IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR966/18

In the matter between:

THARISA MINERALS (PTY) LTD **Applicant**

and

CCMA **First Respondent**

FOURIE, STEYN, N.O **Second Respondent**

ASSOCIATION OF MINING AND CONSTRUCTION
Obo KOBUS VAN ZYL **Third Respondent**

Heard: 11 January 2019

Delivered: 14 June 2019

JUDGMENT

NORTON, AJ

Introduction

[1] The Applicant is a mining company operating in the Marikana District in the North West Province. The Third Respondent is AMCU, a trade union representing Mr Kobus Van Zyl. Mr Van Zyl was a diesel mechanic employed by the Applicant. He was also an AMCU shop steward.

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[2] The Applicant dismissed Mr Van Zyl for threatening violence. The Applicant convened a disciplinary enquiry on or about 16 February 2018. He was dismissed on 5 March 2018 and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number NWRB 652-18. The dispute proceeded to arbitration on 4 May 2018.

[3] On 11 May 2018 the CCMA found that the dismissal was unfair and ordered reinstatement to 5 June 2018 and payment of 3 months wages amounting to R105 000,00. Around 29 May 2018 the Applicant filed a review application, seeking an order to review and set aside the award. The Respondents did not challenge the application, and it proceeded on an unopposed basis.

[4] The onus rests with the Applicant to show that the award is vulnerable to review on the basis as set out in section 145(2) of the Labour Relations Act[1] (LRA). Proving that an arbitrator committed gross misconduct in relation to his/her duties, or committed a gross irregularity in the conduct of the arbitration proceedings, or exceeded his/her powers is an onerous threshold to cross, and if the Applicant fails to discharge that onus, then the Court will not come to its assistance and will dismiss the application. The converse is of course true – that if the Applicant proves that the arbitrator committed a reviewable defect then the Court will come to its assistance by either referring the matter back to the CCMA for a hearing *de novo*, or by setting aside the CCMA's decision and substituting that award with an order the court deems appropriate.

<u>Background</u>

Applicant's version

[5] In November 2017, an employee (Mynhardt) from a service provider to the mine (Pirtek) reported that he had seen two mechanics (Renier and Frans) of Tharisa Minerals (the Applicant) using drugs. The mechanics were placed on suspension on 2 January 2018 and advised to attend a disciplinary hearing. Mr Van Zyl, as an AMCU shop steward was the employees' representative.

[1] 66 of 1995, as amended.

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[6] Around 5 January 2018 (prior to the mechanics' disciplinary enquiry) a whistle-blower identified as "Hansie" claimed to Pirtek's management (being Riaan Rossouw the Regional Manager for Pirtek and Francois de Beer, the site supervisor of Pirtek) that he was contacted by Van Zyl who threatened him and said that he should not get involved in matters on the mine, and that there could be serious implications for Pirtek.

[7] The applicant contended that Rossouw was concerned about this because he had had bad experiences with AMCU at a nearby mine in Steelpoort and he did not want AMCU disrupting operations. He phoned Van Zyl and after leaving a message spoke to him in the afternoon.

[8] However, Rossouw testified that Van Zyl did not threaten him, and that the whistle-blower did not say that Van Zyl threatened violence against Pirtek. De Beer said that a whistle-blower told him that Van Zyl had said that Pirtek must not get involved in mine business and that the applicant's employees were calling Pirtek employees "*snitches*". Furthermore that people had been "*removed*" from the mine and that they were "*going to get into trouble*".

Respondent's version

[9] Van Zyl admitted to phoning Hansie, in order to obtain information about the case against the two employees implicated in drug use. Rossouw phoned AMCU leadership (Van Zyl) and said there was a problem between the mine employees and Pirtek employees, and proposed a meeting to discuss the matter. The meeting never materialised. Van Zyl denied that he had threatened anyone, and regarded the employer's evidence as "*fabrication*".

The arbitration award

[10] The arbitrator found that the employer's witnesses contradicted each other in material respects. Roussouw said that he could not recall the whistle-blower mentioning that Van Zyl threatened violence, and nor did Van Zyl threaten him; De Beer says that the whistle-blower reported that he was threatened by Van Zyl. The arbitrator found the AMCU witnesses to be credible, and that their versions

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corroborated each other.

[11] The arbitrator noted that the whistle-blower never prepared a statement, and that his version of events was reported (in contradictory terms) by Rossouw and De Beer. The arbitrator found that the employer could not prove its case on a balance of probabilities that Van Zyl threatened violence when he phoned the whistle-blower.

[12] The arbitrator found that, "*Rossouw and de Beer's evidence contradict each other in material aspects. Rossouw stated that he did not receive any information from any of his employees that the Applicant (in the arbitration – Van Zyl) threatened violence against Pirtek but de Beer, in Rossouw's presence heard the whistle-blower to implicate the Applicant. I am of the view the Respondent could not prove its case on a balance of probabilities that the Applicant threatened violence when he telephonically called the whistle-blower ("Hansie") and therefore I cannot attach any weight to the probative value of the hearsay evidence of the whistle-blower as heard from Rossouw and de Beer. It therefore flows that the Applicant's case is probable.*"'[2]

[13] Accordingly he found that the dismissal was substantively unfair.

<u>Grounds of review</u>

[14] The Applicant sets out the history of the dispute in the Founding Affidavit but does not explain in what respects the arbitrator allegedly misdirected himself warranting this court's interference. In other words he doesn't clearly set out the 'grounds" for review.

[15] I can glean from the Affidavit that the apparent misdirection may be summarised as follows:

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[2] Paragraph 27

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15.1. The arbitrator reached conclusions which were not capable of justification in that he dismissed the evidence of the employers witnesses as 'contradictory"[3]

15.2. The Arbitrator attached too little weight to the reason the Third Respondent had communicated with Hansie (presumably implying that the real reason Van Zyl contacted Hansie, a foreman from Pirtek, was to intimidate/dissuade Pirtek employees from testifying against the applicant's employees implicated in misconduct).[4]

[16] The Applicant's Supplementary affidavit did not take the matter much further and reiterates the argument that the Third Respondent had no reason to contact Hansie, except to instill fear in the minds of employees at Pirtek not to testify.[5]

The material evidence before the arbitrator

[17] The arbitrator noted that the recollection of the report from Hansie to de Beer and Roussouw about Van Zyl's telephone call to him (Hansie) was materially contradictory. In short de Beer recollected that Hansie had understood from the exchange the intention that Van Zyl had to intimidate him and by implication other Pirtek employees. Roussouw's recollection was precisely the opposite.

[18] De Beer said, that Hansie had told him that '*people had been removed from the mine for much smaller things*." Whereas Rossouw said the following:

> "…so we went into a discussion and what he told me was that there were rumours on the mine…they must be careful to deal with Pirtek because Pirtek is snitches…"[6]
> "… (Hansie) told me that AMCU was now involved in this whole thing. He told me that AMCU was involved and I asked him who is in charge of AMCU …he gave me the number of Kobus."[7]
> He was asked, "Did (Hansie) mention that he was threatened by Kobus…?"
> Roussouw says, "No he did not say that…"[8]

[3] Paragraphs 8.2 and 8.3
[4] Paragraphs 8.5 and 8.7
[5] Paragraph 6
[6] Transcript, pg 56
[7] Transcript pg 58
[8] Transcript pg 59

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> He was asked: "Did you at any stage receive information from any of your employees that implicates the Applicant to have threatened violence against your employees in your company?"
> Rossouw replies, "Not to me, no. No."[9]

[19] The Applicant urges the Court to consider the factual matrix which included Roussouw's concern that AMCU could disrupt operations as happened at Steelpoort, and that de Beer had nothing to gain by misrepresenting Van Zyl's underlying message.

[20] The arbitrator weighed these considerations with the evidence of Van Zyl who knew Hansie, who denied that he had intimidated him, and explained that he was investigating the circumstances related to the suspension of two members.

[21] It must be borne in mind that Hansie did not testify at the arbitration, and nor is there a report or statement prepared by him – all the court has is the recollection of the witnesses' de Beer, Rossouw and Van Zyl.

Analysis

[22] The finding the arbitrator arrived at, that the employer did not prove on a balance of probability that Van Zyl threatened violence is a logical one, well within the *Sidumo and Another v Rustenburg Platinum Mines Limited & others*[10] spectrum of reasonableness:

22.1. Rossouw spoke to Van Zyl and reported no threat of violence;

22.2. Rossouw's recollection of the report from Hansie mentioned no violence;

22.3. Van Zyl explained that he phoned Hansie enquiring about the circumstances surrounding the suspension.

[23] Whilst de Beer gave evidence that he had a good memory and that there was the threat of "*people have been removed for smaller things*" – that evidence must be weighed with the direct recollection of Rossouw and Van Zyl (who had a telephonic interchange).

[9] Transcript pg 61

[10] (2007) 28 ILJ 2405 (CC).

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[24] To succeed on review the Applicant must show that the arbitrator arrived at a result which no other arbitrator reasonably could, and that the misdirection fell within the provisions of section 145 (2) of the LRA. The Applicant has failed to pass this hurdle.

[25] The Applicant has not made out a case for review of the award. There is no reason for the court to interfere with the arbitrator's award.

[26] Accordingly I make the following order

Order

1. The application is dismissed.

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D. Norton

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate W. Hutchinson.

Instructed by: Fluxmans Incorporated.

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