



Not Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1603/2012

In the matter between:

CINQPLAST PLASTOP a member of

THE ASTRAPAK GROUP

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER FAIZEL MOOI

Second Respondent

ICAWU obo MAGAU

Third Respondent

Heard: 17 April 2014

Delivered: 29 May 2014

Summary: Review.

JUDGMENT

GUSH J

[1] In this matter, the applicant applies to review and set aside the second respondent's award reinstating the third respondent alternatively that the award be set aside and the matter be referred back to the first respondent for it to be arbitrated *de novo*.

[2] The third respondent was employed by the applicant as a production foreman and had commenced his employment on 1 November 2008. The third respondent had previously been employed by the applicant but had been dismissed during 2003 and re-employed in 2008.

[3] The third respondent was dismissed on 24 July 2012 and at the time of his dismissal, he was earning R31,199.47 per month. The applicant dismissed the third respondent following a disciplinary enquiry which enquiry the third respondent was accused of:

'Gross insubordination and/or seriousness disrespect in that:

You failed to start-up machine PE 8 after it was handed over to you at 11H00
15 June 2011

You failed to start-up machine PE 13 after being instructed to do so which came to the attention of management on or about 15 June 2011'¹

[4] The notification to attend the disciplinary enquiry also referred to "COMPLAINANT'S STATEMENT ATTACHED". The statement read as follows:

'Vivian Magau failed to start-up machine PE 8 after the machine was handed over by maintenance at 11 AM on 15 June 2011.

An instruction was also issued to start-up machine PE 13 but this was also not done.

In addition

Vivian referred to me as a "cunt". He followed one of our ... Managers after being suspended and he said that he will bring me down.'²

¹ Record page 18.

- [5] It is unclear from the record whether the purpose of this attachment was to provide the third respondent with some background to the charges of misconduct or to supplement/add to the charges of misconduct.
- [6] The third respondent dissatisfied with his dismissal referred a dispute to the first respondent who in turn appointed the second respondent to arbitrate the dispute.
- [7] The applicant called a number of witnesses during the arbitration:
- a. The applicant's first witness was Carlton Khoza the chair of the disciplinary enquiry. He explained that he had imposed the sanction of dismissal as he had found the third respondent guilty of gross insubordination and "because it was clear the [third respondent] had no intention to cooperate with the company because eight machines had to stop for a shift. I couldn't find a reason why the [the third respondent] elected to act in that manner."³
 - b. The second witness was François Roberts: His evidence was that he is the applicant operations manager and the third respondent is a section foreman. "In June 2011 a machine was standing" due to a mechanical problem. A mechanic had been instructed to fix the machine and hand it over to the third respondent. He believed that machine had been handed over at 10H00 and he had asked the third respondent to start the machine. When he returned at 12H00 machine was "still standing" and he approached the third respondent and asked him why.

The third respondent had shrugged his shoulders and Roberts said that he, the third respondent, as the foreman should know why machine was not running. He gave evidence that the third respondent had put his hand on his shoulders and had said "Luister my maat". Roberts said he then told the third respondent to "pack his stuff", took him HR where he was suspended.

² Record page 19.

³ Record page 106.

When Roberts returned the plant a foreman by the name of Danie had reported to him that the third respondent had said "that cunt want to know why it takes so long to start the machine".⁴

As far as Roberts evidence was concerned, with regard to the allegations of misconduct the record reflects that the charge relating to the use of the word "cunt" was introduced to the disciplinary enquiry "to show arrogance" presumably on the part of the third respondent.⁵

What is abundantly clear is that Roberts was told that the third respondent had used this phrase but had not heard it himself. As far as the insubordination was concerned, Roberts explained that he regarded the third respondent actions as having been insubordinate in that he had delayed complying with the instruction. During re-examination, Roberts sought to qualify this by averring that he regarded the third respondent as having disobeyed an instruction which he thought constituted insubordination.⁶

- c. The third witness was Stefan Rautenbach. Rautenbach gave evidence that machine number eight under achieved the relation to its target on 13 June 2011 and that he thought the third respondent was responsible for operating the machine on that day. On 14 June 2011, the same machine again under achieved and the foreman was the third respondent; on 14 June 2011 machine number 13 did not start up on the day shift and production Foreman who was responsible for starting the machine was the third respondent.⁷ During re-examination it transpired that Rautenbach was not the production manager at the time of the incident.
- d. The second respondent's fourth witness was Danie Van Schalkwyk. The record filed by the applicant, however, reflects that this evidence was given by Stefan Rautenbach. This is clearly an error. Van

⁴ Record pages 108-110.

⁵ Record page 117.

⁶ Record pages 117-118.

⁷ Record pages 122-1130.

Schalkwyk's evidence was that on 15 June 2011, it was assisting Russell Stephens in starting up a machine. He was approached by the third respondent who asked for "sponge tape". He proceeded to look for tape in his toolbox and whilst looking for the tape, the third respondent had said to him "did you hear what that cunt says I'm taking too long with the machine". Because Roberts had "was up-and-down the whole day on the floor I know he gave instruction to start with machines number eight, they were both busy on it, he was talking to Vivian on that machine so he gave an instruction so I think he referred to as Francois". This, Van Schalkwyk, said took place "early in the morning between 10 and 11".⁸

- e. The fifth witness was Jannie Huysamen. Huysamen's⁹ evidence was confined to a description of the machine number 13 but was unable to explain what had happened to that machine on the day in question.
- f. The sixth witness was Shepherd Chifamba. Chifamba was the residence further who had effected repairs on machine number PE 8 of 15 June 2011. He had completed the repairs and had approached the third respondent "some time past 10 quarter past 10. I am not sure exactly of the minutes but it was past 10".¹⁰
- g. The applicant's seventh witness was Russell Stephens. Stevens employed by the applicant as a machine setter. On 15 June 2011, he was in the process of repairing machine number 20 when the third respondent approached him and asked for "sponge tape". Although his evidence was that he had heard the word "cunt" he was unable to explain in what context it had been used.
- h. The applicant's last witness was Eric Mukhocho. The extent of Mukhocho's evidence was that on the day in question machines PE 8 and PE 6 were not working and that he had encountered the third respondent on his way to machine PE 12 before 12H00.

⁸ Record page138.

⁹ Record pages 164-171.

¹⁰ Record page 193.

- [8] Conspicuous by its absence is any reference whatsoever in the evidence adduced by the applicant during the arbitration regarding the seriousness of the alleged misconduct or any justification for the applicant having concluded that the employment relationship had been irretrievably broken down. Likewise there was no evidence that the use of the word "cunt" in the manner that the applicant suggested it was used constituted dismissible misconduct. Having regard to the evidence of Roberts, it is clear that the reason he caused the third respondent to be suspended was that the third respondent had the temerity to put his hand on his shoulder and say "Luister my maat". Despite this, however, it must be emphasised that this issue did not constitute an element of the misconduct of which the third respondent was accused, either in the formal "notification to attend a disciplinary hearing" or in the "complainant's statement".
- [9] This being the evidence and material placed before the second respondent, the second respondent in his award, after having summarised and analysed the evidence of the witnesses, proceeded to deal with the issue of substantive fairness, and in particular insubordination and/or serious disrespect.
- [10] Dealing with the aspect of the charge relating to the alleged "serious disrespect", the second respondent found that the applicant had firstly not proved that the third respondent had referred to Roberts when using the phrase "cunt", and in any event the applicant had not been charged with this misconduct. This latter conclusion is supported by the Robert's evidence in particular where he confirmed this.
- [11] As far as the issue of insubordination was concerned, the second respondent, unsurprisingly, concluded that:

'Insubordination, gross or otherwise, has not been demonstrated in respect to machine PE eight on the 15 June 2011 for a number of reasons.'¹¹

¹¹ Award record page 102.

[12] The second respondent sets out those reasons in some detail in his award. His reasons are directly and logically connected to the evidence the applicant elected to adduce at the arbitration.

[13] Is important to apply to the second respondent's award the test on review as recently dealt with in *Herholdt v Nedbank Ltd*¹² a decision of the Supreme Court of Appeal and by the Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd v CCMA and Others*.¹³

[14] In the *Herholdt* matter, the SCA said the following:

‘... the [SCA] enunciated an unreasonableness test ... namely, whether the award was one that a reasonable decision-maker could not reach. That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. ... the reasoning of the arbitrator assumes less importance ... The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.’¹⁴

[15] In the *Goldfields Mining* case, the Labour Appeal Court in considering the application of the *Sidumo* test in applying the provisions of section 145 of the Labour Relations Act held the following:

‘... The constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excessive powers will not lead automatically to a setting aside of the award of any of the above grounds are found 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

¹² [2013] 11 BLLR 1074 (SCA).

¹³ [2014] 1 BLLR 20 (LAC).

¹⁴ At paragraph 12.

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 a band of decisions to which a reasonable decision maker could come on the available material.¹⁵

- [16] In this matter, it cannot be said that the applicant has established in any way whatsoever that the second respondent's award falls foul of the provisions of section 145 of the Labour Relations Act. Likewise it is abundantly clear from the evidence adduced and material placed before the second respondent that his decision is without doubt one that a reasonable decision-maker could come to.
- [17] The second respondent concluded that the applicant's dismissal of the third respondent was substantively unfair. The applicant bore the *onus* of establishing not only that the third respondent was guilty of misconduct but guilty of the misconduct with which he was charged. The evidence adduced by the applicant falls short of discharging this *onus*. In addition to the *onus* of establishing that the third respondent was guilty of misconduct, it was incumbent upon the applicant to establish that the misconduct warranted dismissal. In the absence of any evidence to this effect the applicant's decision to dismiss has not been proved to be fair.
- [18] As far as costs are concerned, there is no reason in law or fairness why costs should not follow the result.
- [19] In the circumstances and for the reasons set out above, I make the following order:

The applicant's application is dismissed with costs.

¹⁵ At paragraph [14] pages 24 – 25.

D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:

J du Randt DPP Attorneys.

FOR THE FIRST RESPONDENT:

M Letoka CHSM Inc. Attorneys