



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2265/14

In the matter between:

**EXXARO COAL MPUMALANGA (PTY) LTD
MATLA COAL**

APPLICANT

And

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

**FAITH GUMEDE N.O.
RESPONDENT**

SECOND

**NUM OBO PETROS MOYANA
RESPONDENT**

THIRD

Heard: 12 JULY 2017

Delivered: 01 DECEMBER 2017

JUDGMENT

THOMPSON, AJ

Background.

- [1] This is an application seeking condonation for the late filing of the answering affidavit by the Third Respondent. There is also an application seeking to review and setting aside of the arbitration award issued by the Second Respondent under case number MB4032/14 on the 15th October 2014.
- [2] I shall deal with the condonation. The Third Respondent states that the Applicant's Rule 7A (8) notice was not served on the Respondent but on the Trade Union. The answering affidavit is six months out of time. The Third Respondent also argued that the service was not proper as it was served via email and that the notification in terms of Rule 7A (8) is defective as it does not state that the Applicant stands by its founding affidavit.
- [3] Clearly one cannot automatically assume that a Trade Union is representing a party after the arbitration process. One would also expect a Trade Union to inform the Applicant's Attorney of its status after receiving such a notification. The date of service on the Third Respondent is the applicable date.
- [4] The wording of Rule 7A (8) is clear that either (a) a notice or accompanying affidavit or (b) deliver a notice that the Applicant stands by its notice of motion. In *Naidu v Ackerman's (Pty) Ltd [2000] 9 BLAR 1068 (LC)*, it was held that the purpose of the Rule 7A(8) 'is to allow a litigant...where no written reasons have been given prior to the institutional proceedings to substitute, amend, vary, add to the grounds of review once the written reasons and or record is filed.'
- [5] The notice complies with the requirements of the Rule 7A (8) (b). I am of the view that the Applicant contributed to the Third Respondent's lateness by not establishing whether the Union was authorised to accept service of the

application. Having considered the merits I find that condonation should be granted.

Review.

- [6] This matter has a long history. The Third Respondent was employed by the Applicant as a boiler maker. He was dismissed after an incident which according to the Applicant breached the Mine Health and Safety Code. The Third Respondent was found guilty at an internal disciplinary hearing and a dismissal followed. The Applicant argued that the Applicant had a zero tolerance for breaching of the Mine Health and Safety Rules. The Third Respondent was performing work on hand rails between two conveyer belts which were in motion.
- [7] The Second Respondent determined in her arbitration award that the dismissal was procedurally fair but substantively unfair. The arbitrator based her finding of substantive unfairness, on the Third Respondent's evidence that Section 8.9(1) (b) of MHSR was not applicable because the Third Respondent had not worked on the conveyer belt. She found that the structure was independent of the conveyer belt. She also found that there was no rule that utterly stipulated how far approximately the Applicant was forbidden to work from a moving conveyer belt. The arbitrator also found that the conduct was not as serious as perceived by the Applicant.
- [8] The crisp issue which the Arbitrator had to decide on the evidence was whether the employee had breached the MHSR by not turning the conveyer system off before commencing work.
- [9] The Attorney for the Applicant argued that Mr Venter, the Chief Safety Officer testified in the arbitration proceedings. He testified that on the 24th of October during a Labour Audit he was accompanied by an auditor at the plant and they saw the Third Respondent working between two conveyer belts whilst the conveyer belts were in motion and this breached the regulations.

- [10] It was argued that the Arbitrator's conclusion that the employer's failure to have a rule which stipulates the distance prohibiting workers from working in the vicinity of a moving conveyer belt is misconceived. The question an Arbitrator in these circumstances should consider is whether there was a breach of the prevailing regulations and managerial instruction stating that (i) "no employee may work on any part of any conveyer system while it is in motion." This question has to be answered in the light of the evidence led and including observations from the *inspection in loco*.
- [11] The Applicant's Attorney further argues that the evidence of Venter is clear when he testified 'I would say that the installing structures onto the belt structure itself is part of repair work and being on the structure itself that is why it comes into play.' He further testifies 'No, because the structure that he worked on was on the moving conveyer belt structure itself.'¹
- [12] The Attorney for the Applicant further argued that the transgression was picked up by the auditor whilst completing this surveillance audit and it was reported in the audit report.
- [13] The Third Respondent's Attorney argued that the matter is not complex and the crux of this matter is whether the hand rail formed part of the platform or the conveyer belt. He argued that the evidence is clear that the hand rail is not part of the conveyer belt.
- [14] The Arbitrator, together with the parties conducted an *inspection in loco*. No evidence has been recorded during the inspection. I find it unusual that parties were not allowed to ask questions, illustrate, point out during the *inspection in loco*. No evidence is recorded other than mention made of it by the Arbitrator in her award. She states that it was observed that the structures are not inter-reliant. The witnesses do not testify in any significant detail relating to the obvious dangers. They also do not lead evidence as to the proximity or distance where the Third Respondent was holding the hand rails in relation to the moving conveyer belt. Nor have the parties provided any photographs as to illustrate what had been observed at the *inspection in loco*.

¹ Page 23 line 6 and 11

The Applicant argues that Venter's evidence, by virtue of his position as chief safety representative, should be accepted. The Third Respondent's argument is on strict interpretation of the managerial instruction and the MHSA that he was not working on the conveyer belt system. The Arbitrator was confronted with two contradictory versions. On the one hand the evidence of Venter, an expert witness by virtue of his position as the Chief Safety Officer who testified that the employee's conduct transgressed the Safety Regulations. On the other hand, the evidence of the employee was that he had not breached the Safety Regulations as he was not working on the structure. The Arbitrator oddly ignores the evidence and entry in the audit report following an inspection by the Safety Inspector from Department of Mineral Resources. On discovering the Employee working on the structure during the inspection, the external inspector ordered that the employee cease his work and return to the workshop. The arbitrator does not deal with the reason for the rejection of the expert witness as largely collaborated by the Department of Mineral Resource's audit report. This is obviously wrong and on this basis the arbitration award stands to be reviewed and set aside.

Order.

1. The arbitration award dated 15 October 2014 under case number MB40321/14 is hereby reviewed and set aside.
2. The Applicant's dismissal was both procedurally and substantively fair.
3. There is no order as to costs.

THOMPSON AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: SHEPSTONE & WYLIE ATTORNEYS

For the Respondent: E.S MAKINTA ATTORNEYS

LABOUR COURT