



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case no.:JR1812/12

In the matter between:

NUM obo MODLANE, VINCENT

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER LAZARUS MATLALA N.O

Second Respondent

SHAFT SINKERS (PTY) LTD

Third Respondent

Heard: 9 January 2014

JUDGMENT

WILKEN, AJ

Introduction

- [1] The Applicant seeks to review and set aside the arbitration award made by the Second Respondent (“the Commissioner”) dated 31 June 2012 in Case No.MWRB1275-12 in which the Commissioner held that the dismissal of Vincent Modlane (“the Employee”) was both procedurally and substantively fair. The Employee clarified the relief he sought in the Heads of Argument filed on his behalf. The Employee seeks his reinstatement. The essence of the Employee’s challenger is the sanction imposed by the Commissioner was unreasonable.

Condonation

- [2] The Third Respondent (“the Company”) opposes the review. The Company sought condonation for the late service and filing of its answering affidavit. Whilst the Applicant did not file any papers opposing the condonation, it was advanced from the Bar at the hearing of this matter that it sought to oppose the condonation sought by the Company.
- [3] The opposition by the Applicant to the condonation application is peculiar having regard to the apparent acquiescence by it to the Company filing its answering affidavit late. An apparent agreement to the Company filing its answering affidavit late is recorded in correspondence between the parties and is contained in the founding affidavit in the application seeking condonation.
- [4] Dealing with the condonation of the late filing of the answering affidavit, the well-known principles in dealing with an application such as the present applies¹, viz.:
- 4.1 the degree of the delay;
 - 4.2 the explanation for the delay;
 - 4.3 the prospects of success; and

¹ *Melane v Santam Insurance Co. Ltd* 1962(4) SA 531 AD and *National Union of Mineworkers and Council for Mineral Technology* [1999] 3BLLR 209 (LAC).

4.4 the importance of the case.

- [5] In exercising its discretion to grant condonation, the Court must have regard to all the facts and circumstances advanced in addressing the basis upon which condonation is sought.
- [6] In the present matter, the answering affidavit is filed approximately 3 ½ months late in circumstances where the Company's official charged with the responsibility of whether the review should be opposed or not, was medically incapacitated, and the Applicant had, on the papers before the Court, not objected to the late filing of the answering affidavit. In the circumstances whilst the delay is not insignificant, the explanation for the delay is plausible and considering the Applicant's acquiescence, had caused the Applicant no prejudice.
- [7] Given that the only challenge to the Commissioner's decision was that the sanction imposed was too harsh, and having regard to the test to be applied in matters of this nature, i.e. that the Commissioner's decision would only be upset by a review Court if his decision was one no reasonable Commissioner could come to, the Company had *prima facie* prospects of success. For these reasons I am of the view that the application for condonation should be granted.

Background

- [8] The Employee was employed by the Company in terms of a limited duration contract as a construction assistant with effect 3 June 2010. The Employee was promoted to the station of crane driver on or about the commencement of 2012 and received 3 months' training in this regard.
- [9] On 14 March 2012, the Employee was required to operate his crane underground. It is common cause that this was the first instance the Employee was required to operate a crane underground. Early on in the shift the Employee travelled up an incline and when negotiating a turn to take up position at a ramp, he engaged the crane in neutral resulting in the

crane running back and colliding with a conveyor belt. It is common cause that the damage to both the crane and the conveyor belt was negligible, and that nobody was injured in the incident.

- [10] The incident was witnessed by Quinton Chuter (“Chuter”), the Respondent’s contract engineer and Gerhardus Meyer (“Meyer”), the shift foreman. Both Chuter and Meyer proceeded to the scene of the incident and observed that the Employee was not wearing his seat belt, did not have his licence to operate the crane with him. Whilst evidence was led to the effect that the Employee had not completed an inspection report at the commencement of his shift. The Employee was charged at the disciplinary enquiry and was brought under the sub-category of inappropriate/irresponsible/unacceptable behaviour in that he performed a gross unsafe act or caused a gross, unsafe condition. For the purpose of the review nothing therefore turns on this issue as this was not advanced as a reason for imposing a dismissal.

- [11] The Company’s disciplinary code provides guidelines to sanctions to be imposed in respect of proven misconduct. It differentiates between the performing of a gross unsafe act, causing a gross unsafe condition or performing an unsafe act or causing an unsafe condition. For the former misconduct attracted the sanction of dismissal in the first instance which the latter does not. In other words, the conduct attracts dismissal if it is so found to be gross, but if not, dismissal is not the recommended sanction at the first instance.

- [12] The disciplinary code similarly differentiates between gross negligence, the first in the guideline sanction act of gross negligence attracting the sanction of dismissal but the first infraction in respect of negligence not.

- [13] Finally, the guideline sanction document describes a gross unsafe act as ‘an act with the potential to result in/or has led to actual loss of life or serious loss of/damage to property or loss of production. The same principle applies to gross negligence’

Arbitration proceedings

- [14] It was common cause that the Employee had engaged the crane in neutral whilst negotiating the turn to enter the area at the ramp, and that the incident occurred on the first occasion the Employee drove the crane underground.
- [15] Chuter was clear and could not be moved under cross-examination that the Employee did not show him a copy of his crane operator's licence. Chuter testified that when he reached the Employee he was still seated in the crane and not wearing his seat belt. He did however, concede that it took him at least two minutes to get to the scene of the incident after it had happened. He concluded that the Employee had not worn a safety belt by virtue of him observing the safety belt behind the Employee's seat. Meyer gave similar evidence, but had been on the scene earlier and he testified that the Employee would have had to exit the crane to position the seatbelt behind the seat.
- [16] Whilst the Employee had pleaded guilty at the disciplinary hearing to the complaint and the sub-elements thereto, he challenged the complaints relating to him not having worn his safety belt and not having carried his operating licence. The Commissioner's finding of the Employee's guilt in this regard was not challenged on review. On the evidence led at the arbitration proceedings I am satisfied that the Employee had not carried his crane operator's license nor had worn his safety belt at the time of the incident.
- [17] The chairman of the disciplinary hearing, Johannes Coetzee Engelbrecht ("Engelbrecht"), approached the issue of sanction on the basis that the Employee was guilty of an act of gross misconduct. Whilst Engelbrecht conceded that the first offence for gross misconduct (causing a gross unsafe condition / performing a gross unsafe act) does not necessarily result in dismissal on the first instance he believed dismissal was justified in the first instance given the circumstances of the case. He contended

that progressive discipline would be inappropriate given the seriousness of the Employee's conduct had in permitting the crane from rolling back given his training. He contended that had any person been in the immediate vicinity of this incident, such person was likely to have sustained serious injuries. It is apparent from Engelbrecht's testimony that the determining factor in imposing a dismissal was the action of the Employee in engaging the crane in neutral, in circumstances where he had received extensive training in operating the crane and given the conditions which prevailed underground. It is apparent from Engelbrecht's evidence that little score was placed in him coming to the decision of dismissal in the Employee not having his licence on him, not wearing his safety belt.

- [18] Engelbrecht further continued that safety was not negotiable and he did not believe any further training or counselling would assist the Employee, some had already received extensive training Engelbrecht testified that he did not want to take the risk of sending someone underground who could cause a similar unsafe condition as that might result in loss of life or serious injury. Engelbrecht gave extensive evidence on both the employer and Employee's obligations under the Mine Health and Safety Act 29 of 1996 ("MHSA"), and the zero tolerance approach adopted by both the Company and its principal, Lonmin, to any failure to comply with safety measures all of which was not challenged by the Employee.
- [19] The Company's third witness was Gerhardus Meyer, the general foreman who testified that he witnessed the entire incident as he was at an elevated level when the incident occurred.
- [20] It is apparent from Meyer's description of the incident that what occurred was that the Employee made a negotiation error when he approached the landing which would have required him to reverse and when attempting to the reverse accidentally engaged the gear in neutral causing the crane to roll back. Whether that action constituted negligence or gross negligence is open for debate but the Employee pleaded guilty to gross negligence. However, since this was never challenged, I must accept that it is evident

that the conduct by Employee constituted an act of gross misconduct.

Arbitration award

[21] The Commissioner concluded that the Employee's conduct of not applying the brakes of the crane when he attempted to correct his error in approaching the ramp, when he might have done so constituted an act of gross misconduct and that such act contravened an important health and safety standard in the operating of the crane. The Commissioner further concluded that on the evidence the Employee had received intensive training on how to operate the crane, that the Applicant was aware of the standard he was required to operate the crane at, as well as the rule that he ought to operate the crane in a safe manner. The Commissioner further viewed the particular circumstances under which the act of gross misconduct occurred, viz., that it related to underground mining activities, and the emphasis placed on safe mining operations as factors justifying the imposition of a sanction of dismissal.

Grounds of review

[22] In the Employee's founding affidavit and supplementary affidavit, it contended that the Commissioner's decision stood to be reviewed as the Commissioner's decision concerning sanction was an unreasonable decision, and/or amounted to a gross irregularity as he ignored material evidence or failed to apply his mind in relation to the sanction imposed given that:

22.1 it was the first time the Employee had operated the crane underground;

22.2 there were no injuries;

22.3 relatively minor damage was suffered to plant and machine;

22.4 the sanction imposed was not in accordance with the Company's sanction guideline;and

22.5 there was no evidence led in relation to the issue of destruction of trust.

[23] At the hearing of this matter the Employee did not persist with the argument that the sanction imposed was not in accordance with the Company's guideline sanction. Counsel made much of the fact that no evidence was led that the trust relationship had been destroyed and most significantly, that the Employee was permitted to continue operating the crane after the incident on the day in question.

[24] Whilst it was common cause that:

24.1 the Employee had pleaded guilty to the complaint of gross negligence/alternatively committing a gross unsafe act, and

24.2 the guideline sanction in the Company's disciplinary code permitted dismissal for a first offence;

24.3 it was the first occasion the Employee had operated the crane underground;

24.4 no injuries ensued as a result of the incident; and

24.5 the damages to plant and machinery was minor,

[25] There was a dispute whether the Employee was permitted to operate the crane after the incident on the first day of the incident.

[26] The Employee did not challenge the evidence of witness Meyer that he was immediately removed from the underground operations after the incident, and similarly the Company did not challenge the Employee's evidence in chief that he was permitted to operate the crane after the incident on the day in question.

[27] It is trite that where there are two irreconcilable versions the Court is required to decide which version to accept. In doing so, the Court has to

embark upon an enquiry into the credibility of various facts and witnesses, their reliability and the probabilities. Given the approach adopted by the Company in relation to the seriousness of the incident, and the extensive evidence led by witness Engelbrecht in this regard, which was by and large unchallenged, viz. that the Company had adopted a zero tolerance approach to safety issues, the probabilities favours the Company's case that the Employee was not permitted to operate the crane after the incident.

- [28] The test to be applied whether the Commissioner's decision ought to be set aside and reviewed is well known ²:

'Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?'

and has recently been clarified by the Supreme Court of Appeal³ as well as the Labour Appeal Court⁴.

- [29] In the Herholdt case, paragraph 25 the Court held that:

'In summary the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds of Section 145(2)(a) of the LRA ... the arbitrator must have misconceived the nature of enquiry or arrived at an unreasonable result... Material errors of fact, as well as a weight and relevant to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

- [30] In the Goldfields case, paragraph 14, with similar sentiments being expressed at paragraph 18, the Labour Appeal Court held that:

'...This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

³ *Herholdt v Nedbank Ltd* 2013 (34) ILJ 2795 (SCA).

⁴ *Goldfields Mining SA (Pty) Ltd v CCMA and Others* (JA2/2012) [2013] ZALAC 28 (04/11/2013).

proceedings, and/or excess powers will not lead automatically to a setting aside of the award if any of the above grounds are going to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings but extends to whether the result was unreasonable or put another way, whether the decision that the arbitrator arrived at is one that falls in the band of decisions to which a reasonable decision maker could come on the available material'.

- [31] What the Employee seeks to do in the current review is to upset the Commissioner's decision on sanction only. To be successful the Employee must demonstrate that the decision reached by the Commissioner is one that does not fall within the band of reasonableness. Whilst the decision by the Commissioner may not have been one this Court would have taken, it cannot be said that the decision taken is so unreasonable that it is one no other reasonable Commissioner could have made, given the extensive evidence led by the Company on the premium placed on safe mining operations and the approach adopted by it as well as the client for whom it was conducting mining operations. In the circumstances the Employee has not demonstrated that the Commissioner committed a reviewable act.
- [32] The Company argued that costs followed the event. No special circumstances to be taken into consideration was raised by the Company other than the Company had been put to the expense of defending the review proceedings. The test to apply in the Labour Court when considering the issue of costs is to have regard to the considerations of law and fairness. The Court must take into consideration factors such as the financial position of the parties, the *bona fides* of the parties in bringing and defending the case, whether there is a continued relationship between the parties, and the effect a cost order would have in discouraging parties to have their disputes heard in Court. Given the continuing relationship between the union and the Company, and the fact that the Employee did not pursue his case on a *mala fides* basis, having conceded he was guilty

of the infraction but contesting only the fairness of the sanction imposed, I am of the view that there are no special grounds to award costs to either party.

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

1. the application for review is dismissed;
2. the Third Respondent's late filing of its answering statement is condoned;
3. there is no order as to costs.

Wilken, AJ.

Acting Judge of the Labour of South Africa

23 January 2014

APPEARANCES:

FOR THE APPLICANT: Mr Terrance Baloyi of Mothobi Attorneys

FOR THE RESPONDENT: Ms Seherisa Rajah of Webber Wentzel Attorneys