



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2724/12

In the matter between:

NUMSA

First Applicant

J B MASHABA

Second Applicant

And

DHELIWE MAVUMA N.O

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

RUSTENBURG BASE METAL REFINERY

Third Respondent

Heard: 19 November 2014

Delivered: 31 July 2015

Summary: A commissioner's failure to deal with the substantial merits of a dispute renders his or her arbitration award reviewable.

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award of the first respondent who I will refer to as the commissioner in this judgement. It is opposed by the third respondent. A number of material facts in this matter are common cause. They are that the second applicant was employed by the third respondent as a boiler operator in 2001. Cleaning boilers formed part of his responsibilities. It is common cause that the inside of a boiler constitutes a confined space in terms of mining legislation and the third respondent's rules. On 17 February 2012, the second applicant was given instructions to clean boiler number seven ("the boiler"). He refused leading the third respondent to prefer the following charge against him:

'Refusal to perform a lawful work (sic) and to obey instructions given by the supervisor without reasonable cause'.

He was subjected to a disciplinary enquiry the chairperson of which found him guilty of the charge and dismissed him. Aggrieved by his dismissal, he referred an unfair dismissal dispute with the assistance of the first applicant to the second respondent, who I will refer to as the CCMA in this judgement. The dispute was arbitrated by the commissioner who found his dismissal both substantively and procedurally fair. In this application the applicants challenge the reasonableness of the commissioner's arbitration award.

- [2] Giving reasons for her decision the commissioner took into account that after the second applicant had been instructed a number of times to clean the boiler he demanded several training courses before he could carry out the instruction. He however, failed to present evidence that additional training was required for him to carry out the instruction. She found that the validity of the risk assessment was not disputed. She noted that the risk assessment reflected that the use of a rope and harness was not necessary and that fire was not a hazard. Part of the evidence which influenced the commissioner's decision was that the second applicant failed to show that he should have been part of the risk assessment. He failed to prove that the occupational hygienist was required to sign on the day the task should have been carried out. The second

applicant admitted that the boiler did not have fire or smoke risks. He did not dispute that had he carried the instruction out, he would have been assisted on how to use the oxygen analyser. When the instruction was issued another employee was already cleaning the boiler without using a rope or safety harness, conduct which the commissioner construed to indicate that the use of a rope and harness were not necessary for the second applicant to carry out the instructions. She concluded that the second applicant raised all sorts of excuses to avoid carrying out the instruction which did not warrant him attending additional training. The commissioner dismissed the applicants' defence of inconsistency owing to lack of evidence. She found that the third respondent had discharged the onus of proving both the substantive and procedural fairness of the second applicant's dismissal.

- [3] The applicants submitted that the award stands to be reviewed and set aside on the grounds that the commissioner committed a gross irregularity in the manner in which she conducted the arbitration as she failed to apply her mind to the legislation that regulates safety issues at the workplace, in particular, the Occupational Health and Safety Act 85 of 1993 ("the OHSA"). Had she considered the provisions of the OHSA she would have concluded that the second applicant's fear to get inside the boiler was founded in that the third respondent's instructions were in breach of the OHSA and unlawful. The applicants also based their attack on the award on the manner in which the commissioner conducted her duties as she misdirected herself regarding the rule which applies to safety issues in confined spaces and in reaching the conclusion that the instructions given to the second applicant were lawful. The applicants submitted that one of the reasons which rendered the commissioner's award unreasonable is that in reaching it, she disregarded evidence which proved that the instruction was unreasonable and in flagrant disregard of the third respondent's own policies.
- [4] The test for review is settled, it is whether the commissioner reached a decision a reasonable decision-maker could not reach on the facts before the commissioner. In this regard see *Sidumo and Another v Rustenburg Platinum*

*Mines Ltd and Others*¹. Enunciating the test, the court in *Gold Fields Mining SA (Pty) Ltd v CCMA and Others*² found that the following questions assist in determining whether an arbitration award is reasonable:

‘...(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?’

- [5] In *Herholdt v Nedbank Ltd and Others*³ the court interpreted the reasonableness of arbitration awards as follows:

‘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 in section 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance 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.’

- [6] The commissioner failed to deal with the substantial merits of the dispute because it is common cause that the second applicant refused to carry out the instruction. He however, maintained that his refusal was justified as he was exercising his right to refuse to carry out instructions which exposed himself to danger. He testified that he lacked practical training on the use of the safety harness and rope which were supposed to be used in confined spaces. He based his right to refuse to carry out the instruction on section 22 of the Mine Health and Safety Act. He further testified that he was not trained on

¹ [2007] 12 BLLR 1097 (2008) (2) SA 24 (CC)

² [2014] 1 BLLR 20 (LAC) at para 20.

³ [2013] 11 BLLR 1074 (SCA) at para 25.

emergency preparedness for employees working in confined spaces in terms of the Occupational Act of 1993. He was therefore in no position to react in an emergency while carrying out the instruction. He persisted under cross examination that the third respondent's training department had informed him that in terms of the third respondent's procedures he had to undergo practical training for the use of the rope and safety harness. He maintained that in terms of the procedure which governed working in confined spaces, he needed the safety harness and a rope particularly because had he fallen down in the boiler, it would not have been possible for people to pick him up.

[7] The applicants' case before the commissioner was that the second applicant's refusal to carry out the instruction was justified because the instruction was in breach of legislation and the third respondent's own procedures. The commissioner based her decision that the second respondent did not need the rope and safety harness in order to carry out the instruction on the fact that his fellow employee was cleaning the boiler without using the rope or safety harness. She also made a finding that training was not necessary for the second applicant to carry out the instructions. Working in confined spaces is regulated by legislation and the third respondent's procedures. As the second applicant exercised his right to refuse to carry out instructions which are in breach of legislation and the third respondent's procedures which regulate the safety of its employees working in confined spaces, a determination on the lawfulness and reasonableness of the instruction the second applicant refused to carry out could not reasonably be made without taking into account the legislation and procedures. She reached both findings without taking into account the substantial merits of the dispute before her. Her error lead her to reach a decision a reasonable decision-maker could not reach on the evidence before her.

[8] I have considered the question of costs and I am of the view that the third respondent did not act unreasonably in opposing this application. In the circumstances a costs order will not be appropriate.

[9] In the premises the following order is made:

- 9.1 The arbitration award issued by the first respondent under case number NWRB 1476-12 and dated 20 September 2012 is reviewed and set aside.
- 9.2 The matter is remitted to the second respondent to be arbitrated *de novo* by an arbitrator other than the first respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Wright

Instructed by: David Cartwright Attorneys

For the Respondents: Mr Caddy

Instructed by: DLA Cliffe Dekker Hofmeyr Inc

LABOUR COURT