



CCMA

Arbitration Award Rendered

Case Number: GAEK9539-13

Commissioner: Bess Pillemer

Date of Award: 23-Mar-2014

In the **ARBITRATION** between

Albert Masango and 8 Others

(Union/Applicant)

and

WB HO Construction (Pty) Ltd

(Respondent)

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Details of hearing and representation

[1.1] The arbitration was held at the CCMA Durban on 12 and 13 March 2014.

[1.2] An official of NUM, E Khan, represented the Applicants. M Maeso of Shepstone and Wylie Attorneys represented the Respondent.

Issues to be decided

[2.1] The issues to be decided are:

[2.1.1] Whether the Respondent unfairly dismissed the Applicants, that is, whether the Applicants were guilty of "serious insubordination/serious misconduct" when they left the building site before the job of erecting support columns (also referred to as pillars) on the building site had been completed.

[2.1.2] If it is found that the Applicants are entitled to relief, the nature of that relief.

[2.2] Whether the dismissal was procedurally unfair because one of the Applicants, Isaac Dlamini, was a shop-steward, and was not given the opportunity to be represented by a union official.

Background to the issue

[3.1] The facts set out below were agreed or not disputed.

[3.1.1] Respondent, a large well-known construction company, employed the Applicants on various dates, between 12 January 1988 and 2 June 2008. It dismissed them on 1 November 2013 for misconduct. The Applicants, who were from Gauteng, were employed as shutter hands or assistant shutter hands. Their responsibilities were to assist to erect and stabilise concrete pillars on Respondent's construction sites. These pillars underpin the floors of the building. The Applicants, who had worked for the Respondent on many sites throughout South Africa, were experienced in the requirements of the job. At the time of the dismissal the Applicants were working on a construction site at Umhlanga Ridge and lived in accommodation provided by the Respondent in Westmead. Respondent provided transport to and from the accommodation on a daily basis.

[3.1.2] Respondent provides a bus for this transport after a shift and while a bus is provided in other provinces at the end of overtime, in Durban, a converted truck, with all the necessary safety features added, has been traditionally used to transport employees after the overtime shift is completed.

[3.1.3] In the minutes of a meeting on 1 October 2013 between site management and employee representatives it was recorded:

"Workers said they do not want to use truck as the transport when they work overtime, threatened to leave columns if their demand is not met".

[3.1.4] The following process is followed when building pillars:

[3.1.4.1] The casing or frame for the pillar is built, which is the responsibility of the shutter hands;

[3.1.4.2] Only once the casing, the mold into which the concrete is poured, has been erected and is in place, the Foreman, in this case Alfred Mhlanga, alerts management, orders the concrete so that it can be poured as soon as it arrives on site, to prevent it hardening. Once the concrete hardens it cannot be used and has to be disregarded at a financial loss;

[3.1.4.3] Once the concrete is ordered the Foreman is kept continually informed on the progress of the concrete truck, and the exact expected time of delivery.

[3.1.4.4] Once the concrete arrives it is immediately poured into the casings. The concrete hands and not the shutter hands (carpenters) are responsible for pouring the concrete;

[3.1.4.5] Once the concrete has been poured the casings are properly aligned (plumbed), which has to be done immediately after the concrete is poured and before it hardens. It is the responsibility of the shutter hands to do this.

[3.1.4.6] The shutter hands are not entitled to leave the premises until the concrete has been poured and plumbed;

[3.1.4.7] Overtime is in the nature of the work, and employees who work overtime are paid overtime worked.

[3.1.5] On 10 October 2013, ten days after the meeting on 1 October 2013, five pillars had been prepared during the day by the Applicants. The concrete was ordered and arrived at approximately

16h30. The concrete was poured into the last pillar, which was then primed, but when it was

17h00, before the remaining four pillars were completed, and at the end of the normal shift, the shutter hands left the site, and caught the bus back to Westmead. Members of other teams assisted Mhlanga to complete the work, but one pillar was not properly plumbed, and had to be demolished and rebuilt. If Mhlanga had not managed to procure help, more than one pillar may have had to be demolished or the concrete would have hardened. This would have had a severe financial impact on the Respondent's budget because of wasted concrete and additional hours worked. If the handover of the site was delayed by the incident the Respondent's client would have imposed financial penalties on the Respondent.

[3.1.6] After the disciplinary hearing had been completed, and the independent chairperson had made a recommendation that the Applicants be dismissed the Respondent contacted the Union to discuss the matter fully before it implemented the sanction of the chairperson. The Union refused to engage because it claimed that the Respondent should have discussed the dispute with them prior to the disciplinary hearing, not after.

[3.2] It was the Applicants' case that they had not ignored the instruction to work overtime on 10 October 2013, but they had left the premises as usual at 17h00, as they had not been told that the concrete was due or instructed to work overtime that day. The Respondent's case was that the Applicants knew (and had been told) that they were to work overtime on 10 October 2013, but they had left the premises at the end of the shift, ignoring the instruction.

[3.3] The Union claimed that the dismissal was procedurally unfair because the Respondent had not allowed the shop steward to be represented by a Union official. The Respondent contended that the shop steward was not entitled in law to demand Union representation at a hearing and claimed it had tried to consult with the Union on the matter before implementing the sanction, but that the Union had refused to communicate with it.

Respondent's evidence

[4] Respondent led the evidence of two witnesses, Mark Jones, the Contracts Manager and Alfred Mhlanga, a Foreman.

[4.1] Most of Jones' evidence was not disputed and has been dealt with under the background above. Jones was the Initiator at the disciplinary hearing. He said Mthembu, a senior shop steward, represented the Applicants and that Dlamini had not made a request that a Union official represents him. Jones was also present at the meeting on 1 October 2013 when Dlamini stated that the workers threatened to leave "columns"

if their demands were not met in regard to the transport, i.e. that a bus replace the truck used to transport overtime staff. Jones made the point that by referring to the columns in particular meant he was referring to workers who worked on the pillars. All nine Applicants were shutter hands who worked on the pillars.

[4.2] Mhlanga testified as follows:

[4.2.1] Five pillars were built on 10 October 2013;

[4.2.2] Mhlanga emphasized that at the start of every day he informed his team what their responsibilities were for the day. On 10 October 2013 he divided the shutter hands into two crews. The first crew was responsible for building the casing and for plumbing pillars one, four and five, and the second crew was responsible for building and plumbing pillars two and three.

[4.2.3] The shutter hands had worked for the Respondent for many years and knew that they could not leave the site until the pillars were complete, once concrete was ordered. He told them that the concrete had been ordered after the pillars were completed, and he has a song he sings to his team members once the concrete is ordered, saying that the concrete is on its way, which he sings until the concrete arrives. Mhlanga stressed that he works continually with his team and worked with them throughout that day. Under cross-examination Mhlanga denied he had left his team unattended on 10 October 2013 and pointed out that the site manager monitors the foremen on radio, and would have noticed if he was not with his team, and he would have been reprimanded for that. Mhlanga made the point that the Applicants were present when the concrete arrived at about 16h30, before the end of the shift, and he handled the crane when the concrete was poured into the first pillar at about 16h45. The first crew plumbed the first pillar. They knew the concrete had arrived and the pillars had to be completed.

[4.2.4] Mhlanga had to move a different crane into place before the concrete could be poured into the second pillar but after he had moved the crane and was ready to pour the concrete, which was around 17h00, he found that the shutter hands had left the site. As the pillars had to be completed immediately he could not afford to waste time chasing them and immediately sourced help from other teams to assist him complete the job, which they did. The shutter hands had left during the process, and without permission. They were not entitled to leave until the job was completed. Two members of his team, concrete hands, remained behind after 17h00 to pour concrete into the remaining pillars as instructed.

Applicant's evidence

[5] Three of the nine Applicants, Ofie Alfred Masango, Gedese Gquiso, and Isaac Dnyani Dlamini, who was also a shop steward, led evidence on behalf of the Applicants. Philane Mthembu, a shop steward, also testified.

[5.1] Masango testified that Mhlanga had not told the shutter hands that they were expected to work overtime that day, and as he had not seen Mhlanga from about 15h00, he left the site as usual with the other shutter hands at about 17h00 to catch the bus. Masango claimed he was not told that the concrete had arrived, nor had he seen the two trucks carrying concrete arrive. He explained that concrete was not always poured on the same day as the pillars were built. He said that in any event if Mhlanga needed him he could have sent him a text message, which he did not do.

[5.2] Gquiso said that the shutter hands were not told that the concrete was to be poured that day. He had not seen Mhlanga since about 15h00 and that he and the team left the site at 17h00. He admitted that he had seen the two concrete trucks arrive, but claimed that the concrete was for a different team. Gquiso admitted under cross-examination that Mhlanga, with the exception of that day, always told the team when the concrete was to arrive.

[5.3.1] Dlamini admitted that he had raised the employees' complaint about the use of a truck instead of a bus to transport employees who had worked overtime at the meeting on 4 October 2013 but explained that it was a general complaint, and not only that of the shutter hands. Dlamini denied that he had said at the meeting that the employees would leave the site early if their demands were not met in this respect.

[5.3.2] Dlamini complained that the disciplinary hearing continued even though the chairperson and management had been informed that he was not represented.

[5.4] Mthembu said he had represented all the Applicants, with the exception of Dlamini, at the disciplinary hearing. He corroborated Dlamini's evidence that the complaint set out at the meeting on 1 November 2013 was a concern of all the employees, and not that of only the Applicants.

Respondent's argument

[6.1] The Respondent argued that the Applicants had refused to work overtime, which was an act of gross insubordination, which could have led to financial loss, a delay in finalizing the project and penalties imposed by its client. One of the concrete pillars had had to be demolished and rebuilt. The Respondent argued that such misconduct, on a construction site, could lead to serious financial losses and destroyed the employment

relationship. It contended that in these circumstances the dismissal was procedurally unfair and the application be dismissed.

[6.2] Respondent submitted that it was plain from the minutes of the disciplinary hearing that the shop steward, Mthembu, had represented all the Applicants at the hearing. There had been no complaint at the time regarding representation. It argued that there were no laws that stipulated that a shop steward is entitled to be represented by a Union official. In the circumstances Mthembu, a senior shop steward, represented Dlamini and before the recommended sanction of dismissal was implemented the Respondent made attempts to contact the Union to discuss the issue. The Union refused to deal with the Respondent. The Respondent argued that in these circumstances the dismissal was procedurally fair.

Applicant's argument

[7.1] Mr. Khan submitted that the Applicants had been incorrectly charged for insubordination where dismissal was an appropriate sanction as opposed to poor time keeping, which was a less serious charge, and would not have resulted in dismissal. Mr. Khan argued that in these circumstances that the Respondent had not in terms of its own code applied progressive discipline, and that dismissal was not the fair sanction.

[7.2] In the event he argued that Mhlanga had not told the Applicants that they were expected to work overtime on 10 November 2013, and that dismissal in these circumstances, where the Applicant had not disobeyed an instruction, was substantively unfair.

[7.3] Mr. Khan submitted that in terms of the Code of Good Practice: Dismissals, the Respondent should have notified the Union that a shop steward was to be disciplined, prior to any action being taken, and that it should have allowed him to be represented by a union official. He argued that the dismissal was procedurally unfair because the Respondent had not complied with the Code of Good Practice: Dismissal.

[7.4] Mr. Khan asked that the Applicants be reinstated.

Motivation and analysis of evidence and argument

[8.1] I accepted the evidence of Jones and Mhlanga. The documentation supported Jones' evidence particularly relating to the procedural complaint as well as the threat made by Dlamini at the meeting on 1 October 2013. Both Jones and Mhlanga were credible witnesses, who gave their evidence well, in particular Mhlanga, who dealt with the incident on 10 October 2013. Their version was also supported by the following probabilities:

previously, they would "leave columns" if their complaint regarding transport was not dealt with. The Applicants indeed did this, contrary to Mhlanga's instruction that they were to work overtime, ten days later.

[8.1.2] The shutter hands must have been aware the concrete had arrived on 10 October 2013 as some of them participated in the plumbing of the first pillar, after the concrete was poured, before the end of the shift, at about 16h45.

[8.1.3] The concrete hands remained after the shift ended to pour the concrete. If they knew the concrete was there to be poured, the rest of the team must also have known.

[8.1.4] I accepted Mhlanga's evidence that he worked on site, with his employees, and told them that the concrete had been ordered and had arrived. It was not challenged that he drove the crane that day, when the concrete was poured into the first pillar, and that the first crew plumbed the first pillar before leaving. Mhlanga must have been present contrary to the Applicants' evidence that they had not seen him since mid afternoon.

[8.1.5] Gqutiso testified that Mhlanga, with the exception of 10 October 2013, always told the members of the team when the concrete was expected. It is not probable that on this one day that Mhlanga would have forgotten to tell the Applicants that the concrete was expected, and they were to work overtime.

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[8.2] I did not accept the evidence of the Applicants who testified that the Applicants had not been told that they were expected to work overtime that day. They were not credible witnesses. They were evasive, did not answer the questions, constantly repeating, to most questions asked, that they had not been told to work overtime. It seemed to me that they had been coached to repeat this. The probabilities as set out in paragraph 8 above did not support their version.

[8.3] I find that the Respondent has discharged the onus and established that the Applicants deliberately left the site contrary to the instructions given to them by Mhlanga. This was not a case of poor time keeping as suggested by Mr. Khan.

[8.4] In these circumstances I find that such misconduct destroys the employment relationship, and dismissal was the fair sanction. I accordingly find that the dismissal was substantively fair.

[8.5] A senior shop steward represented Dlamini at the hearing, and the minutes do not support his claim that he asked to be represented by a union official. In the event the Respondent made attempts to discuss the matter with the Union before implementing the sanction, and the Union refused. Dlamini's case was fully ventilated at the disciplinary hearing, with the other Applicants and he suffered no prejudice. In the circumstances I find that the dismissal was procedurally fair.

Award

[9] The application is dismissed.



Commissioner Bess Pillemer

