



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2392/10

In the matter between:

RUSTENBURG PLATINUM MINES

LIMITED (AMANDEBULT SECTION)

Applicant

and

NCUMANI, ZC

First Respondent

RAMOTSHELA, N.O

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 03 October 2012

Delivered: 26 October 2012

Summary: Review application- Failure by the Commissioner to apply his mind to the evidence.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number LP3977-07 dated 9 August 2010. In terms of that arbitration award, the Commissioner found the dismissal of the first respondent, Mr Ncumani (the employee) to have been substantively unfair and for that reason ordered that he be reinstated.

Background facts

- [2] The employee who was employed as a loco team supervisor was charged with gross negligence and for “allowing his people to work substandard.” The employee together with Mr Thihe employed as team loco supervisors. The applicant operates a number of locomotives underground to transport amongst other materials ore and explosives. As supervisors they were responsible for supervising the transportation of ore and the other explosives. However, on those days that one of them was absent from work, the one present becomes responsible for supervising both the transportation of ore and explosives. In relation to supervising, the transportation of explosives the supervisor was responsible for walking behind locomotive and the hoppers with a red stop light and a pea whistle. The reason for walking behind the locomotive and hoppers was to prevent accidents from occurring with other transportation of employees.
- [3] On the day of the incident, Mr Thihe was absent from work and therefore the employee was responsible for supervising the transportation of both ore and explosives. The employee was accused of failing to supervise the transportation of the explosives on the day in question. The explosives were transported by Ms Mmebe, the locomotive driver and Mr Sebolayi, the locomotive guard.
- [4] The two of them claimed that on the day of the incident they were instructed by the employee to transport explosives. Ms Mmebe stated that she did not realise whilst driving the locomotive that the employee was not accompanying

them as required by the rule. She says she only became aware of this fact when she was alerted by Mr Van Rooyen and Mr Bukle.

- [5] It was further alleged that Mr Van Rooyen confronted the employee about the incident and he (the employee) admitted that he had made a mistake and apologised for allowing the transportation of the explosives on that day without ensuring compliance with the rule.
- [6] The employee was charged with gross negligence and “allowing his people to work substandard.” The employee was found guilty as charged and was given a final written warning. The employee being unhappy with the outcome of the disciplinary hearing lodged an appeal against the written warning. The chairperson of the appeal after hearing evidence reversed the sanction of the written warning and directed that the employee should be dismissed.
- [7] The employee did not accept his dismissal and accordingly challenged it for unfairness. At the arbitration hearing, the employee denied having issued both the driver and locomotive guard instruction to transport the explosives on the day in question.

The arbitration award

- [8] The Commissioner in his arbitration award seems to have accepted the contention of the applicant that when one of the supervisors was absent the other takes the responsibility of supervising both the transportation of the ore and the explosives. The Commissioner further accepted that the employee was the only supervisor present on the day in question. This did not however, according to the Commissioner in itself render the employee liable for the incident of transporting the explosives without following the proper procedures.
- [9] The Commissioner found the employee not to have been guilty of the offence for two reasons. In this respect, the Commissioner reasoned that at the time the driver commenced the transportation of the explosives, the employee was attending to other tasks at some other area where ore comes out and secondly that the driver and his crew were supposed to have called him when

the explosives arrived. The Commissioner further accepted the version of the employee that at the time the explosives arrived he was far from the area where they arrived at and could therefore not have been aware that they had arrived.

- [10] It was on the basis of the above reasoning that the Commissioner found the dismissal of the employee to have been unfair and accordingly ordered that he be reinstated and be compensated in the amount equivalent to 38 months calculated at the salary he received at the time of his dismissal.

Grounds for review

- [11] In challenging the arbitration award, the applicant raised several grounds of review. The essence of criticism of the arbitration award is that the Commissioner committed gross irregularity in the manner he dealt with the evidence and the facts which were presented before him. The other aspect of the challenge relates to the alleged unreasonableness of the conclusion reached by the Commissioner.

Evaluation

- [12] It is common cause that the explosives had to be escorted by a supervisor whenever they had to be transported from one point to the next. The first respondent therefore had a rule relating to the transportation of explosive its underlying objective being safety. The reasonableness of the rule was not challenged. There seem to have been some debate initially as to whether the first respondent was responsible to supervise the transportation of explosives on the day in question. It was however, accepted that in the absence of the other supervisor he was responsible for the supervision of the explosives on that day.
- [13] The factual issue which the Commissioner was confronted with, arising from the defence of the employee was whether he (the employee) was present at the time the explosives were transported and that he did not give the crew the instruction to transport the explosives. The key defence of the employee is that he was not aware that the crew was transporting the explosives and by

implication that is the reason he never supervised or escorted the explosive on the day in question.

- [14] The Commissioner accepted the version of the employee that at the time of the transportation of the explosives he was not aware as he was busy at another section. The applicant contends that the decision of the arbitrator is reviewable because he failed to take into account the evidence of the driver of the locomotive and the safety representative. For the reasons set out below I agree with the contention of the applicant that arbitration award of the Commissioner is reviewable.
- [15] It is important to note that the arbitration hearing commenced with the applicant leading its witnesses. In that context, it was incumbent on the representative of the first respondent not only to challenge the version of the applicants witnesses in cross examination but also put the version of the first respondent to those witnesses in order for them to respond thereto. In this respect the first respondent's representative did not put the version that the first respondent would in his testimony deny having given them instruction to transport the explosives. The first respondent denied having given the crew the instruction to transport the explosives in his evidence in chief. In law, the version of Ms Mabana remains in this context unchallenged. This being the fundamental aspect of the case and in particular the defence of the first respondent, the Commissioner ought to have taken this into account when assessing the evidence which was before him.
- [16] The other aspect which the Commissioner failed to consider is that the version of Ms Mabana was confirmed in certain respect by the testimony of the safety officer, whose version was also never challenged by the first respondent. The safety representative testified that when he saw the first respondent at the battery bay he enquired from him as to where the explosives were being transported to. He further testified that the first respondent simply told him that they were transporting the explosives. On this basis, it follows from the defence that he was not there when the crew was delivering the explosives and that he did not give them instructions to transport the explosives ought to have been rejected.

[17] In the circumstances, I am satisfied that the applicant has made out a case warranting interference with the arbitration award by this court. I do not however, believe that it would be fair to allow the costs to follow the results.

Order

[18] In the premises, the following order is made:

- 18.1 The arbitration award made under case LP3977-07 dated 9 August 2010 is reviewed and set aside.
- 18.2 The arbitration award is substituted with an order to the effect that the dismissal of the first respondent (applicant in the arbitration proceedings) was substantively fair including the sanction.
- 18.3 There is no order as to costs.

MOLAHLEHI, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: L Louw of Edward Nathan Sonnenbergs

For the Respondent: No appearance

LABOUR COURT