



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JR 2354/15

In the matter between

STEVAL ENGINEERING (PTY) LTD

Applicant

and

JOSEPH MPHAPHULI N.O

First Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Second Respondent

STEVEN FRANK CRONJE

Third Respondent

Heard: 13 September 2017

Delivered: 27 September 2017

Summary: Errors committed by an arbitrator in the conduct of arbitration proceedings which have no impact on the reasonableness of the award do not constitute the defects envisaged in section 145 (2) of the Labour Relations Act of 1995.

JUDGMENT

Lallie, J

Introduction

- [1] The applicant approached this court for an order reviewing and setting aside an arbitration award of the first respondent (the commissioner). The application is opposed by the third respondent. The basis of the applicant's case is that the award is defective as envisaged in section 145 (2) of the Labour Relations Act¹ (the LRA).

Factual background

- [2] The applicant employed the third respondent in 2012 until his dismissal on 2 October 2015, when he worked as a foreman. The events leading to the third respondent's dismissal are that sometime in 2015, the applicant was concerned with the third respondent's conduct and absence from work. The third respondent was suspended for an unspecified period from 7 July 2015. The applicant required the third respondent to subject himself to a medical examination by Dr Landman. It arranged appointments for the examination for 15 and 16 July 2015. The third respondent did not honour the appointments. He was booked off sick by his doctor from 3 August to 4 September 2015. The applicant made a further appointment for the third respondent to be examined by Dr Landman on 15 September 2015. At 14h00 on 16 September 2015, Dr Landman forwarded an email to the applicant advising that the third respondent had returned the pathology form for blood tests to his receptionist and refused to undergo any tests. The applicant responded by delivering to the third respondent a disciplinary notice for an enquiry which was scheduled for 30 September 2015. The charge against the third respondent was:

"Breach of Contract of Employment in that you failed and or refused to undergo a Medical Examination as requested by the Doctor Landman on 15 September 2015".

- [3] Pursuant to a disciplinary enquiry which was held in the third respondent's absence, he was found guilty and dismissed for the misconduct which formed

¹Act 66 of 1995 as amended.

the basis of his charge. He referred an unfair dismissal dispute to the second respondent where the first respondent found his dismissal substantively unfair but procedurally fair and ordered the applicant to pay the third respondent an amount of R43 000.00 for outstanding remuneration and compensation in the amount of R192 000.00 which is equivalent to his six months' remuneration. The global amount of the relief granted was in the amount of R235 000.00.

The award

- [4] The commissioner recorded that at the heart of the dispute was whether the third respondent committed an act of misconduct by not honouring the doctor's appointment, conduct which, on the applicant's version, constituted insubordination punishable with dismissal. He noted that the essence of the evidence of Mr Aucamp (Aucamp), the only witness for the applicant, was that the third respondent did not honour his doctor's appointments of 15 and 16 July 2015. The evidence was not disputed by the third respondent but it was submitted that he was unwell at the time and honoured the appointment of 4 September 2015. The commissioner found that the charge was that the applicant did not comply with the respondent's instruction when in fact the opposite was true. He concluded that the charge had no basis in law. He added that even if the third respondent had committed the misconduct, the sanction of dismissal would have been inappropriate as the prescribed penalty in terms of the Site Specific Agreement was a final written warning. He found the dismissal substantively unfair. The commissioner, however, rejected the third respondent's version that the applicant's refusal to provide him with transport to the venue of the disciplinary enquiry rendered his dismissal procedurally unfair.

Grounds for review

- [5] The applicant submitted that the arbitrator misconstrued the nature of the charge against the third respondent as being disobeying a lawful instruction when it was in fact breach of his contract by not undergoing medical tests by Dr Landman. He erred in finding that the third respondent was dismissed for

failure to attend a consultation on 15 and 16 July 2015. He therefore embarked on the wrong enquiry and his error led him to a conclusion which no arbitrator could reasonably have reached. Had he embarked on the correct enquiry, he would have established that the applicant's evidence was not refuted. It was further argued that had the arbitrator evaluated the misconduct which formed the basis of the third respondent's charge, he would have at least concluded that he committed gross insubordination which justified the sanction of dismissal. The applicant submitted that the arbitrator committed a reviewable gross irregularity in disregarding the concession made by the third respondent under cross-examination that he did not have to undergo medical tests because he was medically fit. The third respondent denied that the award is reviewable. He submitted that it is reasonable because his dismissal was substantively unfair as it was punishment for reporting that his superior had raped his wife in the applicant's house that had been allocated to him while the third respondent was on duty. He denied that the grounds for review have substance.

- [6] The applicant argued that the arbitrator misconstrued the nature of the dispute before him in that he conducted the wrong enquiry. He considered whether the third respondent had failed to honour a doctor's appointment on 15 and 16 July 2015 instead of determining whether he refused to undergo a medical examination on 15 September 2015. The error tainted his whole award and led to a failure of a fair trial of issues. He relied on the following dictum²:

"To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry a

² *Head of the Department of education v Mofokeng and others* (2015) 36 ILJ 2802 at para 32

decision which no reasonable decision-maker could reach on all the material which was before him or her.”

- [7] The third respondent argued that the distinction the applicant sought to create between insubordination and breach of contract was artificial as at arbitration its evidence was that the third respondent was dismissed for misconduct for his failure to adhere to an instruction to attend consultations on 15 and 16 July 2015. Defending the reasonableness of the award, the third respondent argued that the clause of his contract of employment he was alleged to have breached required him to submit himself, at the expense of the applicant, to examination by any medical officer appointed by the applicant. The third respondent led evidence to the effect that he honoured the doctor's appointment of 4 September 2015 for which the applicant had to pay. The applicant led no evidence to prove that it had paid for the appointment of 15 September 2015, which formed the subject of the applicant's charge.
- [8] It is trite that an award may be reviewed and set aside if the arbitrator has misconceived the dispute before him or her, alternatively, when the arbitrator has reached an unreasonable conclusion. The applicant argued that the arbitrator misconceived the dispute before him by conducting the incorrect enquiry. He enquired into the fairness of the third respondent's dismissal for failure to honour doctor's appointments on 15 and 16 July 2015 when he was in fact dismissed for refusal to undergo medical examination on 15 September 2015. The third respondent denied that the arbitrator misconceived the dispute before him. He argued that the arbitrator dealt with the third respondent's refusal to undergo medical examination on 16 September 2015 but concluded that no evidence was presented to support the applicant's case. In determining the reasonableness of the arbitration award I am enjoined to consider the evidence that was led at the arbitration in its totality. When Aucamp sought to rely on the email the third respondent received from Dr Landman regarding the third respondent's refusal to undergo medical examination on 16 September 2015, the commissioner informed him that it did not carry much weight. He expressed the view that even Dr Landman was not a witness to the refusal as he based his email on information he received from his receptionist.

[9] The record supports the third respondent's version that the arbitrator dealt with the issue before him. Considered the third respondent's refusal to undergo medical examination on 16 September 2015 and concluded that the applicant failed to lead admissible evidence to prove it. There is merit in the applicant's submission that the arbitrator erred in identifying the misconduct which led to the respondent's dismissal. Errors do not constitute valid grounds for review. It is their effect on the outcome of the award that have an effect on the reasonableness of awards. The arbitrator's errors did not affect the reasonableness of his award because he dealt with the issue before him and reached a reasonable decision on it. The argument that he misconceived the dispute before him is untenable. In *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman*³ it was held that the consent to medical examination in a contract of employment does not constitute justification as contemplated in section 7 (1) of the EEA. The applicant did not establish that the award falls outside the bounds of reasonableness.

[11] The third respondent should not be out of pocket in his attempt to defend an award in his favour. Both the law and fairness require that the applicant pay the third respondent's costs.

[12] In the premises, the following order is made:

Order:

1. The application for review is dismissed with costs.

³ [2017] ZALCJHB 258 (4 July 2017)

Z Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate J Eastes

Instructed by Erasmus-Scheepers Attoeneys

For the Third Respondent: Advocate P Kirstein

Instructed by: Van Der Merwe Attorney

LABOUR COURT