



Not Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D547/2011

In the matter between:

RICHARDS BAY COAL TERMINAL

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

SONJA KILLEN N. O.

Second Respondent

SIYABONGA TICHMAN MSWELI

Third Respondent

Heard: 13 August 2013

Delivered: October 2013

Summary: Application to review and set aside arbitration award. Application dismissed.

JUDGMENT

GUSH J

- [1] The applicant in this matter applies to review and set aside the award of the second respondent in which award the second respondent held that the applicant's dismissal of third respondent was substantively unfair and ordered the applicant to reinstate the third respondent.
- [2] As its name suggests the applicant carries on business in Richards Bay as an export terminal for coal.
- [3] The third respondent's dismissal followed a disciplinary enquiry that commenced on 2 August 2010 and continued on 16 August 2010. The

allegations of misconduct that formed the subject of the disciplinary enquiry were that the fourth respondent was guilty of sabotage and insubordination. The fourth respondent was found guilty of the misconduct and dismissed. The fourth respondent appealed against his dismissal which appeal was unsuccessful.

[4] The background to the circumstances leading to the charges of misconduct is as follows:

- a. The third respondent commenced employment with the applicant in October 2000 and, at the time of his dismissal on 31 August 2010, was employed by the applicant as a shift millwright earning approximately R27,027 per month.
- b. On 12 July 2010, the trade union to which the third respondent belonged commenced industrial action over a dispute involving wages.
- c. Despite this, the third respondent reported for duty and "clocked in" at 05H52:40 on 12 July 2010. The third respondent was to have worked a 12 hour shift commencing 06H00 to 16H00.
- d. The evidence established that employees reporting for duty were required to "swipe their card" when entering the shift millwright office. This procedure records the times when an employee enters the office. There was no requirement to similarly "swipe a card" when leaving the office.
- e. The third respondent was observed leaving the shift millwright office by his colleague, Koekemoer, carrying cable cutters at approximately 06H00. ("I can't say exact time, 2 minutes to or a minute after 6, I can't say exactly."¹) Koekemoer was adamant that he was unable to recall the exact time. In his evidence, Koekemoer explained that he had observed the third respondent carrying a pair of cable cutters and that cable cutters were kept in the shift millwright office for the purposes of cutting cables.

¹ Record page 39 line 16.

- f. At 06H02, the applicant's control systems recorded a fault, which later transpired to have originated from a cable having been cut and a "thumb pin" having been pushed into a cable.
- g. Due to the ongoing industrial action on the 12 July 2010, the third respondent left the applicant's premises at 10H00.
- h. At 17H12 on 12 July 2010, the third respondent SMS'ed his section manager, Derek Du Pavillon, with the following request:

'Sir sorry the SMS. Honestly I do want 2 work that the problem is that I can't work day shift as I will be seen as a rat and you know things can turn bad. If I can work nightshift that could help. You know I love my work. Thankx. (sic)'
- i. Du Pavillon replied as follows at 17H23:

'Hi siya. I understand where u are coming from but unfortunately it is too late for that as u left site today during your shift. Nothing can be done about it now except try and come to work as u should. Cheers Dereck. (sic)'
- j. The third respondent reported for night duty on 12 July 2010.
- k. The applicant after having investigated the incident involving the damage to the cable and the SMS's presented at the third respondent with a "Disciplinary Level 2 Enquiry – Notification To Employee" in which notification the third respondent was advised that the purpose of the enquiry was "to hear the following charges against you: sabotage of RBC equipment and insubordination".
- l. The charge of insubordination was based on the third respondent's actions in reporting for night duty disregarding the SMS from Du Pavillon that stated "try and come to work as u should".
- m. At the disciplinary enquiry the third respondent, on the charge of sabotage, denied that he had anything to do with the cutting of the cable and that he had left the shift millwright office with the cable cutters in order to break open the lock on his locker as he had misplaced his keys.

n. Following the disciplinary enquiry in respect of these allegations respondent was found guilty of both counts of misconduct and dismissed.

[5] The third respondent dissatisfied with his dismissal referred a dispute to the first respondent concerning his dismissal and after an unsuccessful attempt at conciliation the dispute was referred to arbitration. The arbitration commenced on 22 February 2011 and was finalised on 17 May 2011. The second respondent's arbitration award was handed down on 3 June 2011 wherein the second respondent came to the following conclusion:

'The dismissal of the [third respondent], Mr S R Msweli, was substantively unfair.

The [applicant], Richards Bay Coal Terminal, is ordered to reinstate the [respondent], Mr S R Msweli, in his previous position as shift millwright on conditions no less favourable than those that governed his employment at the time of his dismissal.'

[6] It is this award that the applicant seeks to review and set aside and that the award be substituted with a ruling that the dismissal was procedurally and substantively fair; or if the dismissal is found to be substantively unfair that the third respondent be awarded compensation and not reinstatement; or that the award be set aside and be referred back to the first respondent to be heard *de novo*.

[7] At the outset, it was necessary to deal with the issues related to condonation for the late filing of various pleadings. The first issue related to the applicant's late filing of its supplementary founding affidavit, the second issue related to the third respondent's late filing of his answering affidavit. It is clear that both the applicant and the third respondent failed to diligently comply with the time limits provided for the rules of this Court and ultimately applied for condonation for the late filing of the pleadings. I am satisfied in the circumstances that in both instances condonation should be and is granted.

[8] The record of the arbitration proceedings including evidence relating to polygraph testing. The applicant indicated that it did not intend relying on nor referring to the polygraph test as any basis or ground for reviewing the award.

- [9] In her award, the second respondent correctly points out that she was required to determine whether the third respondent's dismissal was substantively and procedurally fair and that the applicant bore the *onus* of proving this on a balance of probabilities.
- [10] As far as procedural issues were concerned second respondent concluded that the applicant had complied with the basic requirements of fairness and that from a procedural point of view the third respondent had been treated fairly
- [11] In approaching the issue of substantive fairness, the second respondent correctly sets out (with reference to appropriate case law) the test applicable to the burden of proof in dismissal matters and particularly where a party relies on circumstantial evidence.
- [12] In this regard, the second respondent records that the applicant relied on the evidence of Koekemoer and Du Pavillon who:
- a. saw the third respondent leaving the shift millwright office carrying a pair of cable cutters;
 - b. that the witness Koekemoer could not say exactly what time the third respondent left the office. (The record of Koekemoer's evidence reveals that when dealing with the time the third respondent left the office he said the following: "I can't say exactly what time"² and later under cross examination: "exact time, I can't say exact time, 2 minutes to or a minute after 6, I can't say exactly."³)
 - c. confirmed that the cable had been cut at 06h02 as the system had recorded the break in the cable at this time;
 - d. saw the third respondent returning to the office at 06H06;
 - e. that it took seven minutes to get to and from the shift millwright office and scene of the "sabotage";

² Record page 27 line 25.

³ Record page 39 line 16.

- f. that the cable cutter was later found in the office with strands of fibre attached to it but that no evidence was led that it was the same fibre that formed part of the cable that had been cut; and
- g. that as the third respondent was a member of the union that had embarked on strike he had the motive to sabotage the applicant by cutting the cable. There was no mention of the third respondent having pushed the thumb tack into the cable or that he had been responsible for this as well.

[13] The third respondent gave evidence at the arbitration and called witnesses. The third respondent denied having sabotaged the cable and explained that he had left the Millwright office after 06h00 with the cutters intending to cut open his locker.

[14] The second respondent in her analysis of the evidence on the charge of sabotage expresses the view that she could not find that the third respondent's explanation regarding his possession of the cable cutter was not reasonably possible and that there was no basis upon which she could simply reject it.

[15] As for the applicant's evidence, she said the following:

'I am not "convinced that the [applicant's] evidence is strong enough to find that it is more probable than not that it was the [third respondent] who cut the cable on the day in question. I say this because there is too much doubt.'⁴

[16] On the charge of insubordination, the second respondent, unsurprisingly given the facts and the evidence, concluded "on the evidence before me I cannot find that the [third respondent] disobeyed an instruction"⁵

[17] the applicant's grounds of review are essentially that the second respondent:

- a. misdirected herself by her failure to resolve the factual disputes, thereby committing a gross irregularity;
- b. failed to apply her mind to the real issues before her and to the material evidence

⁴ Award Pleadings page 47.

⁵ Award Pleadings page 47.

- c. failed to take account of the overall circumstances, the material evidence placed before her; and took into account irrelevant partly speculative evidence in arriving at a decision; and
- d. came to a decision that is "not a justifiable decision that a reasonable decision maker would have made, particularly in the light of the totality of evidence presented by the company together with the conclusions to be drawn there from."⁶

[18] There is, however, nothing in the second respondent's award to suggest that she failed to take into account the evidence presented at the arbitration or the "overall circumstances" let alone that she misdirected herself or committed a gross irregularity.

[19] From the record, it is clear that the applicant was unable to adduce any direct evidence that the third respondent was in fact guilty of the sabotage.

[20] The third respondent offered what the second respondent referred to as explanation that was reasonably possibly true in response to his possession of the cable cutters. Aside from this all the applicant offered regarding the third respondents guilt was that because the third respondent was a member of the trade union that had embarked on industrial action this was the motive for the sabotage. The applicant led no evidence to substantiate the conclusion that it was the third respondent that had resorted to sabotage. This must be seen in the light of the fact that the third respondent had continued on duty until 10h00 that day and had reported for night shift that evening, that incidently had led to the insubordination charge

[21] There was no evidence to suggest that the industrial action was accompanied by any other acts of sabotage or any untoward behaviour at all. In the absence of any direct evidence, it was incumbent upon the applicant to adduce sufficient circumstantial evidence to justify the conclusion that the only inference to drawn was that the third respondent was guilty of cutting the cable.

[22] The second respondent, in her award, set out in detail the evidence adduced at the arbitration and a lucid analysis thereof. There is no doubt that the

⁶ Pleadings page 32.

applicant was relying on circumstantial evidence to establish the third respondent's guilt and I am not persuaded that the second respondent's handling of this evidence was in any way irregular or constituted misconduct.

[23] Not only is it clear that the second respondent committed no misconduct nor gross irregularity in relation to her duties in the conduct of the arbitration but her conclusion that the applicant did not discharged the *onus* is reasonable taking into account the evidence adduced at the arbitration.

[24] The applicant's founding affidavit and argument suggest that the applicant is appealing against the decision of the second respondent as opposed to reviewing it, despite couching it grounds of appeal in the nomenclature of a review.

[25] Not only is the second respondent's conclusion that the applicant failed to establish on a balance of probabilities that the third respondent was guilty of sabotage a decision entirely justified by the evidence, the second respondent's award is most certainly one that a reasonable decision-maker could arrive at considering the material placed before her. The award satisfies in all respects the test laid out by the Constitutional Court and referred to the judgment in the SCA in the matter of *Edcon v Pillemer* viz.

'Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.'⁷

[26] As far as the charge of insubordination is concerned, the applicant sought to persuade the court that the conclusion reached by the second respondent that by reporting for duty on nightshift despite the statement by the third respondent's supervisor that he should "try and come to work as u should" was a reviewable irregularity or a decision which a reasonable decision-maker could not come. There can be no doubt that not only was the second respondent correct in reaching this conclusion but that it was justifiable and most definitely a reasonable conclusion.

⁷ *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA) p 2650 para 15.

[27] In the circumstances, I am not persuaded that the award of the second respondent is reviewable. Both parties argued that costs should follow the result.

[28] In the circumstances, I make the following order:

The applicant's application is dismissed with costs

D H Gush
Judge

APPEARANCES

FOR THE APPLICANT:

O Mooki

Instructed by Cowan Harper Attorneys

FOR THE FIRST RESPONDENT:

C A Nel

Instructed by Kloppers Inc