REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2865/08

In the matter between:

NATIONAL UNION OF MINEWORKERS	**Applicant**
OBO BOTSANE	
and	
TERENCE PARKINSON N.O	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
ANGLO PLATINUM MINES LTD	
(RUSTENBURG SECTION)	**Third Respondent**

Heard: 26 July 2012

Delivered: 18 October 2012

Summary: Review based on arbitrator misconstruing the charge and failing to determine the issues when he found applicant guilty of failure to comply with his statutory duties as resident engineer- award upheld.

JUDGMENT

BHOOLA J

Introduction

[1] This is an application for an order in terms of section 145 (2) of the Labour Relations Act[1] ("the Act"),reviewing and setting aside the award of the first respondent ("the arbitrator") dated 31 October 2008.

Background

[2] The applicant was appointed Resident Engineer at the third respondent's Brakspruitand Bleskopshafts from or about July 2006. This is a statutory appointment in terms of Regulation 2.13.1 to Schedule 4 of the Mine Health and Safety Act 29 of 1996, ("the MHSA") in terms of which he was *inter alia* responsible for ensuring that the two plants and all equipment complied with statutory safety requirements.

[3] Each underground level of the Brakspruit shaft (which had 24 levels) had a railway network with locomotives(colloquially known as locos)running on tracks and hauling trucks (hoppers). To avoid collisions underground,the third respondent implemented measures, known as the S & SD initiative, which involved the fitting of proximity devices to locomotives that would warn of other moving locomotives in the vicinity. A proximity device consists of a battery, a sensor, a transponder and a light which would set off an alarm when there is another locomotive within a distance of approximately 70 – 80 metres. This would allow the drivers to take precautionary measures to avoid collisions. The expected implementation date for the proximity devices was a hotly disputed issue in the proceedings.

[4] A fatal accident occurred at the Brakspruit shaft on 5 May 2007, resulting in the death of a miner, Mr A. Marrime, and an investigation was conducted by the Department of Minerals and Energy ("the DME enquiry") in terms of

[1] 66 of 1995.

section 65 of the Mine Health and Safety Act. The DME enquirywas held on 23 and 24 May 2007 and established, *inter alia*, that the two locomotives involved in the accident (SWB29 and JR1) had not been fitted with proximity devices.This was not found however to be the cause of the accident. The finding of the enquiry wasas follows: “Rustenburg Platinum’s Mining Standards: Issuing of Licences WG120-0015 (Exhibit M, page 1) clearly states that no person shall drive, operate or permit any person to operate Machinery, unless such persons are authorized. The fact that MrMothhae was not trained and not familiar with the new controller installed on locomotive SWB29, was the reason why the Locomotive SWB29 was put into motion before the train pulled by Locomotive JR1 had passed through the rail switch. From the inquiry it was also clear that the majority of locomotive operators on the mine was not tested and authorized according to the Code of Practice for Issuing Licences as *per* Mining Standard WG-120-0015 (Exhibit M, page 1). There was no key control system available at Brakspruit Shaft for Rail Bound Equipment as stated in Underground Tramming and Transport Procedure WG-320-0003(Exhibit M page 9 point 19)”. In citing regulations or codes that have apparently been contravened, the DME enquiry found that the two locos were not fitted with anti-collision devices as stated in the General Loco Safety Procedure of battery locos Regulations 320-0028. The evidence was that one of the locos had not been commissioned for use and did not have a proximity device and the other had been removed.

[5] On 17 May 2007, the applicant was charged with the following :

> ‘1.Gross negligence – in that you failed to comply with S and SD Initiative of the Company, relating to the safe operations of battery locomotives.
>
> 2. Dishonesty.’

[6] It is common cause that the charges were not related to the fatal accident and that the DME enquiry was only relevant to the charge of dishonesty. The applicant was found guilty on both charges and was dismissed. His dismissal was confirmed on appeal. He referred a dispute relating to the procedural and substantive unfairness of his dismissal to the second respondent.

Grounds of review

[7] The primary ground of review is that the arbitrator misconstrued the charge when he permitted evidence to be led on systems for monitoring compliance with the installation of the proximity devices.

[8] The supplementary affidavit sets out the following as the grounds of review :

8.1 ChristiaanSteynberg's evidence was irrelevant and was not put to the applicant in cross-examination;

8.2 Jan Hough's evidence was not supported by documentary evidence and was improbable but was accepted by the arbitrator as probable in preference to the evidence of the applicant;

8.3 The arbitrator refused to include inconsistency as a ground for attacking the substantive unfairness of the dismissal notwithstanding the evidence to this effect.

8.4 In permitting the third respondent to lead evidence on new issues, the applicant was cross-examined on issues that he had not canvassed with his legal representatives;

8.5 There is a reasonable apprehension of bias on the part of the arbitrator.

The evidence led at arbitration

[9] It is common cause that the applicant reported directly to the Production Manager and had an indirect reporting line to the Managing Engineer, Hough.It is further common cause that Hough had instructed him to make sure that the proximity devices were fitted to the locos according tothird respondent's standards.

[10] On 27 November 2006, Hough sent an email to the Mine Manager (Peter van Dorsten) and copied the applicant. The email contained a "Loco Proximity Implementation Plan" which indicated the proposed completion date for installation of the proximity devices as being end May 2007. This was based

on a proposed monthly installation schedule. The applicant’s evidence was that this was the only implementation plan of which he was aware, and that Hough’s version that the implementation date was in fact end January 2007 emerged for the first time during his disciplinary enquiry. Hough testified however that this was never an official implementation plan but had been prepared at a time when he was uncertain of the number of devices that could be obtained from the supplier, and when a larger consignment was received in December 2006, a new implementation plan reflecting 31 January 2007 as the completion datewas communicated verbally to the applicant and his team. Thereafter on numerous occasions the applicant was reminded to ensure compliance with this completion date.

[11] It is common cause that Hough asked the applicant in February 2007 about progress with installing the devices. The applicant indicated he was unsure but believed that there were five or six devices that still had to be installed. Thereafter, in an inspection in March 2007, Hough found locos on levels 14 and 15 without devices and instructed the applicant to ensure that they were fitted. Hough testified that at some stage the applicant informed him that all the devices had been installed by 11 March 2007. The applicant submits that this evidence could not have been correct as it contradicted Hough’s testimony in the disciplinary enquiry andJames Whitley, the chair of the disciplinary enquiry also understood this to be the case. In his statement to the disciplinary enquiry Hough had stated that the applicant ‘confirmed that the proximity units will be completed on 11 March 2007 at Brakspruit shaft’.He sent a report to the Mine Manager the following day in this regard and copied same to the applicant.

[12] It is common cause that Hough did not charge the applicant until after the accident which occurred on 5 May 2007. He also confirmed that as Resident Engineer the applicant was only required to continue with systems in place and was not required to invent new systems, but he was not sure what systems the applicant used to ensure compliance with the S & SD initiative. In his statement to the disciplinary enquiry, he stated that it was his opinion that the applicant ‘did not drive this process diligently, that he was grossly

negligent in executing his duties in this regard, after several instructions and that he supplied me with false information'.

[13] The applicant's evidence was that during February 2007, Hough telephoned him while he was in a meeting with the shaft engineer,GoitseChoabi, and his foreman. Hough asked him how many locos had been fitted with proximity devices, and in the presence of his subordinates the applicant relayed their feedback that all locomotives had been fitted. In cross-examination in the arbitration he confirmed that when he conducted an underground inspection with Hough on 14 and 15 levels in March 2007 they saw two locos without devices and Hough instructed him to make sure they were fitted. However, on 18 March 2007 he and Choabi conducted an inspection underground and again discovered two locomotives without devices. They instructed an artisan and his crew to immediately attend to the installation instead of doing their regular tasks. The applicant threatened to dismiss the shaft engineer if the situation ever recurred. In his statement to the disciplinary enquiry he stated that thereafter on subsequent inspections he checked all locos and established that all had fitted devices. He was sure that following the inspection on 18 March and after the two locos had been fitted, there was 100% compliance as far as the proximity devices were concerned. Thereafter on 13 April 2007,the applicant instructed the new foreman, Alfred Seetsi (who took over the mechanical responsibility of the locos from 10 April 2007) to check whether all locos had swivel chairs and Perspex windows installed. Although it was not his direct responsibility (it is the electrical foreman's function), the applicant asked him as a favour to confirm compliance with the proximity devices installation.On 14 April 2007,Seetsireported to him telephonically that there were six locos that were not compliant in terms of devices and the applicant asked him to establish which locos they were and on which levels they were operating. On the Monday thereafter,however,he could not locate Seetsiand was unable to verify the identity and location of the six locos because he doubted the veracity of Seetsi's report and he approached the electrical foreman (Van der Walt).The latter was adamant that all the locos had been fitted with devices and the applicant accepted hisversion. After the accident the applicant received reports that drivers had

removed the light fittings of the devices because the lights were too distracting, and had been using them as drinking cups. When questioned about his failure to take disciplinary steps he said he had insufficient information to do so.He only realised on the day of the fatal accident that the information provided by Seetsi had been correct and felt very remorseful to the extent that he informed his colleagues that he should have believed Seetsi. Hough would not have been aware as he was not present at the time.

<u>The arbitration award</u>

[14] The arbitrator's conclusion on substantive fairness is based on the inter-relationship between the applicant's managerial and legal or statutory duties. He found that although these could be examined separately they are not mutually exclusive. In regard to his management responsibilities he concluded that the applicant adopted an approach that was based on delegation and affording some degree of autonomy to his subordinate engineers and foremen. This, however, meant that he did not grasp the difference between delegation of duties and abdication of responsibilities, which in this case unfortunately had tragic consequences.

[15] In examining his statutory duties under section 7 of the MHSA, the arbitrator found that the statute makes no concession to management style nor does it provide any authority to delegate functions although this might be normal in day to day management. He had regard to the legal responsibilities that the appointment of the applicant carries with it and which are critical in ensuring that the third respondent meets its statutory obligations. These, he found, could under no circumstances be delegated. He cited regulation 2.13.1 in terms of which the applicant was appointed, which reads : 'At any mine or works where- (a)….., (b) any winding plant intended for conveying persons is installed, <u>all machinery shall, subject to Regulation 2.13.6.1 be under the general charge of an engineer who shall be appointed in writing by the manager</u>' (arbitrator's emphasis).

[16] In regard to the applicant's evidence that he relied upon the integrity and trust of his subordinates, the arbitrator noted that the appointment of a subordinate

engineer does not relieve the resident engineer appointed in terms of Regulation 2.13.1 of any personal responsibility.This justifies his conclusion that :

> 'Botsane was utterly wrong in confusing his statutory responsibilities with his managerial duties. Disregarding the evidence of the [third] respondent's witnesses for the moment, Botsane's admission that he did not know how many locos had to be fitted with devices and his apparent ignorance of the SAP system is almost incomprehensible'.

[17] The arbitrator thus made the following finding in regard to the applicant's failure to fulfil his responsibilities:

> '.. as professional engineer, with any understanding of his legal responsibilities, how could Botsane then, after being appraised of the importance and urgency of this critical safety feature, not determine for himself the number of locos needed (sic) be fitted, set a target date for their fitment, not devise a simple plan to plot progress, such as was devised, on the spot I might add, by Steynberg when given the same task?". Further, if he was aware that devices were being abused, why, with his legal responsibilities, did he not take any steps, personally, to ensure they were put right? To compound the gross negligence as charged he would have me believe that it was acceptable for him to merely abdicate his responsibilities by placing the onus on his subordinates to feed him the correct information, without his carrying out any spot checks either on the fitment of the proximity devices or ensuring the replacement of the damaged parts. I can only conclude that his whole inept and cavalier approach to both his management and legal responsibilities led, in no small part to the tragic consequences occurring later. Although he could not be deemed to shoulder all of the blame, it is only his actions, or lack of them I have been tasked with determining.'

<u>Submissions</u>

[18] Mr Hulley, advanced two principle submissions in support of the review:

18.1 The arbitrator misconstrued the charge and as a result committed a gross irregularity in the conduct of the proceedings.

18.2 The arbitrator simply accepted one versionover another without a process of reasoning and without actually weighing the evidence on a balance of probabilities.He in fact determined the dispute on the applicant's own version and accordingly failed toarbitrate the dispute, resulting in misconduct in the performance of his duties.

Misconstruingthe charge

[19] The applicant objected to evidence being led in regard to his lack of systems and controls to meet his statutory obligations as an engineer. The arbitrator dismissed the objection and explained his decision in his award as follows:'I reject any and all propositions that I should not take account of any evidence not adduced at Botsane's disciplinary hearing. It is now trite law that any arbitration conducted under the auspices of the CCMA is a hearing *de novo* and certainly not a mere re-hash of a disciplinary hearing. At company level, all participants are, almost without exception, laypersons, whereas in these proceedings, it is not at all unusual for parties to be legally represented. That being the case, one would obviously expect the evidence to be more extensive and more deeply probed. There is no restriction that I am aware of wherein a party is prohibited from introducing whatever evidence it feels necessary to assist with its case or on the number of witnesses sought to give evidence'.

[20] Mr Hulley submitted that the arbitrator misconstrued hisobjection. The issue was not whether evidence could be led which had not featured at the disciplinary enquiry, but whether the third respondent, having charged the applicant with negligence for failure to comply with the S & SD initiative, could lead evidence on a new issue related to the applicant's failure to develop systems for monitoring the installation of the proximity devices. He submitted that even the chairpersonof the disciplinary enquiry, Whitley, had excludedsystems from the enquiry.

[21] Mr Hulley confirmed that the objection was not that evidence not adduced at the disciplinary enquiry should not be admissible, but that the third respondent had been permitted to cross-examine the applicant on his alleged failure to

develop systems to monitor progress with the installation of the proximity devices without affording him the opportunity to prepare and without this having featured in the disciplinary enquiry. The applicant was prejudiced as a result. Therefore in dismissing the applicant's objection the arbitrator committed a gross irregularity, failed to apply his mind properly to the issues before him and in consequence arrived at a conclusion that no reasonable decision-maker could reach.

[22] Mr Hulleyfurther submitted that the arbitrator committed a gross irregularity in the conduct of the proceedings by failing to determine the charge of dishonesty. He found that it was unnecessary to deal with it in light of the fact that he had already found the applicant guilty of gross negligence and held that in any event he would not have found that the charge, even if proven, merited dismissal. Counsel submitted that this approach ignores the common cause facts recorded in the pre-arbitration minute that the charge of dishonesty related to the following:

> '2.8The charges related to the Applicant's alleged dishonesty and negligence in not ensuring that the proximity devices were fitted to all the locomotives at the Brakspruit shaft, and by giving false information to Mr Hough and at the enquiry convened by the Department of Minerals and Energy.
>
> 3.1 The respondent contends that the applicant was dishonest in the following respects:
>
> 3.1.1 In the last week of February 2007 the applicant informed the managing engineer, Mr Hough, that all the underground locos were fitted with proximity devices. In March 2007 the applicant and Mr Hough were underground and discovered two locos that were not fitted with proximity devices. The respondent contends that the information supplied to Mr Hough in February 2007 was accordingly false and the applicant thus dishonest'.

[23] The dishonesty issue, Mr Hulley submitted, further involved the 11 March 2007 deadline and the applicant's testimony to the DME enquiry. In this regard, the arbitrator recorded the evidence of Hough as follows: '[30] Questioned further on the dishonesty charge, Hough said that Botsane had been dishonest when he reported that all devices had been fitted by the 11th of

March when they clearly had not been. Only at the end of February had Botsane reported that there were 6 locos still to be fitted and, himself set the date of 11th March for completion. Only after Botsane had reported to him that the devices had all been fitted by the 11th of March had he submitted the tracking report with a covering memo on the following day, the 12th.'

[24] The dishonesty charge was therefore related to his alleged failure to comply with the S & SD standards and if there was no dishonesty it would follow as a consequence that there was no negligence in regard to the above issues. As I understand the submission, it is that if he was not dishonest in regard to the 11 March deadline then this evidence should similarly have been rejected as proof of negligence. Mr Hulley submitted therefore that if the arbitrator failed to determine the dishonesty charge he could not have found the applicant grossly negligent in regard to his failure to comply with the S & SD standards.

[25] I am however in agreement with the submission by Mr Yeo that in leading evidence on the lack of systems, the third respondent was not introducing a new charge or broadening the charge, but was adducing evidence in support of the charge of gross negligence. This is in essence the distinction between *factaprobanda* and *factaprobantia* – the former relates to the components of the charge and the latter to facts relevant to proving the charge. It was in any event put to the applicant in the disciplinary enquiry that he was grossly negligent *inter alia* for the reason that he did not ensure that all proximity warning devices were fitted <u>and</u>that he had no systems or controls in place to check compliance. Hough's evidence at the disciplinary enquiry was clearly that he was not sure what systems the applicant had in place to ensure compliance, and on the applicant's own version his system consisted purely of receiving verbal feedback from his subordinates. The applicant conceded that his legal responsibilities involved using systems.Hough also testified that he was not required to develop new systems but that he could have used the existing SAP asset register as a basis for identifying the locos and thentracking the installation of the devices. It is common cause that he failed to do so.

[26] Hough in fact cross-examined the applicant in the disciplinary enquiry on the lack of systems and although he indicated that he used a spread sheet this was never produced. The exchange is recorded as follows[2] :

> 'Question: What is your role and responsibility at Brakfontein?
>
> Answer:To ensure maintenance and safe operations. All applicable standards and instructions are implemented.
>
> Question:How?
>
> Answer:Systems (recording)
>
> Question:What recording system did you have in place?
>
> Answer:Spreadsheet.'

[27] In any event in regard to this issue,Mr Hulley submitted that it was apparent that the third respondent did not have any systems other than oral communication in place prior to the applicant being appointed and that prior to the accident Hough did not have any problem with such a system and in fact used this himself. This was therefore consistent with the way in which the third respondent operated. In this regard, it is noteworthy that the S & SD initiative consisted largely of oral instructions (except for the implementation plan), and on Hough's own version (although the applicant disputed this) he had conveyed the revised installation date to the applicant verbally.

[28] In my view,even if the arbitrator was incorrect in admitting the systems evidence, the applicant's admission that he had his suspicions about the information he received (at the very leastfrom Seetsi) but took no steps to verify itwhether by utilising existing systems or developing a new one or in fact personally investigating it urgently, is in itself definitive of his negligence. He conceded that his method of checking compliance was not effective and that he did not insist on a log indicating the status of the installation in respect of each loco. Moreover, even if the applicant is correct that Steynberg's evidence was not admissible, it was the applicant's own version that he relied

[2] Record of Disciplinary enquiry, page 79.

entirely on verbal communication. He also conceded that the fitment of devices was as important as the installation of all safety devices in all machines at the site, and that in addition to installing the devices he also had maintenance obligations. The applicant was therefore well aware of the third respondent's case at the disciplinary enquiry and this evidence should have made it clear that the lack of systems was an issue that was relevant to proving his negligence. The fact that Whitley testified that he did not investigate systems and controls at the disciplinary enquiry does not necessarily imply that this did not form part of the third respondent's case but simply reflects the approach he took to the charge. The applicant could have been under no misapprehension therefore that the charge included his failure to utilise any formalsystem, and that his reliance on verbal reports from his subordinates without verification was not sufficient given his substantial legal responsibilities. In this regard, the arbitrator in my view correctly, justifiably and reasonably accepted that his own evidence was conclusive proof of his guilt and this cannot be said to constitute a gross irregularity.

[29] The systems issue did not constitute a new charge or result in the introduction of new evidence and the applicant's contention that he was taken by surprise alternatively prejudiced by being cross-examined on this issue without having the opportunity to prepare is therefore without merit. This ground of review accordingly falls to be dismissed.

Managerialandstatutory responsibilities

[30] Mr Hulley submitted that in concluding that the applicant had confused his statutory responsibilities with his managerial duties and citing in detail all his statutory responsibilities, the arbitrator further misconstrued and expanded the charge. The applicant's statutory responsibilities did not form the basis of the charge as it was confined to non-compliance with the S & SD initiative. This related only to his managerial responsibilities in that the third respondent's case is that he failed to comply with the deadlines and ensure implementation of all the proximity devices as instructed by Hough.Steynberg testified after the applicant and his version was never put to the applicant, and secondly, the arbitrator's finding that the applicant "stuck to his guns" in relation to the

implementation date is not correct. Steynberg moreover referred to a period of two weeks not three and his evidence was largely based on untested assumptions. Mr Hulley submitted that the arbitrator committed a gross irregularity in accepting Steynberg's evidence in this regard.

[31] At the very least, Mr Hulley submitted, in order to reach the conclusionthat the overwhelming probabilities favour the view that the applicant was indeed guilty of gross negligence, the arbitrator would have had to determine the content of the S & SD initiative as well aswhat the applicant failed to do measured against what he was required to do. There was no documentary evidence before him on this aspect however, and he instead accepted the obscure evidence of Hough that the initiative encompassed both written and verbal components and entailed "a couple of technical solutions" to address safety concerns. In contrast, the applicant had never heard of the acronym "S & SD".Again, thearbitrator, he submitted, simply reached a conclusion but did not weigh the probabilities through a process of reasoning. He failed thus to perform the most basic duties of a commissioner and as such committed misconduct in the performance of his duties.

[32] In addition, Mr Hulley submitted thatthe finding that the applicant's conduct "smacks not only of sheer laxity but of any kind of the sense of urgency which the instructions from corporate management was intended to convey", has no evidentiary basis. Hough was the only witness led by the third respondent on the charge. He became aware on two occasions that the installation had not been completed but nevertheless took no disciplinary steps against the applicant. Instead he made the vague assertion that he intended to charge him at some point. The arbitrator however made no reference to this in the award. He simply presented a conclusion without any process of reasoning or explanation as to why he accepts one fact over another and accordingly failed to apply his mind to the matter.

[33] In regard to the contention that the arbitrator misconstrued the charge by conflating the applicant's managerial and legalduties and responsibilities, Mr Yeo submitted that the applicant's legal representative accepted at the commencement of the arbitration that the charges related to the interface

between the applicant's management and statutory duties. Moreover, it is common cause that he was appointed Resident Engineer in terms of Regulation 2.13.1 and that this was a senior legal appointment with a high level of responsibility and accountability. Indeed, it was his version that his duties were to ensure that machines were operating safely according to relevant standards and 'to put into place systems that ensure that the machines also run safely'. The full spectrum of his statutory duties featured throughout the disciplinary enquiry. It is clear that what the arbitrator did was to weigh the applicant's responsibilities in the context of his defence that he relied on reports given to him verbally by his subordinates with regard to the fitment of the devices and took no steps to independently verify the information.

[34] In any event,the applicant's own evidence was that despite knowing that the installation of the devices was a priority and being told on 16 April that there were still locos without devices, he failed to act with the requisite urgency. It is not surprising then that the arbitrator found him lacking in urgency. The arbitrator clearly adopted the correct approach in determining the charge in the context of his statutory accountability, and the applicant's submission in this regard must be rejected.The applicant's statutory obligations, as the arbitrator made clear, were an essential backdrop to proving that he was responsible for ensuring the fitment of the devices and failed to do so. In this context, it is immaterial whether he was entitled to rely on the later implementation date or whether he believed the information fed to him, the fact is that (as the arbitrator found in evaluating the evidence) his evidence in regard to the SAP system, his lack of knowledge of the S & SD initiative (or of the acronym only as submitted by his counsel), as well as his failure to determine independently how many locos were fitted are utterly incomprehensible given his substantial legal accountability. In fact, his evidence that he had consistently done nothing wrong in relying on verbal reports (for instance, he asked the electrical foreman 'over and over…I asked about 6 not fitted, I asked for recheck'[3]) and the odd spot check, could not

[3] Record of Disciplinary enquiry, page 80.

absolve him from responsibility for his failure to comply with both his statutory and management responsibilities. What is more serious is that although he indicated that he understood his responsibilities the evidence before the arbitrator indicated that at the very least he failed to appreciate the magnitude of the duties for which he was responsible, or even if he did he displayed a glaring nonchalancetowards compliance. To contend otherwise is to rely on a completely specious distinction between his management and statutory duties and cannot constitute a ground for review.

Failure to arbitrate the dispute

[35] Mr Hulley submitted that the arbitrator is required to weigh the evidence and determine on a balance of probabilities where the truth lies. This requires him toconsider the evidence of both parties but he instead accepted the version of one party without any explanation or reasoning. This constitutes a failure to perform his duty of arbitrating the dispute in that he simply found the applicant guilty on his own version. This failure is apparent from his conclusion that the applicant lacked any sense of urgency. Hough's evidence was that he was aware at least on two occasions that the installation had not been completed (when the applicant told him in February that there were about six locos outstanding, and in March 2007 when he and applicant went underground and discovered two locos that were not fitted with devices). He however took no steps to charge the applicant, but said he intended to charge him with misconduct at a later stage. This is not mentioned by the arbitrator at all. Mr Hulley submitted that it was improbable that if the expected completion date was January, Hough would not take action against the applicant for failure to comply but simply continued making enquiries about progress. Furthermore, the conclusion that the applicant's conduct as " a professional engineer" was relevant ignores the common cause fact that he was not required to attend to the installation of the devices himself but to ensure that they were implemented, and this is recorded in the pre-arbitration minute as common cause.[4] The arbitrator however avoided the issue completely and fails to

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[4] Paragraph 2.9 states : "These proximity devices had to be fitted and installed by the mine's electricians. The electricians reported to the foremen, who reported in turn, to the shaft engineer who, in turn, reported to the applicant".

provide any evidentiary basis or reasoning to indicate how he arrived at this conclusion. The finding that the applicant had an ‘inept and cavalier approach’ is similarly devoid of an evidentiary basis in that it was common cause that he was not responsible for the accident and that it had been caused by another employee circumventing the S & SD initiatives.

[36] Although he conceded that the dispute as to the implementation date was not material, Mr Hulley submitted that it was relevant to the probabilities in that Hough’s evidence was not supported by documentary evidence but the arbitrator nevertheless accepted his testimony that the revised date of 31 January 2007 had been verbally communicated to the applicant. Even though the applicant produced the implementation plan to support his version the arbitrator nevertheless accepted Hough’s version.He submitted that, in the context of a charge relating to the failure to implement the S & SD initiative, and if the arbitrator accepted that, on Hough’s version, it was part of the corporate culture that verbal communication was acceptable, then he had to likewise accept the applicant’s version that he did nothing wrong in relying on verbal feedback on the installation process from his staff. On the contrary however, he seemed to accept that it was permissible for Hough to operate in this manner but not the applicant. Thus, Mr Hulley submitted, one of the principal arguments of the applicant is that the arbitrator did not explain why he accepted one fact over another. He simply presented a conclusion without undertaking any process of reasoning or weighing the evidence on the probabilities.

[37] Mr Yeo submitted that it was the applicant’s own evidence that during early January he was not satisfied with progress with the fitment of the devices and placed the shaft engineer and foremen on nightshift in order to accelerate progress. He also confirmed that he told Hough in February that there might be five or six devices not fitted. Therefore on the probabilities Hough’s version was correctly accepted by the arbitratorand therewas sufficient evidence which confirmed Hough’s version of the implementation date as being 31 January 2007. Hough’s version that 50 devices were received for the 45 locos they had at the shaft and “hence it was communicated that we need to

expedite this and have it finished by 31 January 2007", was not disputed. At the end of February, when he was informed that there were five or six outstanding, Hough again instructed the applicant to make sure it was finished because 'we were already past our cut-off date for the installation which was 31 January'. The arbitrator therefore cannot be said to have committed misconduct in accepting that Hough's version of the date being brought forward was more probable.In any event, the applicant informed him on 11 March that the installation of devices was completedor would be completed and meant that on his own version he could not have been working towards a May completion date. If that was the case he would have had no need to fast track the process. In any event, Mr Yeo submitted, the implementation date is irrelevant given the admission by the applicant that he had advised Hough in February and again in March that all devices had been fitted. Although this has no probative value in relation to the dishonesty charge it is nevertheless proof that he failed to comply with his own deadlines. This ground of review can similarly not be sustained.

Analysis

[38] As Mr Hulley submitted, the thrust of the applicant's case is that it is obvious from his process of reasoning in the award that the arbitrator missed the point. This invokes the test for what the Labour Appeal Court in *Herholdt v Nedbank Ltd,*[5]referred to as the dialectical or process-related test of unreasonableness (which focuses on the logical path by which the decision-maker arrived at his or her decision) and which has since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[6]become accepted in contrast to the substantive or results-based reasonableness test (which considers whether the outcome reached by the arbitrator is one which a reasonable decision-maker could reach). Mr Hulley however submitted that the applicant was seeking to rely on the "traditional test" on review by which I understand him to rely not on a process-related defect but that the outcome was unreasonable.

[5]Unreported judgment of the Labour Appeal Court under Case No. DA20/2010 dated 4 May 2012 at paras 33 – 41.

[6](2007) 28 ILJ 2405 (CC) at paras 109 – 110.

In other words, as a result of the failure to determine the issues before him the arbitrator committed misconduct in the performance of his duties thereby resulting in an award that is not one that could be reached by a reasonable decision-maker. In this context,Mr Hulleysubmitted that the arbitrator simply reached a conclusion unsupported by any obvious process of reasoning in regard to the probabilities. In other words, he failed to determine, through a process of reasoning, where the probabilities lie, or to indicate which facts he accepted and rejected on a balance of probabilities, and this demonstrates that he failed to perform his basic duty which is to determine the dispute.Irrespective of whether one applies the outcome or process-based test however, in my view on either test the grounds for review have not been established. As set out above the arbitrator may have expanded the ambit of his decision-making by incorporating the statutory responsibilities of the applicant, but this does not render the outcome unreasonable nor is there a demonstrated failure to in the process either by failing to apply his mind to the material facts or to misconstrue the charge or to fail to determine the probabilities.Although his use of language was unfortunately harsh, the arbitrator properly determined the dispute and cannot be said to have made a decision that could not be made by a reasonable arbitrator on the evidence before him.

[42] The inescapable fact is that the evidence before the arbitrator established that the applicant as the resident engineer had statutory obligations for safety of the plant and machinery. In other words, he was the legally responsible person and it is clear from his evidence that he understood this responsibility. He owed a higher duty in terms of the MHSA and the arbitrator correctly and justifiably understood the charge in this context. It is moreover not correct that he found the applicant guilty of not complying with all his statutory responsibilities.On the applicant’s own version he doubted the veracity of the information he was being given by his subordinates and was very concerned. Yet on his own admission, he did very little to remedy the situation. He did not employ independent verification methods but simply arranged for another employee to act as a spy and keep him informed. When he received information that six locos did not have devices, a full three weeks before the

accident, he spoke to the shaft foreman and, despite the seriousness of the information he had been presented with, simply chose to believe him when he hotly disputed that his staff had not completed the installation. This cannot by any stretch of the imagination be said to absolve him from a charge of gross negligence.He in fact chose not to use the existing SAP system or develop his own system for monitoring fitment of the devices. By contrast,Steynberg was able to immediately develop a system for identifying which locos still had no devices. Even if one disregards the unproven content of the S & SD initiatives, it is at least common cause that itrequired the installation of proximity devices and it is in this context that the arbitrator found his conduct lacking. Furthermore, in the context of the evidence before the arbitrator that the applicant did not properly inform Hough of the situation and led him to believe the devices had all been fitted, his failure to act urgently flies in the face of his concession that safety was of paramount concern. He conceded that the devices were available in December and the best he knew was how many had been fitted but could not say to which locos or on which levels. In fact the fullest extent of his knowledge was that they had been installed "here and there". Steynberg's testimony that all the locos could have been fitted on a Sunday or an evening shift was moreover not challenged.Finally it was not acceptable for the applicant to absolve himself from responsibility by saying that it was not his personal responsibility to install the devices as he was ultimately accountable as Resident Engineer.One cannot however help but feel sympathetic towards the applicant in that he was obviously not the only person responsible for the failures and that some responsibility must attach to the apparently *laissez faire* culture of management that prevailed. However, this does not absolve him of what is the responsibility ultimately to ensure that the lives of employees are safeguarded and that safety standards are adhered to. He was required to take personal responsibility for this and in the circumstances dismally failed to do so. It is also unfortunate that Hough reminded him of his commitment to install the devices on a number of occasions without taking disciplinary steps, and it is doubtful whether he in fact would have disciplined him had the accident not happened. Thus the arbitrator found, reasonably and justifiably and with due regard to the evidence presented, that the applicant was personally accountable.For these reasons the review is without merit and falls to be dismissed. There are no reasons why in the interests of law and fairness costs should not follow the cause.

Order

[43] Therefore, I make the following order:

The application is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: G I Hulley

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