



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 442/2013

In the matter between:

KROON GIETERY & STAAL (PTY) LTD

APPLICANT

and

NUMSA OBO S MORAKE

FIRST RESPONDENT

METAL AND ENGINEERING BARGAINING

COUNCIL

SECOND RESPONDENT

JOSEPH MPHAPHULI N.O

THIRD RESPONDENT

Date of hearing: 10 September 2015

Date of judgment: 1 October 2015

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the third respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator found that Mr S Morake (the employee), on whose behalf the first respondent acts, had been unfairly dismissed by the applicant. The arbitrator ordered that the employee be reinstated.
- [2] The employee was dismissed on charges of insubordination and exhibiting disrespectful behaviour toward the applicant's management. The charge of insubordination had its roots in an incident in which the employee left his workplace without completing his duties after having been instructed to do so. The charge of disrespectful behaviour related an earlier incident on the same day when the employee is alleged to have shouted at his manager, a Mr Smit, pointed a finger at him and warned him that he was "watching him".
- [3] The arbitration hearing took place on 15 January 2013. Only two witnesses testified at the arbitration hearing – Smit for the applicant and the employee on his own behalf. The version proffered on the applicant's behalf was that on 26 October 2012, the employee led a group who approach Smit to complain about overtime payments. Smit testified that he informed the employees that they were not paid overtime because they had not worked overtime. At this point, the employee became angry and pointed a finger at him and warned him that he was watching him. The employee then said to the other employees in the office that talking to him (Smit) was a waste of time and that that they should leave the office. The employees then left without completing work on sandboxes, as they ordinarily did on a Friday. As a consequence, there was a loss in production. The

employee denied having influenced other employees to leave before completing the sandbox. He also denied having shouted at Smit or otherwise having behaved disrespectfully toward him. The employee stated that the reason he left the applicant's premises without completing the sandbox was because he had reason to believe that his employer would not pay him for the overtime work necessary to complete the sandbox, as he had not been paid for similar overtime in the past.

- [4] The arbitrator correctly recorded that there was a dispute of fact as to whether the employee had acted in a threatening disrespectful manner towards Smit. He goes on to find the following

29. Mr Smit's testimony constituted a single version. Mr Smit's version was not corroborated and was not convincing.

30. The respondent only led Mr Smith's evidence to prove its case. The onus to establish the existence of misconduct lied with the respondent. Proof is on a balance of probabilities. I do not find that the balance of probabilities favour the respondent's case.

31. The reason being that there was cause for Mr Smit to be upset in that he did not appreciate the employees approaching him when in fact they did not deserve payment for overtime in his view. His claim for disrespectful and threatening behaviour was not supported by evidence, notwithstanding the fact that there were other witnesses on the scene according to Mr Smit.

32. The version that the applicant was a leader of the group on the shop floor was discarded by the applicant. The applicant was not a shop steward, a supervisor or a team leader and had no authority whatsoever to direct the actions of his fellow employees.

33. The applicant was ready to admit that together with his fellow employees that left the workstation without carrying out their overtime duties.

34. According to the applicant the employees had no confidence that the respondent would pay them for overtime duties. The employee's action was

informed by the respondent's failure to pay them overtime which was the reason for the dispute addressed in the Mr Smith's office.

35. Ordinarily the employee's conduct was cause for disciplinary action; in the same vein cannot be ignored that the employee's action was prompted by the respondent's failure to compensate the employees for overtime work done in the recent past.

36. This factor should have been taken into account when beating the disciplinary action. The fact that other employees who participated in the same misconduct were not found guilty on the basis of unsubstantiated evidence that they were influenced by the applicant renders the reason for dismissal to be unfounded. Further it makes the respondent's approach to the application of workplace discipline to be inconsistent.

37. It is against this background that I find that the dismissal had no basis in law and was not supported by facts.

- [5] The arbitrator's logic, as far as this can be discerned from the above analysis, appears to be that the employee's conduct would ordinarily have warranted disciplinary action but was not culpable in the present instance since it had been prompted by the applicant's prior failure to compensate its employees for overtime work done. The second finding made by the arbitrator that served to exculpate the employee was the inconsistent application of discipline, and in particular the fact that other employees participated in the same misconduct were found not guilty.
- [6] These two findings clearly led the arbitrator to conclude that the applicant had failed to discharge the onus of proof to establish a substantively fair dismissal. (Procedure not been placed in issue during the course of the proceedings under review.)
- [7] In my view, the arbitrator, in reaching the conclusion that he did on the material before him, committed a reviewable irregularity in the conduct of the arbitration proceedings. I deal first with the issue of the finding relating to applicant's alleged

failure to pay its employees overtime when overtime was worked. Smit's evidence was there was a practice in terms of which employees would commence work early on a Friday (at 7:00) and that the shift would ordinarily end at 13:00. Because those employees engaged in constructing sandboxes were required to complete the work so as to enable a later melting, they continued work until the job had been completed, usually by 14:00 to 14:30 each Friday. This entitled them to overtime pay which ordinarily they were paid. However certain employees (and the employee in particular) had begun a practice of arrived late for the shift, some 40 to 45 minutes after the scheduled starting time. The employee denied that he arrived for work late. For the applicant, the consequence of the late start was that the work performed after 13:00 was work that fell within ordinary working hours and did not attract the premium of overtime work. When the employee gave evidence he appeared initially to suggest that the employees had left the premises at 13:00, because that was the normal knockoff time. It was only after a grossly leading question put to him by the arbitrator as to the reason why the employee had left at 13:00 that the version of a prior failure to pay for overtime work emerged. In this regard, it should be noted that but for the employee's monosyllabic response to the arbitrator's question, there was no cogent evidence presented by the employee to the effect that the applicant had failed to compensate him for overtime work done in the recent past.

- [8] In short, what the arbitrator had before him was a material dispute of fact. Smit had testified that the employee had arrived late and that work performed after 13:00 on Fridays thus did not attract the premium ordinarily paid for overtime. The employee denied that he had ever arrived late. Smit's evidence was that employees had been paid overtime rates when overtime was worked. The employee denied this and based his defence almost entirely on the refusal or failure by the applicant to pay overtime rates for overtime worked.
- [9] What the arbitrator failed to do was to determine the factual dispute before him by a proper assessment of the credibility of the witnesses and the inherent probabilities of each version before him. Instead, the arbitrator came to the

conclusion (without giving reasons) that the employee's version was the more probable and that the applicant had thus failed to discharge the onus of proof. This in itself demonstrates a misconception on the part of the arbitrator in relation to the resolution of factual dispute. The onus of proof ordinarily becomes relevant only where the probabilities are evenly balanced and it is not possible to prefer one version over another on the basis of the probabilities. It was incumbent on the arbitrator to determine that dispute by conducting a proper and reasoned assessment of the evidence. Instead, what the arbitrator did was simply to prefer one version over the other, without giving cogent reasons for accepting one and rejecting the other, and erroneously apply the onus of proof.

- [10] In relation to the second finding made by the arbitrator, that of inconsistency, there was simply no evidence that served before him to sustain this conclusion. Smit's uncontested evidence was that other employees who had left the applicant's premises early had been disciplined and that in a disciplinary hearing conducted by an independent chairperson, it had been found that they had been influenced by the employee. On that basis, they were not dismissed. The arbitrator makes no reference to this evidence (which was not contested or subject of challenging cross-examination) and concludes that the employees concerned were found not guilty 'on the basis of unsubstantiated evidence' that they had been influenced by the employee. This finding lacks any factual foundation - no evidence had been presented as to the disciplinary proceedings initiated against the other employees or what had transpired in the course of those hearings.
- [11] The erroneous approach adopted by the arbitrator in relation to the assessment of evidence is further demonstrated by what appears to be his finding that the employee did not act disrespectfully towards Smit. The arbitrator appears to have rejected Smit's version because in his view, there was cause for him to be upset at the nature of the approach made to him when he (Smit) believed that the employees did not deserve payment for overtime (see paragraph 31 of the award). For this reason, the arbitrator appears to have accepted the employee's

version that he did not shout at Smit or act disrespectfully towards him. Again, what the arbitrator failed to appreciate was that he had before him a material dispute of fact. The arbitrator failed properly to assess the evidence, to make credibility findings as far the respective witnesses are concerned and to make any finding on the inherent probabilities of the versions placed before him. Having failed to conduct the required assessment in relation to the version that served before him, he simply concluded that the applicant had led insufficient evidence to establish that the employee had acted disrespectfully. In doing so, and in summarily rejecting Smit's evidence, the arbitrator committed a reviewable irregularity.

- [12] Of course, the test to be applied is whether the arbitrator's conduct had the consequence of an outcome that is unreasonable in the sense that the decision to which the arbitrator came falls outside of a range of responses to which a reasonable decision-maker could come on the available material. In my view, the arbitrator's award is not capable of being rescued by reference to the material that served before him. In the circumstances, the award stands to be reviewed and set aside.

I make the following order:

1. The arbitration award issued by the third respondent under case number MIFS 1882 on 24 January 2013 is reviewed and set aside.
2. The matter is remitted to the second respondent for rehearing before an arbitrator other than the third respondent.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr H Wissing, Henk Wissing Attorneys

For the first respondent: Union official

Labour Court