



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 136/15

In the matter between

SACWU obo KAGISHO & 15 OTHERS

Applicant

And

NBCRFLI

First Respondent

PIETER GREYLING N.O.

Second Respondent

GRAINOVATION

Third Respondent

Heard: 17 February 2016

Delivered: 22 February 2016

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the respondent, to whom I shall refer as the commissioner. In his award, issued on 17 December 2014, the commissioner found that the dismissal of the individual applicants (the employees) by the third respondent (the employer) was substantively and procedurally fair.
- [2] The relevant factual background is recorded in the award, and I do not intend to repeat the facts here. It is sufficient to say that the employees were dismissed for refusing to obey an instruction that they should work overtime on the weekends of 5-6 and 12-13 July 2014, for participating in an illegal work stoppage on the same dates and for leaving company trucks unattended in an unauthorized parking area without permission on 4 and 11 July respectively. In essence, the union's case at the proceedings under review was that the employees were under no contractual obligation to work overtime and that any instruction that they do so was consequently unlawful. The union also attacked the procedural fairness of the dismissal.
- [3] The founding affidavit is not a model of clarity, and it is difficult to discern precisely the applicant's grounds for review. The affidavit comprises what is termed an 'attack on the award' in the form of a paragraph by paragraph response to the award, much along the lines of an answering affidavit. Under the heading 'grounds for review' one finds the following: dishonest, failure to have regard of material facts, bad legal interpretation, avoided the main collective agreement purposively, supported invented terminology, disown himself the jurisdiction, became spokesperson of respondent, denying our claim for due monies, and converted contracts into all-purpose documents (sic). None of these grounds address the reasonableness threshold which forms the basis of an application such as the present, but I will afford the applicant a generous

interpretation of the founding affidavit in so far as the grounds for review are concerned.

- [4] The applicant has also filed a document referred to as 'amending the founding affidavit'. Its status and purpose is not entirely clear, but the deponent, Mr. Mogase, appears to seek to 'amend' certain facts relating to the events that preceded the weekends on which the employees did not work. The function of a review court is to determine the reasonableness of the outcome of the proceedings under review, having regard to the evidence that served before the commissioner. The consequence is that the court is bound by the record of the arbitration proceedings, and yet another version of the facts during the course of a review is not ordinarily relevant to a determination of the reasonableness of the commissioner's award.
- [5] It also warrants mention that the notice of motion contains a series of prayers which are simply not competent in an application such as the present. I did not understand Mogase, the union official who appeared on behalf of the applicant, to dispute that they should be disregarded and that what the applicant sought was a review and setting aside of the award and an order substituting the commissioner's ruling for a finding that the dismissal of the employees was unfair and ordering their reinstatement.
- [6] This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicant appears to contend for the latter, on the basis reflected above. However, the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).

- [7] The Labour Appeal Court recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.
- [8] It bears reiterating that the above principles distinguish a right of appeal from a right of review. This appears to be lost on the applicant in the present case which by and large attempts to re-argue the case before the commissioner on its merits. This court is not entitled to set aside a commissioner's decision simply because the court would have come to a different conclusion on the same facts. This court is not entitled to intervene if the commissioner makes mistakes of law or mistakes of fact. The commissioner is allowed to be wrong. All that the commissioner may not do is make a decision that falls outside of the band of decisions to which reasonable decision-makers could come on the available material. As the Labour Appeal Court has noted on more than one occasion, the threshold to be met by an applicant in a review application is set high and it is not often that this court will interfere.
- [9] At the hearing of the present application, the applicant's complaint crystallised into a single issue – that the commissioner committed a reviewable irregularity by attaching insufficient weight to evidence concerning the employees' obligation (or rather, the lack of obligation) to work overtime, which in turn led him to conclude (erroneously) that the basis of the instruction given to the employees was lawful.
- [10] The commissioner's award records that the issue to be determined is whether the dismissal of the employees was substantively and procedurally fair. He further recorded that it was common cause that the employees had refused to

work on the weekends in question, and that that refusal emanated from a view that the instruction to work on the days concerned was unlawful and that the employees were therefore entitled to refuse to attend work.

[11] Insofar as procedural fairness is concerned, the only issue that the commissioner was called upon to decide was whether the third respondent's refusal to grant a postponement of the disciplinary proceedings on 4 August 2014 rendered the proceedings unfair.

[12] Two witnesses gave evidence for the respondent. Their evidence is summarised in the award. The only witness to give evidence on behalf of the employees was Mogase, whose evidence comprises by and large his opinion that there was no agreement between the parties to work overtime and that in the absence of any agreement to do so, the employees were not obliged to work overtime and that the instruction given to them was accordingly and lawful. He is also provided an explanation for his failure to attend to the disciplinary hearing.

[13] The commissioner's reasoning can be discerned from the following paragraphs:

21. It is the applicant's argument that in terms of the respondent's standard employment agreement, the agreement provides for a system of commission that is to be paid should a driver reach a specific target in a month. The contract itself does not make provision for working overtime. It is common cause that the commission system was abandoned at the request drivers and replaced by an overtime system. In terms thereof applicants would be paid overtime as provided for in the bargaining council collective agreement. It is also common cause that the system was implemented at the beginning of June 2014 and that applicants received overtime payment at the end of June 2014. It is also apparent from the pay slips of all the applicants as contained in the bundle of documents that all the applicant received payment for overtime worked.

22. It is the respondent's argument that based on clause for the applicant agreed to the working of overtime. Clause 4 reads as follows: "You will be expected to conform to our truck transport hours and to work at such additional times as may be necessary for the effective performance of your duties". What is further to be noted is that both parties were in agreement that the commission

system which allowed applicants to be paid commission for earnings received in general forced applicants to work in non-standard hours. The overtime system was also accepted as a demand from the drivers. It is also common cause that the new system was introduced in June 2014 and that the applicant worked overtime for the month and was paid accordingly.

23. It is therefore evident that the applicants in their own minds had no objection to working overtime. If overtime was not part of their contract, why did the applicant's work overtime immediately after the commission scheme was abolished? It would have been a different matter the applicant's refusal to work overtime was initiated in the beginning of June.

24. It is also apparent that the applicant union was involved in negotiations and discussions regarding the issue of the commission systems replacement with the overtime system. During this proceeding the union did not produce any document or notification or other evidence of its members objection to the overtime scheme.

25. In the last instance I must also disagree with the applicants in their argument that the contract of employment does not provide for overtime work. It is clear from clause 4 that it provided for additional hours. Truck transport hours can only mean one thing. It also provides for "additional times" as may be necessary for the effective performance of their duties.

26. In view of the above must conclude that an agreement to work overtime existed between the parties. An instruction to work on the days are set out in para 3 above would therefore not constitute an illegal instruction.

[14] In regard to procedural fairness, the commissioner went on to hold that it was common cause that the disciplinary proceedings had been postponed three times before 4 August 2014. The commissioner noted that in some of the instances the union had made certain demands regarding representation and the manner in which the hearing was to be conducted, to which the third respondent had agreed. A notice of set down had been sent to the union on 31 July 2014 by email and by fax. The commissioner noted Mogase's explanation that his tablet was not functioning properly; however, he observed that no explanation had

been provided why nobody had become aware of the notification up until 2 August 2014. Further, Mogase had been advised when he was telephonically contacted on the day that the proceedings would be held in abeyance for a further 90 minutes. At this stage, Mogase was 45 km from the venue but offered no explanation as to why he did not attend the proceedings to put his case or apply for a postponement. On the probabilities, the commission concluded that the applicants had been aware of the proceedings and deliberately decided not to attend.

- [15] The applicant's case rested on the proposition that the third respondent had violated sections 10 and 29 of the BCEA, and that the instructions to work overtime were therefore unlawful. Mogase chose not to call any of the employees, but testified himself. As I have indicated, his evidence largely comprises his opinion of the lawfulness or otherwise of the instructions given to the employees is captured by the following passage:

APPLICANT REPRESENTATIVE: Then let me count to issues that relates to the evidence of legality and validity of the instructions that were issues to an applicants on those particular days, Mr Commissioner this instructions were unlawful because they were based on the employment contract that were no longer in operation, it is well say that here and it is a common course that from 2 June 2014 the operations at work place altered altogether, there was no more commissions no more even if they call it transport hours, the applicant were going to be paid according to the specifications of the basic condition of employment and the main collective agreement, I have now attached there as an annexure M to our document and that shows how the overtime is should be operated in this particular council or industry, now the question the question is does the respondents have any document before us...

- [16] What followed was the submission of heads of argument in which the applicant states the following:

24. Applicants submits that the instructions of the respondents were unlawful and unreasonable and even provocative for the following reasons;

24.1 From 2 June 2014 applicants entered into an agreement with the respondents, an agreement to work for overtime pay system and exit from the one we termed kilometre pay system. The pay slips of June 2014 stands as witness to this effect.

24.2 The most important fact here is that the employment contract that existed between parties was rendered null and void therefore invalid by transition from the kilometre pay system to the overtime pay system. I must emphasise that the employment contract of applicants was existing solely because of the kilometre pay system. Now once the kilometre pay system is revoked automatically the employment contracts are avoided and cease to exist.

24.3 The overtime pay system kicks in the normal working hours (45 per week) and the payment of overtime after the completion of nine (9) hours in a weekday or overtime and weekend after completion of forty five (45) hours after(5) they week. I must state this dispute does not relate to weekday overtime, it relates directly to the weekend overtime

24.4 The respondents wanted the applicants to remain by the tracks on weekends and said the subsistence allowance was enough for their payment. In this way even if the applicants worked on weekends, still the respondents would say the subsistence allowances paid to them therefore they cannot claim the overtime.

24.5 The applicants never refuse to work on weekends. Applicants wanted to be paid overtime for been on duty on the weekends consistent with the MCA (sic).

[17] Clearly, an agreed change to move from what was referred to as the 'commission' scheme to one in terms of which overtime would be paid at the prescribed rates did not result in the employee's contract becoming null and void or otherwise invalid. The evidence before the commissioner clearly disclosed an agreement that the employees would be paid overtime rates in accordance with the provisions of the bargaining council agreement. On the evidence, this is clearly what occurred during the month of June 2014, when the third respondent agreed to a demand to that effect. The evidence also disclosed, as the commissioner observed, that the employees worked overtime without objection during the course of that month and it was common cause that the employees received overtime payments at the end of June 2014. For the commissioner, this constituted an agreement to work overtime for the purposes of s 10 of the BCEA.

He found further evidence of agreement in clause 4 of the standard contract of employment signed by the employees. In the absence of any evidence to the contrary, the commissioner's conclusion that there was an agreement to work overtime cannot be faulted. On the evidence served before the commissioner, the new system of remuneration for overtime did not extinguish or amend any pre-existing obligation to work overtime. It follows that the commissioner's decision that an instruction to work overtime on relevant weekends did not constitute an illegal instruction is not unreasonable. For this reason, the application stands to be dismissed.

- [18] While it is not strictly relevant to the determination of the commissioner's decision, there does not appear to be any explanation on record as to why the applicant did not refer any dispute concerning the application and interpretation of the bargaining council agreement or otherwise seek to dispute the implementation of the overtime system. The employees, clearly acting on the misguided advice of Mogase, elected instead to refuse to work. As I have indicated, that advice was misguided and regrettably, the employees have paid the price.
- [19] In so far as the commissioner's findings on procedural fairness are concerned, the commissioner's finding is reasoned and rational and cannot be said to be so unreasonable that no reasonable decision-maker could not find, as the commissioner did, that given all of the circumstances and the numerous attempts made by the third respondent to convene a disciplinary hearing and the obstructive conduct displayed by Mogase, the hearing was fair. It should be recalled that the Code of Good Practice requires only that an employee be afforded the opportunity to state his or her case. This is what the third respondent did. If the employees or the union frustrated that effort, they cannot now be heard to complain that the third respondent's conduct was unfair.
- [20] In so far as costs are concerned, the third respondent submits that there is a proper basis on which this court should exercise its discretion to award costs against the applicant. Section 162 of the LRA affords the scope to broad

discretion to make orders for costs according to the requirements of the law and fairness. This court has also previously held that the right of representation extended to union officials is one that must be exercised with the same degree of competence and diligence that applies to legal practitioners. In the present instance, the applicant has failed to comply with the provisions of Rule 7A. Further, the papers contain a number of spurious and derogatory remarks made particularly against the commissioner, and are burdened with irrelevant annexures. The heads of argument fail properly to identify the real issues in dispute and address them with any degree of pescription. For these reasons, in my view, the applicant should be ordered to pay the costs of the proceedings.

I make the following order:

1. The application is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. C Roodt, instructed by AM Spies Attorneys

For the Respondent: Union Official