of the two eyewitnesses, is rather significant if it is

remembered that Kotze is one. He saw Mashiloane bleeding, and was told by him what had allegedly occurred. Perhaps his personal knowledge of the matter caused him to decide that the offence in question warranted nothing but dismissal.

[22] My second concern is the approach adopted by the appeal chairperson. According to him, only in cases of assault consisting of threats or abuse, would progressive discipline be warranted. In all other cases of assault, dismissal would be only possible sanction. This inflexible approach is not recorded in the Mine's own disciplinary record, which categorises assault as misconduct where progressive discipline may be applied. Assault certainly does not fall in the category of misconduct relating to dishonesty, where dismissal would almost always follow. This is so because the trust relationship between the employer and employee is broken in cases of fraud and theft. It is difficult to understand why the Mine would maintain that assault destroys the trust relationship. It is the relationship between Mashiloane and Tyumse which had been destroyed in this case.

[23] To have only one sanction, and the harshest one possible, for an offence such as assault, which can vary much in nature, is unrealistic. The assault in question, is for instance, different from the one previously mentioned, which took place in the Mine's club. That was a cowardly assault. Two people attacked one person from behind, and when he fell, kicked him in the face. It was also not an impulsive act, as was the case in the present matter. It was

premeditated because it related to a work issue and the assault occurred after hours. That victim had no part in the attack on him. Mashiloane was described by witnesses, to have been in a fight with Tyumse, even though Tyumse was not the one who ended up crying, bleeding and requiring stitches, as Mashiloane did. I do, however, not believe dismissal was one and only sanction for this misconduct, given the surrounding circumstances.

[24] I am mindful that reviews, unlike appeals, are rather concerned with the manner in which tribunals or arbitrators come to their conclusions, and not so much with the result itself. The parameters of a review must be considered against this distinction. In *Carephone (Pty) Ltd v Marcus and Others [1998] 11 BLLR 1093,* Froneman DJP warned at paragraph 36 of that judgment:

> **"As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order".**

[25] The assault in question was indeed a serious assault. However, before I interfere and substitute the arbitrator's sanction with a harsher one, depriving a family of a source of income they had relied on for twenty one years, I must be certain that the arbitrator did not apply her mind to the facts, or that she acted unreasonably. She did not do either. Equally reasonable people may differ on the question of sanction. The award is also justifiable, in terms of her reasoning. Her award is clearly one of a range of reasonable

outcomes. I therefore decline to set aside the award.

[26] The application for review is dismissed with costs.

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Elna Revelas
Judge of the Labour Court

Date of hearing: 29 June 2006

Date of judgment: 04 July 2006
Typed judgment: 05 July 2006

On behalf of the Applicant

Adv. A. Snider instructed by Leppan Beach Attorneys

On behalf of the third and fourth Respondents

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