



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 832/08

Not reportable

In the matter between:

GRAHAM FREDERICK THORNE

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

CARLTON JOHNSON, N.O.

Second Respondent

ITHEMBA LABS

Third Respondent

JUDGMENT ON LEAVE TO APPEAL

Introduction

- [1] Owing to difficulties in locating the court file due to renovations in the Cape Court, the consideration of this application for leave to appeal was unfortunately delayed.
- [2] The applicant appeals against the judgment handed down in this matter on 3 November 2014 dismissing his review application of an arbitration award in which the arbitrator found that he had been fairly dismissed for refusing to carry out a reasonable and lawful instruction.

Grounds of appeal

- [3] Firstly, the applicant claims that the court failed to appreciate that the applicant's conduct in not performing welding work he was instructed to do amounted to a mere failure to obey an instruction and did not amount to gross insubordination which might justify dismissal. On the evidence before the arbitrator, this characterisation does not do justice to the wilful nature of the applicant's failure, which underpins the ethical explanation he belatedly advanced as his reason for non-compliance with the instruction to perform certain welding work, nor does it fairly reflect that it was not a once off refusal but an ongoing state of affairs. I do not think it is likely that another court would see the arbitrator as having acted unreasonably in not seeing it the way the applicant does.
- [4] Secondly, the court erred in not finding that the arbitrator failed to perform his duty because he failed to discern an ethical basis for the applicant's failure to perform the welding work in question, or to call for more evidence to determine the true nature of the dispute.
- [5] The court erred in finding that the commissioner was not obliged to enquire into the basis for his refusal to perform the instruction, which was purely ethical. In

relation to the last two grounds mentioned, the duty which the applicant seeks to burden the arbitrator with is to discern a defence he could not even present himself by the time he got to arbitration despite being an articulate individual and despite being an arbitrator. I am satisfied that it is unlikely another court would impose the kind of interrogative burden on an arbitrator that the applicant would like to see imposed. An employee is obviously entitled to refuse to obey an unlawful or unreasonable instruction but the applicant's 'ethical' basis for his refusal which he did not articulate clearly until he reviewed the arbitrator's award was not on a par with the authorities he cites.

- [6] The court erred in not appreciating that the applicant was not challenging the employer's authority as he had lodged a grievance and had tried to find a workable solution with the employer and that the commissioner had not acted in consonance with the purpose and values of the LRA which would have required him to adopt a remedy other than dismissal. The workable solution sought by the applicant was to be sent on expensive training which the employer was not prepared to incur, having refused to accept an offer of other training. He sought a solution only on his own terms and persisted in refusing to do welding work he had previously performed.
- [7] The court failed to realise that the arbitrator's alleged failure to consider the following issues made his award reviewable :
 - 7.1 The minimal impact of the applicant's refusal to perform the welding working in question;
 - 7.2 The applicant's long record of clean service against the gravity of the misconduct;
 - 7.3 Whether further training could have resulted in him not repeating the misconduct.
- [8] In relation to the last mentioned ground, there was no basis on the evidence that the applicant would have obeyed the instruction in question in the future unless he got the training that he insisted on, not the one offered by the

employer. Further, the applicant's refusal necessitated the employer to allocate other less skilled employees to do the work which is an inconvenience and disadvantageous arrangement the employer was not obliged to put up with. The applicant also failed to take up the issue of why a less severe sanction might have been appropriate with the employer's witnesses at the time and I cannot see how another court is likely to conclude that just because the applicant had long service, the employer was obliged to put up with his refusal to perform work he had previously performed until it agreed to send him on the training he had decided was appropriate. What the applicant failed to appreciate is that he gave no indication that his attitude would change if he was reinstated and it is difficult to say that the commissioner acted unreasonably in not finding that his long service somehow should have offset his obduracy.

- [9] In the circumstances, I am not satisfied that there is a reasonable prospect of another court reaching a different conclusion in reviewing the arbitration award.

Order

- [10] The application for leave to appeal is dismissed.

- [11] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court

26 June 2015

(In chambers)