



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, Johannesburg

JUDGMENT

Reportable

Case no. JR2068/09

In the matter between:

SOUTHGOLD EXPLORATION

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

THAMSANQA NKAMBULE NO

Second Respondent

SAMUEL MANQUTHU

Third Respondent

Heard: 14 December 2011

Delivered: 06 February 2012

Summary: -Review application- arbitrator misdirected himself- failed to apply his mind to the evidence before him- award set aside- dismissal of the third respondent substantively and procedurally fair.

JUDGMENT

MOTHIBI AJ

Introduction

- [1] This is an application to review and set aside the arbitration award made by the Second Respondent (“the Arbitrator”) under case no. GAJB6292/09. In terms of the arbitration award, the Arbitrator found the dismissal of the Third Respondent (“the Respondent”) to have been substantively and procedurally unfair and made an order reinstating the Respondent retrospectively and further ordering that he be paid an amount equivalent to four months of his remuneration as at the time of his dismissal as back pay. The total amount comes to R115 271.68 (4 x R28 817.92).

Background facts

- [2] The Respondent was employed by the Applicant on 3 November 2008 as a Production Shift Boss. His appointment was subject to a probationary period of 90 days. The 90 day period ran from the date of his employment, being 3 November 2008.
- [3] His employment carried a formal appointment in terms of the Mine Health and Safety Act, 29 of 1996 (“the MHSA”), particularly schedule 4 thereof.
- [4] He was responsible to the Applicant's Line Manager. He was, amongst other things, responsible for production at the mine in respect of the section to which he was assigned, but more importantly and germane to this matter, the health and safety of subordinates. His responsibility on health and safety included ensuring that persons working under his supervision and control conducted their work in a safe manner. In addition he was to regularly inspect working hours in his section to ensure that production done was conducted in a safe manner and in accordance with the provisions of the MHSA.
- [5] On or about 2 January 2009, two of the Applicant's employees who were working underground and in the Respondent's section were injured when rocks came loose in an underground unsupported area.

- [6] Following an investigation, the Respondent was issued with a notice to attend a disciplinary enquiry. He was charged with:

‘Negligence or failure to exercise proper care with regards to the manner of discharge of your duties in that on 2/01/2009 you instructed and allowed your subordinates to work in an unsupported area and also to make use of LHD bucket to lift them up which resulted in 2 employees being injured and the safety of other employees being at risk’.

- [7] Pursuant to a disciplinary enquiry which took place on 19 – 22 January 2009, he was found guilty and dismissed. An appeal hearing was held on 24 February 2009 which upheld the finding of guilt and sanction of dismissal.

- [8] He referred a dispute to the CCMA.

Arbitration proceeding

- [9] The arbitration proceedings took place on 1 June 2009 at which the Applicant was represented by its Employee Relations Manager. The Respondent was represented by a legal practitioner. Both procedural and substantive fairness was disputed by the Applicant as set out in the parties’ pre-arbitration minute. Bundles of documents were exchanged with an agreement that both sets of documents were what they purported to be.
- [10] The Applicant called two witnesses, one being Mr PJ Stok (“Stok”) who was employed as the Applicant’s Superintendent at the time. Stok’s evidence revolved around the investigation that he conducted after the incident that caused injuries to the two employees referred to above.
- [11] The second witness was the Applicant’s Employee Relations Manager who presented evidence to rebut the allegation that the Respondent’s dismissal was procedurally unfair.
- [12] The Respondent testified on his own behalf and did not call any additional witnesses.

Arbitration Award

- [13] Pursuant to the above arbitration proceedings the Arbitrator found that the dismissal of the Respondent by the Applicant was procedural and substantively unfair.
- [14] It is this award that is the subject matter of this judgement.
- [15] The grounds of review articulated in the Applicant's papers are that the Arbitrator ignored, misconstrued or failed to apply his mind to the evidence which was placed before him during the arbitration proceedings in finding the Respondent's dismissal was substantively and procedurally unfair. It is further contended that he ignored the evidence produced in respect of the charges that were levelled against the respondent at the arbitration proceedings and, consequently, that his award is unjustifiable in relation to the reasons given.
- [16] As appears hereunder I agree entirely with the Applicant.
- [17] It is my conclusion, for the reasons set out in this judgment, that the award stands to be reviewed and set aside because and as more fully explained below the Arbitrator ignored, misconstrued or failed to apply his mind to the evidence placed before him. I find that he misdirected himself in the manner that he conducted the arbitration proceedings particularly around the issue of probation, which was not an issue which he was called upon to decide. When the issue came up he was not entitled to stop the proceedings midway and attempt to influence the parties to settle the matter, going so far as to advise them that should the matter not be settled then he was likely to find against the Applicant. I make this finding having regard to the fact that neither the First Respondent nor the Arbitrator made use of their right to file affidavits disputing what are serious allegations against the arbitrator as articulated in the Applicant's founding affidavit particularly paragraphs 11.3 to 11.7 of the Applicant's founding affidavit. Rather than filing a comprehensive affidavit denying these allegations, the First and Second Respondents simply filed a notice advising the Court that it would abide by the Court's ruling. The

Respondent on the other hand, was not helpful. He simply made a bold denial of the allegations without dealing with them in any comprehensive manner.

[18] Indeed I am inclined to accept the Applicant's version as contained in the aforementioned paragraphs and of its founding affidavit that the Second Respondent had formed a biased view against the Applicant from the outset of the proceedings based on his unreasonable and unjustified views relating to the probation clause found in the Respondent's contract of employment.

[19] I pause here to mention that the offending probation clause, if it is such, provides that the Respondent's employment was subject to a 90 days probationary period commencing 3 November 2008. The probationary period would accordingly have come to an end on or about 4 February 2009. The incident which led to his dismissal occurred during his probationary period. This however is not germane to this matter. Health and Safety in the mining section is of paramount importance given the inherent risk that is the mining occupation. The Respondent had the requisite qualifications and experience to have known this – he knew it. Any failure by him to ensure that his subordinates work in a safe environment is serious enough, on these facts to warrant dismissal. This is irrespective of the probation clause.

[20] On this basis alone, the award must be set aside. The Arbitrator misconducted himself.

[21] The manner in which the Arbitrator dealt with the probationary issue and as recorded in his arbitration award is a further indication that he failed to grasp the issues before him by misconstruing or failing to apply his mind to the evidence on probation when he finds in the award that, and here I refer to paragraph 6.14 of the award:

'On balance of probabilities there were omission with regard to the Applicant's probation, however this was not the matter before me but a secondary point raised to indicate whether dismissal was fair or unfair.'

- [22] If probation was not a matter before him as he finds, why then does he mention it! The Applicant points out that the Arbitrator fails to record any grounds or facts on which he comes to the conclusion that there was an omission with regard to the dismissed employee's probation. What omission is he referring to? Nothing further is said to shed light to the reader of the arbitration award what further grounds, if any, the Arbitrator took into account to come to the finding that the Respondent's dismissal was substantively unfair.
- [23] A further reason why the award should be set aside relates to the manner in which the arbitrator assessed the evidence before him when he came to his conclusion. It will be remembered that the evidence before the Arbitrator was in the form of oral evidence from both the Applicant's and Respondent's witnesses as well as documentary evidence.
- [24] The issue before the Arbitrator, put simply, related to whether the Respondent was negligent or failed to exercise proper care with regard to the discharge of his duties. Did he on 2 January 2009 (during his probation) instruct or allow his subordinates to work in an unsupported area? Did he also instruct and allow them to make use of an LHD bucket to lift them up which instructions resulted in two of the Applicant's employees being injured and the safety of other employees being compromised?
- [25] A careful reading of the arbitration record filed detailing what occurred at the arbitration proceedings reveals the following answers to the above questions:
- 25.1 An accident happened on 2 January 2009 underground when two of the Respondent's subordinates were injured whilst working underground. It is common cause from the record that I have read that the area where they worked was unsupported. It was further common cause that they were not, in terms of the Mine Health and Safety Act (MHSA) and the Applicant's internal safety procedures supposed to have worked in the area where the accident happened without such area being supported. The Respondent did not dispute that the area was not supported.

25.2 The Respondent attempted during the proceedings to suggest that he was not in the vicinity of the area where the accident happened alternatively that he did not issue the instruction further alternatively that if he issued the instruction his subordinates could and should have ignored him.

[26] I do not intend to burden this judgement with the litany of contradictions in the Respondent's testimony during the arbitration proceedings suffice to find that it is clear from the record that he was an unreliable, evasive and misleading witness. His testimony, compared to that of the Applicant's witnesses could not be accepted and should not have been accepted. I reject it.

[27] To edify my finding it is clear from a statement which was signed by the Respondent during an investigation undertaken by the Applicant's Mr Stok, which preceded his disciplinary hearing that he was in the vicinity of the area where the accident happened. He confirms that he was there saying in his statement that: "after marking the marks on the face, Antonio came back to take a twinie and pull towards the face". He continues in his statement to describe what happened up until the accident which injured his two subordinates. It is clear he was there. It is clear that he witnessed, even assuming that he did not give the instruction, employees working underground in an area which was unsupported. He did not stop them. He allowed them to work. He clearly failed to exercise his duties and responsibilities as production shift boss and in accordance with his formal appointment in terms of the MHSA, particularly schedule 4 thereof, by allowing his subordinates to work in an unsupported area. This can not be disputed. It is clear from the record and from the Respondent's own statement.

[28] During argument in Court, Counsel for the Respondent pivoted her argument on the basis that Stok's evidence ought to be rejected *in toto* because he was not there when the accident happened. I do not accept this. It is clear from the statement of the Respondent which was submitted during the arbitration and not disputed that the Respondent was there. The Respondent himself says so. The Respondent furthermore confirms that the statement submitted during the

arbitration proceedings correctly reflects his version. That should have been the end of the matter. The statement incriminates him and there is no suggestion by him during the arbitration proceedings that the statement was not made freely and voluntarily.

[29] Based on all foregoing, I come to the finding that the arbitration award is hereby reviewed and set aside because the Arbitrator misdirected himself. Furthermore, the arbitration award stands to be set aside for the reason that the Arbitrator ignored evidence which was placed before him in the form of the Respondent's own statement. He further failed to apply his mind on the issues before him and ignored the evidence placed before him. His finding that the dismissal was substantively unfair is hereby set aside.

[30] I also set aside his finding that the Respondent's dismissal was procedurally unfair on a similar basis. The only allegation of procedural unfairness related to the Respondent's allegation that he was not given copies of the disciplinary hearing minutes prior to the appeal hearing. It is however common cause that he never asked for these minutes prior to his appeal hearing. In any event, I do not see why a failure to give him minutes of the hearing at which he was present constitutes a procedural irregularity. I accordingly find that the Arbitrator's award is one that a reasonable Commissioner would not have made in the circumstances and is unjustifiable in relation to the reasons he provided.

[31] In the circumstances, an order in the following terms is made;

31.1 The arbitration award issued by the Second Respondent under the auspices of the First Respondent under case number GAJB6292/09 and dated 10 June 2009 is hereby reviewed and set aside.

31.2 The Arbitrator's award is substituted with an order that the dismissal of the Third Respondent was substantively and procedurally fair.

31.3 There is no order as to costs.

J Mothibi AJ

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT: Mr Johan Olivier of Brink Cohen Le Roux

FOR THE THIRD RESPONDENT: Adv Este Wessels instructed by Du Randt
Du Toit Pelser Attorneys

LABOUR COURT