



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1900 /14

In the matter between:

SASOL SYNFUELS

Applicant

and

NBCCI

First Respondent

NP LUCWABA N.O

Second Respondent

CEPPWAWU obo ZEPH HLATSHWAYO

Third Respondent

Heard: 8 August 2017

Delivered: 20 September 2017

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to have an arbitration award issued by the second respondent ('the arbitrator') reviewed and set aside. In his award, the arbitrator held that the third respondent's dismissal was substantively unfair, and ordered his reinstatement with retrospective effect.
- [2] The third respondent was dismissed for having contravened the applicant's disciplinary code in that he failed to follow safety rules by

allowing two employees to put their heads into a class B (high risk) vessel, potentially containing lethal gases, without wearing the required safety masks. The photographs that form part of the record reveal that the vessel is a massive tank-like structure. The incident occurred during a shut down in March 2012. The two employees referred to (reflected in the award as Vernon and Vukile) were employees of a contractor, Kentz, who were contracted to conduct work in the vessel.

- [3] The evidence of Harris, the applicant's production area manager, was that he saw Vernon and Vukile place their heads inside the vessel. He was some 7 to 8 meters from the vessel, with clear vision. He stated further that both Vernon and Vukile had later admitted to him that they had placed their heads in the vessel, and said that they had made a mistake. The manhole through which they had stuck their heads was fully open. The third respondent was standing behind the two employees and observed them place their heads in the vessel without the necessary protective masks. The third respondent's evidence was, in effect, that neither Vernon nor Vusikile had placed their heads in the vessel.
- [4] The core of the arbitrator's finding is to be found in paragraphs 52 to 53 of the award. I do not intend to repeat that finding here, save to note that the arbitrator finds that the third respondent contradicted himself on at least one occasion (in relation to the permit given to Harris) and that Vernon had also contradicted himself in relation to the location of a gas meter at the time of the incident (see paragraph 52 of the award). However, the arbitrator did not consider these contradictions to be material. In relation to the crucial issue of whether or not the two Kentz employees put their heads inside the vessel, the arbitrator records the mutually destructive versions given by Harris and Vernon Ervin respectively. He rejects Harris's evidence on the basis that the nature of the vessel was such that *'I do not believe that anyone would be able to look up or down once their head is inside the manhole.'* Secondly, Vernon said that he did not know either the third respondent or Harris prior to the day of the incident. The arbitrator reasoned that *'This means that he had nothing to gain from coming all the way from Durban to lie for the applicant. Trevor on the other hand could*

argue that he had no reason to want to get rid of the applicant but his actions on the day spoke volumes.'

- [5] The arbitrator concluded that Harris was 'targeting' the third respondent and that his version was therefore improbable. On this basis, the arbitrator made the finding that it was more probable that the two Kentz employees had not put their heads inside the vessel and concluded that the third respondent had not committed the offence with which he was charged.
- [6] The applicant's grounds for review are directed against the arbitrator's evaluation of the evidence. In particular, the applicant contends that the arbitrator failed properly to apply his mind to the relevant evidence and that had he done so, he would have concluded that the applicant had presented sufficient evidence to justify the third respondent's dismissal. Secondly, the applicant submits that the arbitrator failed properly to consider the evidence presented by the applicant's witnesses to the effect that it would not be appropriate for the third respondent to be reinstated into his employment. Thirdly, the applicant contends that given the material dispute of facts that served before the arbitrator, he failed properly to assess the credibility of the witnesses and to determine the probabilities as he was required to do.
- [7] 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 contends for the latter, on the basis reflected above.
- [8] In *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 ILJ 923 (LC), Myburgh AJ noted that where an arbitrator is required to resolve a factual dispute, the arbitrator is required to undertake a balanced assessment of the credibility, reliability and probabilities associated with the evidence (see *Sasol Mining (Pty) Ltd v Ngqeleni NO & others* (2011) 32 ILJ 723 (LC)). Arbitrators are obliged to weigh all of the relevant evidence and probabilities before drawing inferences and making findings (see paragraph [65] of the judgment, and in particular the reference to *Minister*

of Safety and Security & another v Madikane & others (2015) 36 ILJ 1224 (LAC)). 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)).

- [9] The Labour Appeal Court recently affirmed this principle and held 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, while a failure properly to assess the evidence is indicative of an unreasonable outcome, 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.
- [10] I deal first with the basis on which the arbitrator rejected Harris's evidence. The arbitrator's finding that he could not believe that anyone would have been able to look up or down once their head was placed inside the manhole, is simply not supported by the evidence. The documentary evidence clearly suggests that the manhole is of a significant size, certainly sufficient to allow a person to place their head inside the vessel. To the extent that the arbitrator suggests that Vernon had nothing to gain by coming all the way from Durban to lie for the third respondent, he fails to take into consideration that by the same logic, because Harris did not know Vernon, he had nothing to gain from fabricating a version to the effect that Vernon placed his head in the manhole, an offence which would invariably lead to Vernon's dismissal. The obvious reason and motive for Vernon to testify that he did not put his head into the vessel, was his own self-interest. Further, to the extent that the arbitrator reasoned that because Harris had failed to call Labuschagne on the day of the incident or to enquire after the person on standby, that this necessarily led to a

'reasonable conclusion on a balance of probabilities' that Harris was 'targeting' the third respondent, this finding ignores the uncontested evidence that Harris did not call Labuschagne because he had not seen him on that day. Further, the version that Harris was targeting the third respondent had never been put to Harris for a response. On the other hand, in his cross-examination, the third respondent testified that while he and Harris had sometimes argued about work-related matters, there was no personal animosity between them. The arbitrator's finding to the effect that there was a personal and concerted campaign by Harris to victimise the third respondent, the primary basis on which he rejected the applicant's version, thus had no basis in the evidence before him – indeed, it was a version disavowed by the third respondent. In short, none of the reasons for rejecting Harris's evidence are sustainable when one considers the evidence as a whole.

- [11] The arbitrator was faced with a material dispute of fact. Harris testified that he saw Vernon and Vukile place their heads through the fully open manhole, and look up and down the interior of the vessel. He also testified that the third respondent, in response to his question why he had allowed the vent to occur, stated that he had tested for gas and that it was safe. When he asked to see the permit and noted that it was a B class permit that required the wearing of a safety mask, he stopped work. Vernon and Vukile admitted to him that they had placed their heads in the manhole, and to having made a mistake. The third respondent denied that either Vernon or Vukile had placed their heads inside the vessel, and testified that the in any event, the positioning of the manhole cover would have precluded them from doing so. Faced with so stark a dispute of fact, the arbitrator was obliged to have adopted the approach employed by courts for resolving factual disputes. This is set out in *Stellenbosch Farmers' Winery Group Ltd & Another v Mortell et Cie & Others*, 2003 (1) SA 11 and encompasses three main considerations - the credibility of the witnesses, their reliability, and the probabilities. The arbitrator failed to undertake this enquiry, and thus failed to view the evidence cumulatively, with reference to the probabilities overall. This constituted a misdirection on his part.

- [12] The next stage of the enquiry is to determine whether notwithstanding the arbitrator's misdirections, the award is capable of rescue by reason of its reasonableness having regard to the evidence. In my view, it is not. It is more probable than not that the two Kentz employees placed their heads in the vessel, as observed by Harris, to see the demister pads and under the assumption that a gas reading had been taken and that the manhole cover had been open for some time. Harris had no reason to manufacture a version that would falsely accuse the third respondent and both Kentz employees. When he determined that the vessel was a class B vessel and that the applicable safety measures had not been met, he reported the incident.
- [13] Harris's evidence must be seen in the context that it was common cause that the demister pads could not be seen without being inside the drum of the vessel or placing one's head inside the drum, that it was a requirement that a person entering the drum wear a safety mask, that the third respondent was responsible for controlling entry into the vessel, that the vessel was a class B vessel (i.e. with a high degree of risk on account of the possibility of the presence of gas), and that the third respondent was aware of the applicable safety protocol.
- [14] The record discloses that for the most part, the version of events proffered by the applicant's witnesses was left unchallenged, and much of the third respondent's version was not put to the applicant's witnesses. For this reason alone, the third respondent's version stands to be called into question. The only reasonable conclusion to be reached on the evidence is that the third respondent committed the act of misconduct with which he was charged, and that in terms of the applicable policy, dismissal was the appropriate penalty. The third respondent contravened a safety code and endangered the lives of two contractors. The award accordingly stands to be reviewed and set aside.
- [15] Finally, in so far as costs are concerned, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. The court does not ordinarily make costs orders in disputes

involving collective bargaining parties, and I see no reason to depart from that convention.

I make the following order:

1. The arbitration award issued by the second respondent on 15 August 2014 under case number MPCHEM 286-12/13 is reviewed and set aside.
2. The award is substituted by the following:
‘The applicant’s dismissal was substantively and procedurally fair.’

Andre van Niekerk
Judge

APPEARANCES

APPLICANT: Mr D Pretorius, Fluxmans Attorneys

THIRD RESPONDENT: Mr I Shongwe, Shongwe Attorneys