IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 2667/16

Not Reportable

In the matter between:

GLENCORE OPERTIONS SOUTH AFRICA (PTY) LTD (LION FERROCHROME)	**Applicant**

And

NUM OBO JERRY MAKGATA	**First Respondent**
CCMA	**Second Respondent**
JOSIAS SELLO MAAKE N.O.	**Third Respondent**

Heard: **7 August 2018**

Delivered: **30 April 2019**

JUDGMENT

WHITCHER J

[1] This is an application to review an arbitration award in which Commissioner J S Maake found that the dismissal of Mr Makgata for misconduct was substantively unfair.

[2] The Applicant operates a ferrochrome smelting plant and its operations are subject to stringent health and safety rules.

[3] Mr Makgata commenced employment with the applicant in 2010, as a trainee engineer. At the time of his alleged misconduct (April 2016), he was employed as an Engineering Superintendent in terms of the OHSA. In short, it was his job to ensure that his section of the plant complied with the relevant safety rules. *Inter alia*, he had to ensure that dangerous moving machinery were properly guarded, and that it was stopped and fixed when not securely guarded. The appropriate guarding prevents employees from coming into contact with dangerous moving machinery.

[4] At the arbitration, the applicant led its case through Mr Cheloane, their Engineering Manager. His testimony, in summary, was as follows.

4.1 Prior to 12 April 2016, in several discussions, Mr Cheloane instructed Mr Makgata to ensure that the sump pump in his section was operating efficiently. By that, Mr Makgata was to make sure that the pump was not overflowing. Mr Cheloane explained to the commissioner that if the pump did not operate efficiently, it would overflow and pose a risk of slippery surfaces for employees.

4.2 Mr Cheloane also instructed Mr Makgata to ensure the availability of correct spares to fix a faulty primary crusher.

4.3 On 11 April 2016, Mr Makgata assured Mr Cheloana that he had complied with the instructions.

4.4 However, on 12 April 2016, Mr Cheloana observed the following:

(i) The sump pump was overflowing.

(ii) Mr Makgata had failed to order the correct spares, and, as a result, had the main frame of the crusher drilled in order to install and secure the chik plates, a modification procedure which was not permitted because it could weaken the structure and cause a faulty crusher.

(iii) The guarding on a secondary crusher ("the conveyor") was not secured. It was operating without fixed guards in place. Mr Cheloane referred the commissioner to a photograph, stating that he took the photograph on 12 April and it recorded the defective guarding that he had observed on 12 April 2016. Based on his observation, Mr Cheloana ordered that part of the operation to be stopped.

4.5 Mr Cheloana said that Mr Makgata's overall conduct had not only caused a safety risk, it also caused a planned shutdown to be postponed.

4.6 In addition to the above evidence, Mr Cheloane referred the commissioner to specific sections of the transcript of Mr Makgata's disciplinary enquiry. According to the transcript, Mr Makgata agreed at the disciplinary enquiry that he had been given the above mentioned instructions, he agreed that the sump pump was found overflowing, he backtracked on his claim that a water restriction had caused the pump to overflow and he agreed that the photograph showed a defective and unsafe guarding.

[5] Mr Makgata was dismissed pursuant to the following charges:

5.1 Breach of safety regulations in that you failed to ensure that driven machinery was operated with proper guarding in place.

5.2 Failure to follow directions instructions in that after several discussions regarding the sump pump you failed to ensure the pump was running efficiently which led to the sump overflowing, causing final product contamination and posing a risk of slippery surfaces to fellow workers; and in that you failed to ensure that the correct spares were available and that the crusher was not prepared for the shutdown which was scheduled for 12 April 2016. This led to the postponement of the shutdown.

[6] The chairperson of the disciplinary enquiry held that dismissal was the appropriate sanction on the basis that Mr Makgata had been on a final written warning for safety violations at the time he committed the misconduct.

[7] Although Mr Makgata's coordinator had been similarly charged, he was not dismissed. The different treatment was based on the fact that the coordinator had reported to Mr Makgata [Makgata was his senior] and, unlike Mr Makgata, he did not have a final written warning for similar offences at the time of the misconduct.

[8] In relation to whether the trust in the employment relationship could objectively be held to have irretrievably broken by Mr Makgata's conduct, Mr Cheloana testified that he could no longer trust Mr Makgata to follow important orders that had safety repercussions and Mr Makgata had shown that he is not amenable to correction in light of the fact that he had been sitting on a final written warning for similar offences at the time of the new offences.

[9] In a misconduct case, once the employer has fleshed out its allegations with evidence to a degree that its version requires a proper answer or rebuttal lest it be believed, the evidentiary burden shifts onto the accused employee to prove otherwise.

[10] The sum total of Mr Makgata's defence in his oral evidence and in the cross-examination of Mr Cheloana was as follows:

10.1 The photograph of the defective guard was not taken in his presence, so it does not constitute proof that the guard in his section was defective. This submission has no merit. There is no requirement in labour law (or any law for that matter) that for a photograph to be awarded weight it must be taken in the presence of the accused employee. Moreover, no sinister or ulterior motive was suggested for Mr Cheloana taking the photograph in the absence of Mr Makgata.

10.2 When Mr Makgata agreed at his disciplinary enquiry that the guarding was defective, he had been merely referring to the guarding in the photograph shown to him. He had denied that the guarding in his section was defective. However, when called on to do so, Mr Makgata was unable to establish this claim with reference to the transcript of the disciplinary enquiry.

10.3 The company logbook recorded that the plant was stopped because of a dumper. It thus follows, Mr Makgata argued, that the plant was not stopped because of a faulty guard, and it must follow from this, that there was no faulty guard. Apart from the logical fallacy of this argument, Mr Cheloana gave a reasonable explanation for the logbook, which was not disputed by Mr Makgata. Mr Cheloana explained that it was a practice that only the primary reason for a stoppage is recorded in the logbook. The defective guarding was one of the reasons, but not the primary reason, for the stoppage on the day in question.

[11] Clearly taking his cue only from Mr Makgata's evidence and submissions, the commissioner found Mr Makgata's dismissal substantively unfair for the following reasons:

11.1 The applicant was unable to produce documentary evidence that the operation of the plant was stopped because of the substandard guarding on the conveyor.

11.2 The photograph taken by Mr Cheloana on 12 April 2016 was inadmissible because it was not taken in Mr Makgata's presence.

11.3 There was no proof that the relationship had irretrievably broken down.

[12] The first reason is based on a misconception of the law of evidence. The absence of corroboration is not a ground for rejecting the evidence of a good witness. Corroborating evidence merely adds weight to the evidence of a witness.

[13] The second reason is also based on a misconception of the law of evidence, as already discussed earlier on.

[14] Regarding the final reason, it is evident that the commissioner failed to consider the testimony of Mr Cheloana in this regard. If he had, he would have found that the applicant had provided sufficient justification for feeling that the relationship had irretrievably broken down. Mr Makgata's misconduct was serious and the fact that he had been on a final written warning for safety violations at the time of the misconduct demonstrates that he is not amenable to correction on very important matters, namely safety in the workplace and the duty to comply with important instructions.

Order

[15] In the premises, I make the following order:

1. The award issued by the third respondent on 26 October 2016 in the arbitration proceedings between the applicant and the first respondent under case number LP5064-16 is reviewed and set aside, and substituted with an award that the dismissal of the first respondent, Mr Jerry Makgata, was substantively fair.

2. There is no order as to costs.

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B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	D Masher, from Edward Nathan Sonnenbergs Inc
For the First Respondent:	Advocate K. Mahlalela
Instructed by	Motaung Attorneys