



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No:JR 697/14

In the matter between:

KAEFER ENERGY PROJECTS (PTY) LTD

Applicant

and

CDR OF THE MEIBIC

First Respondent

COMMISSIONER D LEVY N.O

Second Respondent

NUMSA

Third Respondent

ZACHARIA RAMOTEBELE

Fourth Respondent

Heard: 10 August 2017

Delivered: 22 September 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 25 March 2013. In his award, the arbitrator found that the applicant had failed to establish that the fourth respondent was guilty of the misconduct for which he had been dismissed and that he ought accordingly to be reinstated into the position in which he was employed immediately prior to his dismissal.
- [2] The material facts are recorded in the arbitration award under review and I do not intend to repeat them here. It is sufficient to note for present purposes that the fourth respondent was employed by the applicant on the Medupi project. He was dismissed on charges of participation in unprotected industrial action, possession of a dangerous weapon, and wilful damage to property. The charges followed an incident of unprotected industrial action that occurred during July 2013.
- [3] The first witness to testify for the applicant, Mr Mayrhofer, stated that on 24 July 2014, he arrived at the site before 6 am. He saw the applicant walk past him, on his way to the change room. He thought it strange that the applicant was not wearing his personal protective equipment but had on a short-sleeved brown T-shirt. At about 7 am, Mayrhofer was engaged in what is referred to as a 'toolbox talk' when he heard shouts and sounds of scuffling. He saw a group of employees of another contractor, Murray and Roberts, engaged in what appeared to be industrial action. He watched the proceedings until the group became violent at which point he left.
- [4] Importantly for present purposes, Mayrhofer acknowledged that he did not see the fourth respondent himself taking part in any industrial action or committing any of the other acts of misconduct with which the fourth respondent was charged. Mayrhofer's evidence placing the fourth respondent on the scene was given only by reference to a video recording which was played at the arbitration hearing. Mayrhofer identified an individual on the recording as the fourth respondent. The person was wearing a brown T-shirt and had a balaclava over his head. Mayrhofer stated that he was able to identify him on account of the T-

shirt and his gait. The person identified was part of a group of employees attempting to overturn a vehicle.

- [5] The second witness, Mr Jean Oosthuizen, gave evidence of a polygraph test conducted on the fourth respondent on 16 September 2013. The fourth respondent was asked whether he had participated in the industrial action and whether he had participated in acts of misconduct. In the witness's view, there was a significant and consistent indication of deception.
- [6] The third witness, a Mr Kobus de Wet, testified that a significant number of people that been identified using the video recordings that had been made on the day in question and other people he had interviewed had generally agreed that they were the persons identified in the recordings. The fourth respondent's evidence was that he had arrived in the early morning of 24 July 2013, wearing his orange T-shirt with long sleeves, blue trousers with reflective strips and safety boots. He changed into his PPE top and put on his white helmet, went to the toolbox talk at about 6:50 am. He left after the commotion by the Murray and Roberts employees, went back to the change room, took off his jacket and put on his t shirt and stood at the village gate for about five minutes. He saw angry people throwing stones. A white man in a bakkie stopped and offered him a lift. They left the site and he was dropped off on the road to Marapong. He did not clock out on account of the tension that had prevailed.
- [7] In his award, the arbitrator comes to the following conclusions:
- Apart from the uncorroborated testimony of the site manager that the individual identified in the video recording was wearing a brown T-shirt identical to the one worn by the fourth respondent when he saw him earlier that morning, there is nothing to connect the fourth respondent to the individual in the video recording. The fourth respondent denies that the individual was him and denies that he was wearing a brown T-shirt that day. I personally would describe the colour of the T-shirt worn by the individual and the recording is dark grey rather than brown, but this too is open to interpretation. I must therefore conclude that the video recording does not incriminate the fourth respondent.

- [8] The arbitrator went on to consider what amounted to circumstantial evidence on which the applicant relied. First, he observed that the fourth respondent had failed to clock out which it was alleged, was indicative of his wishing to remain unaccounted for. Secondly, as a shop steward, the fourth respondent would not have left the site truly as he had an obligation as a shop steward to provide guidance to his members. Third, the fourth respondent, unlike other employees who identified on the video, failed to confirm that it was him shown in the video.
- [9] The arbitrator concluded that this evidence was not, in his opinion, nearly strong enough to warrant a conclusion, even on the balance of probabilities, that the fourth respondent was carrying a dangerous weapon or that he damaged property. He said the following *“at a stretch, it might indicate that he was present during the industrial action (as were hundreds of others), but it is not clear that being present during industrial action equates to participation in the industrial action.”*
- [10] In relation to the polygraph test results, the arbitrator concluded the following:
- Finally, the polygraph test results indicate strongly that they were significant and consistent indications of deception in the fourth respondent responses to the questions put to him during the examination. Based on this test, the fourth respondent is guilty of all the charges other than the charge of carrying a dangerous weapon. However the polygraph test is not accepted by South African cultures evidence which, on its own, can determine a person's guilt. Therefore, while the outcome of the polygraph test indicates unambiguously that the fourth respondent participated in and protected industrial action, damaged property and threw stones at security personnel, I cannot find the fourth respondent guilty of committing the offences that he was charged with, on the basis of these findings alone.
- [11] The primary ground of review concerns the arbitrator's assessment of the evidence. In essence, the applicant contends that the arbitrator's reasoning is flawed in that the first witness, Mayrhofer, had given direct evidence of the fourth respondent's attendance on site, his participation in the unlawful industrial action,

and the fact that he had not clocked out. In the founding affidavit filed in support of the present application, the deponent says the following:

Not only was the evidence given by the witness on behalf of the applicant, Mr R Mayrhofer ("Mayrhofer") that he was able to identify the fourth respondent but Mayrhofer also gave evidence that the fourth respondent was '*involved with a group of employees that were attempting to overturn a vehicle*'. There was, therefore, direct evidence of Mayrhofer that the fourth respondent was involved in the unlawful industrial action and that he was involved in the damage to property.

[12] The applicant contends that there was no basis to reject the evidence of Mayrhofer together with the corroborative evidence in relation to the fourth respondent's attendance on the day, his participation and his failure to discredit Mayrhofer in any way. Of some significance, so contends the applicant, is the fourth respondent's defence of a bare denial. He called no witnesses to support his version. His explanation in the light of the overwhelming evidence against him stood to be rejected. In short, the applicant contends that the arbitrator did not properly assess the evidence with the result that the findings to which he came were accordingly not sustainable with the result that the conclusion to which he came was not reasonable.

[13] The applicable legal principles are well-established. 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 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)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, 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.

[14] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgement). Specifically, the questions for a review court to ask or whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he was she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he will see may produce an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[15] In the present instance, in effect, the arbitrator came to the conclusion that the applicant had failed to discharge the onus to establish that the fourth respondent had committed the misconduct with which he had been charged. He did so by first considering the direct evidence presented by way of the video recording. His conclusion that the fourth respondent could not be identified in video recording and that the recording did not incriminate the fourth respondent is not unreasonable. It is clear from the record that Mayrhofer himself was unable unequivocally to identify the fourth respondent in the recording. His evidence amounted to no more than an assertion that upon watching the video footage, 'we' managed to identify the fourth respondent by reference to his build and gait,

and his clothing. Mayrhofer did not directly observe the fourth respondent during the industrial action and that was only later, on watching the video footage, that he identified him. Even then, as he said in his evidence:

We can only go on the way that Mr. Ramotebele was walking that morning, his build, his heart and the way he walks as well as the clothes that he is wearing.

- [16] Having concluded that the video footage and Mayrhofer's uncorroborated evidence was insufficient to place the fourth respondent on the scene, the arbitrator then considered the circumstantial evidence that had been proffered by the applicant. This included what it averred to be a failure to clock out (as indicative of the fourth respondent wishing to remain and unaccounted for); secondly, that the fourth respondent was a shop steward would not have left the site on account of his obligations to the union's members and fifth, that the fourth respondent, unlike other employees identified on the video, failed to confirm that it was him shown in the video. The arbitrator concluded that this evidence was insufficient to warrant a conclusion on the balance of probabilities that the fourth respondent was carrying a dangerous weapon all that he damaged property at most, it served indicated that he was present during the industrial action but not that he participated in it. That left the polygraph test results and as the arbitrator stated, these in themselves were an insufficient basis to find that the fourth respondent was guilty of committing the offences with which he was charged.
- [17] In coming to these conclusions, the arbitrator was obviously aware of the competing version, uncorroborated as it was, put up by the fourth respondent. It may well be that the arbitrator's compartmentalised approach to the evidence was not the preferred manner to engage with it, and that he ought to have viewed the evidence as a whole. It may even be that another reasonable decision-maker would have come to a different conclusion on the same facts, and been persuaded that on a totality of the evidence, the fourth respondent was present at and participated in the industrial action. But that does not mean that the award is reviewable. The applicable threshold admits a range of responses to the evidence. By definition, there is no single correct outcome. The fact remains that

Mayrhofer's evidence was not as unequivocal as the applicant seeks to suggest and that having failed to establish the fourth respondent's presence on the scene, the circumstantial evidence against him was insufficient in itself to prove any of the charges against him. It should further be recalled that ultimately, the whole onus of proof rested on the applicant – it was not for the fourth respondent to disprove his presence at the scene of the industrial action. In short, I am not persuaded that the arbitrator's award, having regard to the evidence before him, was so unreasonable that no reasonable decision-maker could come to the conclusion he did on the available evidence.

I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr B Bleazard

For the third and fourth respondents: Union official