



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT PORT ELIZABETH**

**Case no: PR 59/15**

In the matter between:

**NATIONAL UNION OF  
MINEWORKERS obo S VANGILE**

**Applicant**

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**M MDLALANA N.O.**

**Second Respondent**

**ESKOM HOLDINGS (PTY) LTD**

**Third Respondent**

**Heard:** 01 November 2016

**Delivered:** 04 November 2016

**Summary:** (Review-misconduct-failure to comply with procedures-gravity of misconduct)

---

**JUDGMENT**

---

## LAGRANGE J

Background

- [1] This is an application to review an arbitration award in which the individual applicant, Mr S Vangile ('Vangile') was dismissed for failing to comply with "Eskom's conditions of service, procedures, agreements with trade unions, operating regulations, security and/or safety measures, procedures and directors, and applicable statutory requirements." It was alleged that "[o]n 27 February 2014 you breached regulations 2.08.b, 5.0 4.1 and regulation 8.0 1.3.2 of the ORHVS<sup>1</sup> Regulations in that you failed to correctly returned to service the 400 Kv bus-bar in the Neptune Substation".
- [2] In the arbitration following his dismissal the arbitrator found VANGILE guilty of two of the regulations. The respective regulations were Regulation 5.04.1, which states:

"[B]efore returning any apparatus or line, on which work has been carried out, to service the authorised person shall first personally satisfied himself that all persons had been withdrawn from the apparatus or line... and that all permanent barriers have been replaced."

and Regulation 2.08.b, viz:

"TAKING PLANT OFF THE SYSTEM

apparatus shall not be considered to be part of the power system when it has been disconnected and declared out of commission from the power system by:

- (a) ... or
- (b) by the opening of isolators. When opened, these isolators shall be locked with safety locks on the keys placed in custody of a person not directly involved with the operating."

- [3] The Neptune substation was designed to transfer the current to a new cable in the process of being directed which would carry power to Vuyani substation near Umtatha. On 27 February part of the substation was isolated so that certain tests could be conducted on the plant by other

---

<sup>1</sup> Operating Regulations for High Voltage Systems

employees. To enable this to be done, VANGILE needed to close certain isolators, which were open. When an isolator is open no current can flow and converse applies when it is closed. The isolators in question were open and were secured in the open position with various locks. Some of the locks had been placed there by a contractor who was working on the Vuyani line. The 1 was given keys to unlock the isolators locked with Eskom locks. When he phoned his supervisor about to do in relation to the isolators locked open by the contract he was told to cut the locks which he did.

- [4] The arbitrator also found that once the testing work had been performed, irrespective of the responsibilities of the person performing the testing, VANGILE was responsible for seeing that all persons were withdrawn from the line and that permanent barriers had been replaced before advising the control officer that the work was completed. As it happened, VANGILE did not restore the isolators to their open position and when the connection was restored, the apparatus which had previously been isolated and energised and the line tripped when current was diverted to earth by temporary earths measures attached to the line. At the time that comment was restored, the contractors workers on the Vuyani line had already stopped working on the line that day, although VANGILE was unaware of this and the temporary earths were sufficient to stop the Vuyani line being energised as well. Nevertheless, the tripping affected amongst others, production operations at Mercedes Benz and there was evidence that the temporary earths might not necessarily have prevented injury to workers busy on the Vuyani line.

#### The arbitration award

- [5] The arbitrator did not accept that VANGILE could simply absolve himself from responsibility for closing the isolators which had been locked open with the contractors locks because his supervisor had told him to cut them. The contact details of the contractor were clearly visible on the labels affixed to the locks and there was no justification for breaking them without getting the go-ahead from the contractor in circumstances where nobody knew why the contractor had not yet removed them. The regulations

provided that keys had to be placed in the custody of a person not directly involved with operating the system. The arbitrator found that it was “unwise and patently negligent” on the part of the applicant and his supervisor to agree to open the locks forcefully without checking with the contractor that his work was finished.

- [6] In relation to the restoration of the isolated portion of the substation to service, the arbitrator found that VANGILE was an authorised person for the purposes of complying with the regulations, irrespective of whether the person who had done the testing work might also have been an authorised person for the purposes of performing his work. As far as returning the plant to service was concerned after the testing had been done the arbitrator found that VANGILE should have personally satisfied himself that it was safe to do so which included ensuring that permanent barriers such as the isolators locked in the open position were restored to that position.
- [7] There was evidence led during the arbitration that the accident which caused the tripping could also have been prevented if control of the substation had been properly handed over to two control centres. However, the arbitrator found that irrespective of the role this might have played in the Incident, VANGILE still had his role to play by ensuring that he was operating safely and within the regulations.
- [8] The arbitrator also dismissed regulations VANGILE’s claim that his dismissal had been procedurally unfair because the disciplinary action was only taken nearly five months after the incident, whereas the companies disciplinary code provides that it would endeavour to take disciplinary action within three months of becoming aware of any misconduct. Eskom’s witnesses had said that the disciplinary action was delayed because they had waited for the release of the final report into the incident, though they simultaneously denied that the charges had been influenced by the report itself. The arbitrator clearly didn’t accept this rationalisation for the delay but also found that there was no demonstrable prejudice which VANGILE had suffered as a result thereof.

### Grounds of review

- [9] The applicants contend that some of the arbitrator's finding is simply irrational. They also argue that when deciding on whether the dismissal was an appropriate sanction, the arbitrator effectively applied the zero tolerance standard of the employer instead of considering all the factors he was supposed to consider.

### *Alleged irrational findings*

- [10] The applicants argue that it was irrational to blame VANGILE for cutting the contractors locks because he had been instructed to do so. They also argued that contrary to the arbitrator's finding that it was improbable that he would not have been aware of the fact that his co-worker who was his 'buddy' on the day in question had in fact issued the permit to the contractor to work on the line.
- [11] They also contended that it was irrational to hold VANGILE responsible for ensuring that all persons had been withdrawn from the line before it was restored to service because it was the responsible person for doing that was the person who had been performing the tests. It is true that the person performing the tests (Mr Phokane) had certain duties regarding the apparatus which he had worked on, but he was not responsible for returning the system he had worked on to service. As was described by one of the employer's witnesses, the work performed by Mr Phokane was like someone who was responsible for the filling in a sandwich but VANGILE was responsible for the rest of the sandwich containing the filling.
- [12] It also stands to reason that the person performing the testing was not responsible for making creating the initial safe environment in which the testing could be performed. Once the testing was done and Phokane had restored the apparatus to the condition he found it and made sure everyone was removed from the site, it was VANGILE who had ensure that it was now safe to return the plant to service. It was clear from the evidence that the tester had his responsibilities to restore the apparatus to the state he found it in and to ensure that all staff were removed from the

area where the work had been done. That duty did not include restoring the plant to the state it was in before VANGILE made it safe for him to perform his duties. To the extent that there was any overlap in the responsibilities, it appears that VANGILE had to be satisfied that the tester had left the plant in a state that made it possible for him to take the additional steps to return the plant to service.

- [13] The applicants also criticise the arbitrator for supposedly ignoring the evidence of the Eskom report which showed that the trip on the system could have been avoided if the system had been properly handed over. Firstly, the arbitrator did not ignore that other role players might have prevented the tripping, but did not mean that VANGILE was absolved from performing his duties. Had he performed his duties properly he would also have prevented the tripping. It is in the nature of the various safety measures contained in the regulations and applied by Eskom that various role players have their own distinct responsibilities, each of which can prevent an accident if they are properly performed.
- [14] In relation to the claim that the arbitrator considered in the relevant issue in considering whether VANGILE had suffered any prejudice as a result of the delay in his disciplinary proceedings, I fail to understand the merit of this point on review. It is well established that mere non-compliance with a disciplinary code does not in and of itself mean that a dismissal was procedurally fair.<sup>2</sup> What is required is a consideration whether all the circumstances such a defect materially impacted on the fairness of the process. Nothing in the conduct of the proceedings suggest that VANGILE was in any way hampered in his defence because of the delay. In the circumstances no cogent reason has been advanced why the arbitrator's finding in this regard was irrational.
- [15] It was also argued that the arbitrator could not have concluded that VANGILE was negligent in relation to the consequences of cutting the contractors locks because there was no evidence that he was aware that the contractor was still working on the Vuyani line because he was not told

---

<sup>2</sup> See, e.g. *Highveld District Council v CCMA & Others* (2003) 24 ILJ 517 (LAC) at 520-521, para [15].

by his 'buddy' Ms Cele who had issued the permit to the contractor that the permit was no longer valid nor was he advised by his supervisor. The arbitrator found that both VANGILE and his supervisor were negligent in cutting the contractor's locks. It might be debatable to what extent negligence between VANGILE, Ms Cele and the supervisor should be shared, but it was not wholly unreasonable in my view for the arbitrator to conclude that VANGILE was negligent in not taking any steps himself to verify that the contractor had stopped working on the line, which would have been a very easy thing to do given that the contractor's contact details were plainly visible on the locks. Moreover, nothing suggests that VANGILE was unaware or ignorant of the purpose of such locks and the possible implications of the isolators being closed, if work on the Vuyani line had not in fact finished. Faced with the fact that the contractor had not removed the locks it is not unreasonable to assume that a person with the level of VANGILE's expertise would not have simply accepted the say-so of his supervisor, without at least asking the supervisor to obtain confirmation from the contractor that work on the line was finished and the locks could be removed. As it turned out, the permit issued to the contractor was still in force and work on the Vuyani line was still being undertaken. Had either VANGILE or his supervisor bothered to contact the contractor they would have ascertained this, quite apart from whether Ms Cele had a duty as the issuer of the permit to speak up before the locks cut. In any event, while it is possible to equivocate over the degree of negligence on the part of VANGILE in cutting the locks, he was solely responsible for not ensuring that the isolators were restored to the open position for returning any apparatus to service.

- [16] The applicants most trenchant ground of review is that there was no evidence that the arbitrator separately considered the question whether or not dismissal was an appropriate sanction. On the face of the award, there is nothing to suggest that after finding the applicant guilty on two charges that the arbitrator paused to evaluate whether the dismissal was therefore substantively fair or, if not, what the appropriate remedy should be. The applicants contend that the arbitrator implicitly accepted that a 'zero tolerance' standard applied and that a finding of guilt on the charges

automatically lead to the conclusion that dismissal was the only appropriate sanction. The applicants pointed out that the labour appeal court has recently made it clear in **Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others**<sup>3</sup> that:

“[17] It is also necessary to make some further remarks as regards dismissal for a first offence, ie a 'zero tolerance' policy. A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance approach if the circumstances of the case warrant the employer adopting such an approach.

[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as it were, a 'no-go area' for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise assigned for the refuse bin. See the incisive contribution by André van Niekerk 'Dismissal for Misconduct — Ghosts of Justice, Past, Present and Future' in R le Roux & A J Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (Juta J 2012) at 102-19. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees.”

While the facts of this case might well justify a less tolerant approach to the infractions in question, it was still incumbent on an arbitrator to consider the relevant factors affecting the fairness of the sanction of dismissal as required by the Code of Good Practice read with s 188(2) of the LRA.

[17] Satisfied that in this instance there is no evidence that the arbitrator considered the distinct question whether the dismissal of VANGILE was

---

<sup>3</sup> (2015) 36 ILJ 2273 (LAC)



fair as a separate issue from determining his guilt. As such, the arbitrator committed misconduct in relation to his duties.

- [18] As far as appropriate relief is concerned I do not believe that the issue should be determined by this court without the parties having an opportunity to make relevant representations. For that reason the matter is remitted back for the determination of the substantive fairness of the dismissal in terms of the order below.

### Order

- [19] The finding of the second respondent in his arbitration awarded handed down on 26 March 2015 under case number ECEL 3247-14 that the dismissal of Mr S Vangile was substantively fair and his dismissal of his referral are reviewed and set aside. All the other findings of the second respondent remain unaltered.
- [20] The matter is remitted back to the first respondent to enrol the matter within 30 days of receipt of this judgment for a hearing before an arbitrator other than the second respondent to determine if the dismissal of Mr S Vangile for the misconduct he was found guilty of by the second respondent was an appropriate sanction and accordingly if his dismissal was substantively fair or not, and to make an appropriate order consequent thereto if necessary.
- [21] The arbitrator appointed in terms of this order must determine the fairness of the dismissal on the record of the arbitration proceedings before the first respondent, taking account the findings of this court in the review application and the unaltered findings of the second respondent, and after hearing any submissions of the parties on the substantive fairness of the dismissal or alternative appropriate sanction.
- [22] No order is made as to costs.

---

**Lagrange J**  
**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT:

J G Grogan instructed by  
Wesley Pretorius

THIRDD RESPONDENT:

N Gqamana, SC instructed  
by Smith Tabata Inc.