

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR2153/16

In the matter between:

**SASOL LIMITED**

**First Applicant**

**NATIONAL PETROLEUM REFINERIES**

**OF SOUTH AFRICA (PTY) LTD**

**Second Applicant**

and

**THE NATIONAL BARGAINING COUNCIL**

**First Respondent**

**FOR THE CHEMICAL INDUSTRY**

**ELEANOR HAMBRIDGE N.O.**

**Second Respondent**

**DIRK TREURNICH**

**Third Respondent**

**Date heard: 7 June 2019**

**Delivered: 17 September 2019**

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**JUDGMENT**

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RABKIN-NAICKER, J

- [1] This is an opposed application to review and set aside an arbitration award under case number GAJB14037-15 issued by the second respondent (the Arbitrator) in which she found that the dismissal of the third respondent was

procedurally and substantively unfair. She ordered his retrospective reinstatement to 5 May 2015 with no loss of benefits prevailing at the time of his dismissal. The second applicant, his employer, was ordered to pay his back-pay in the amount of R425 000-00 on or before 5 October 2016.

[2] The background to the dispute was set out in the Award as follows:

“2.1 The Employee, a process controller, was dismissed for dereliction of duties due to negligence, as well as fraud and falsification (in essence one allegation) pursuant to a joint disciplinary inquiry during which the Employee, Buti Seyale (Buti) and Mildred Baartman (Mildred) were all found guilty and dismissed. The Employee had launched an appeal against his dismissal, which appeal was unsuccessful and communicated as such on 5 May 2015. During the arbitration hearing, in response to my question, I was advised that Buti had withdrawn his matter at the NBCCI and the dismissal of Mildred was confirmed at arbitration under the auspices of the NBCCI.

The Employee earned R25000-00 per month at the time of his dismissal. The Employee had a clean record and 14 years of service.”

[3] The third respondent was found guilty of the following charges at his disciplinary hearing:

3.1 Fraud in that on 22 December 2014 whilst working at the second applicant's white products weighbridge he scanned a new fingerprint and linked it to a truck driver who was not physically present at the place where the scanning took place;

3.2 Falsification in that on 22 December 2014 whilst working at the first applicant's white products weighbridge, he intentionally replaced a fingerprint in the dispatch system in order to release a truck which was present for release on 22 December 2014; and

3.3 Dereliction of duty due to negligence in that he did not ensure to retain transaction documents after releasing a fraudulent transaction on 22 December 2014.

[4] The founding affidavit sets out the grounds of review alleging that the Arbitrator:

- 4.1 Made material errors of fact;
- 4.2 Failed to make an appropriate assessment of all the evidence placed before her;
- 4.3 Made material errors in law, which material errors in law constituted a gross irregularity and/or negligence in performing her duties;
- 4.4 Was grossly negligent, alternatively committed misconduct in relation to her duties in that she disregarded some of the evidence before her;
- 4.5 Was grossly negligent, alternatively committed misconduct in relation to her duties in that she placed too much reliance on some evidence and disregarded other evidence, thereby failing to properly apply her mind;
- 4.6 Failed to apply her mind to the criticisms and improbabilities emanating from the third respondent's evidence;
- 4.7 Failed to apply her mind to the appropriateness of dismissal as a sanction in the context of the facts before her;
- 4.7 Failed to apply her mind to the continued employment relationship particularly given that the second applicant testified that the trust relationship had irretrievably broken down, and where she had concluded that the third respondent had been guilty of negligence.

[5] In the applicants' supplementary affidavit, a new ground of review is dealt with i.e. that the Arbitrator descended into the arena, and exhibited bias.

[6] The parties prepared a pre-arbitration minute. Included in the common cause facts are the following:

"8. On 22 December 2014 the applicant was stationed at the Natref weighbridge, being the last checkpoint in respect of the process by which trucks load and collect fuel for transportation purposes ("the process").

9. The applicant's position within the collection process twice a day is determined through the ball selection system. The colour of the balls

determines the location of the applicant's position in the process during his shift.

10. The process to be followed at the weighbridge is as follows:

- 10.1 the driver arrives at the weighbridge;
- 10.2 the driver hands his barcode to the operator;
- 10.3 the operator captures the barcode onto the computer system;
- 10.4 the computer system verifies:
  - 10.4.1 the transaction in question as it appears on the bar code;
  - 10.4.2 the weight of the truck in relation to the quantity of fuel loaded and a mass of 80 kg for the driver;
- 10.5 the operator verifies the transaction by capturing his fingerprint;
- 10.6 the driver must then verify the transaction by capturing his fingerprint. After the driver's finger print has been captured or overrode, the necessary proof of delivery documents are printed four copies of each;
- 10.7 the applicant signs all the copies and provides them to the driver for countersignature;
- 10.8 the driver signs all the documents and provides two copies to the applicant;
- 10.9 the applicant already closed the transaction by printing the documents;

11. The barcode is generated and sent to the driver's mobile telephone.

12. The details of the barcode include:

- 12.1 the driver's name
- 12.2 the driver's identity number;

12.3 the registration numbers of the driver's vehicle including any horse, trailer and pups;

12.4 the period during which the driver is entitled to participate in the process;

13. It is responsibility of the person at the inspection truck stop to verify the identity of the driver and the license plate of the vehicle.

14. The details of the barcode are synchronized with the respondent's system and once the barcode is scanned, the process is initiated.

15. The applicant was off duty on 21 December 2014.

16. On 22 December 2014:

16.1 the applicant reported for duty at 05:05:42;

16.2 the applicant, through the random selection process, was stationed at the weighbridge;

16.3 at approximately 06h06 the applicant suspended the driver due to the driver's failure to return the documentation to the applicant;

16.4 at 06h22 Neels Wilson ("Wilson") moves the schedule of the barcode;

16.5 the barcode number \*77393437\* belonged to a Unitrans driver Tawanda P Mubayiwa ("Mubayiwa")

16.6 Unitrans confirmed that Mubayiwa was allocated to the vehicle with registration number CK55GK GP, fleet number 47101.

16.7 Unitrans confirmed that the vehicle with registration number CK55GK GP, fleet number 47101 was in Klerkdorp at the time of the incident in question.

16.8 The vehicle at the weighbridge which caused the suspension of Mubayiwa was a Unitrans vehicle with fleet number 4613 or 4615.

16.9 At 11h43, Wilson loads the latest version of the driver and un-suspends the driver.

17. All entries captured on the system are logged.

18. On a daily basis, a function is performed by the respondent in terms of which the supporting documentation in respect of all processes is correlated with the printout of all transactions to ensure that all supporting documentation is properly accounted for.”

[7] Given the approach taken by the applicants in this application, it is important to emphasise the trite distinction between an appeal and a review. The Court is not dealing with appeal grounds but with whether any irregularities or errors by the Arbitrator led to an award that a reasonable arbitrator could not make. In the matter of *Head of Department of Education v Mofokeng and Others*<sup>1</sup> the Labour Appeal Court (LAC) set out the test thus:

“Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

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<sup>1</sup> (2015) 36 ILJ 2802 (LAC) at para 33.

- [8] In this case, the Arbitrator found that the employer had not discharged its onus to prove that the third respondent was grossly negligent. Central to her finding was the issue of whether a rule existed pertaining to positive identification before changing a fingerprint of a driver at the weighbridge. The arbitrator stated in material part of her Award the following:

“Although Dalina<sup>2</sup> had testified that the rule pertaining to positive identification before changing a fingerprint was communicated by herself in an e-mail during July 2014, such email did not form part of the bundle of documents and on more than one occasion during the course of the arbitration hearing, I had enquired as to its existence. I have carefully perused the relevant part of the transcript of the disciplinary enquiry and it would seem that the e-mail relating to the rule requiring positive identification of a driver of a truck had been read into the record at such disciplinary enquiry. However, on a careful analysis of this extract, it would seem the rule was made applicable to the truck stop only and not also to the white weigh bridge, where the Employee had worked. It was however argued by the representative for the Employer that the Employee considering his length of service and the fact that he had previously acted in a senior position, should have known better and should have insisted on positive identification before changing the fingerprint of the driver. The Employee, on the other hand, had convincingly testified that he had assumed that the identification of the truck driver had been verified previously, at the inspection truck stop. It must be borne in mind that according to the minute of the pre-arbitration, it was common cause that it was the duty of the person at the inspection truck to stop to verify the identity of the driver and the license plate of the vehicle. Furthermore, it was common cause that the Employee worked at the white weigh bridge the day of the incident and before reaching the white weigh bridge, a truck driver would have passed the inspection truck stop and the black weigh bridge and then only would have reached the white weigh bridge, the last checkpoint before exiting the premises. I am thus inclined to accept the version of the employee and in my opinion, his oversight to not insist on positive identification could hardly be termed

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<sup>2</sup> Dalina Groenewald was the Company's witness.

gross negligence, but negligence at most. It was also the version of the Employee that the truck driver had presented him with a barcode upon which he had acted and that the barcode implies that the identity of the driver had been verified at the truck stop. It was further common cause that the Employee had suspended the driver on the system and also alerted two of his superiors to the incident and furthermore, it was also common cause that the Employee had alerted his Employer as to another suspicious incident, also involving Buti and Mildred, which had occurred on 30/31 December 2014. These actions of the Employee are indicative of an Employee attempting to mitigate the damages of the Employer and cannot be construed a dereliction of duties amounting to gross negligence.”

- [9] The extract referred to by the Arbitrator was read out at the disciplinary enquiry, and recorded in the transcript of the enquiry as follows:

“TAU NKITSENG: Yes, it is dated 25 June 2014 and it was emailed, sent to the entire personnel at dispatch as high importance, it says four new finger scanners, fingerprint scanners have been now ordered from ....[inaudible] Sons, we sincerely hope that this will resolve problems encountered at truck stop and work....[inaudible] with immediate effect, should the driver experience difficulty with his finger at the truck stop and no volume allocation can be done due to fingerprint not reading by the scanner, a copy of the drivers ID must be obtained and certified and positive identification must be done, ID copy to be attached to the barcode before requesting the driver to obtain a manual volume allocation when arriving at the weighbridge.

No manual volume allocation will be done without a copy of driver's ID attached to the barcode and I need to quote what has been said there, it has been good to trust but it is better to check. Do you know if the person in front of you is the person you think it is, currently we are investigating the possibility of installing an application for manual volume allocation at the truck stop to prevent this action from occurring at the weighbridge. Please take note that once a meter entry had been done for a vehicle and it has been found that the volume allocation is incorrect another manual volume allocation cannot be done, this results in a data disturbance on the NDMS and



will not be accepted therefore a zero load must be created and the whole process starting from the beginning, thanks for your cooperation.”

[10] In the Court’s view, the failure of the company to produce the actual email at the arbitration in the face of a denial by the third respondent that he received it was reasonably noted by the Arbitrator, despite the reading out of the extract from the disciplinary enquiry. The email itself had it been produced as requested by the Arbitrator, would have established who the recipients of it were. In any event, the content of the email as set out above suggests that if any problem at the truck stop regarding the driver’s identity occurred, it would be apparent at the weighbridge, as a copy of the ID would have been attached to the barcode when the driver arrived at this last stop. This was not the case. Although the Arbitrator appears to have been factually incorrect regarding the truck stopping at the black weighbridge before it reached the white, this was not material to her determination on the gross negligence charge.

[11] In respect of the charge of ‘falsification or fraud’, the Arbitrator stated as follows:

“As to the allegation of fraud and falsification of documents, this is inherently the same allegation and was agreed to as such in the opening and closing argument of the Respondents. I understood the case of the Respondents to be that the Employee had changed the fingerprint of the truck driver without positive identification and the subsequent failure by the Employee to secure the delivery documents as completed by the truck driver the day of the incident constituted fraud and falsification of documents. Since the Employer failed to prove all the elements of fraud, which constitutes a misrepresentation made intentionally causing actual or potential prejudice, I am persuaded to find that the Employer had failed to discharge the onus that any fraud and/or falsification was indeed committed by the Employee. The fact that the Employee had initially indicated that the truck driver had failed to sign the delivery notes in his report and subsequently said that the driver had driven off with such documents, does not, in my opinion, constitute a material contradiction, nor does it constitute a had suspended the truck driver on the system and also

alerted his Employer to the situation at hand. The Employee cannot be held responsible for the fact that the truck driver was subsequently unsuspended on the system by one Neels.”

[12] It is necessary to repeat the agreed common cause facts in the pre-arbitration minute relating to the job of the operator at the weighbridge which reads as follows:

“10. The process to be followed at the weighbridge is as follows:

- 10.1 the driver arrives at the weighbridge;
- 10.2 the driver hands his barcode to the operator;
- 10.3 the operator captures the barcode onto the computer system;
- 10.4 the computer system verifies:
  - 10.4.1 the transaction in question as it appears on the bar code;
  - 10.4.2 the weight of the truck in relation to the quantity of fuel loaded and a mass of 80 kg for the driver;
- 10.5 the operator verifies the transaction by capturing his fingerprint;
- 10.6 the driver must then verify the transaction by capturing his fingerprint. After the driver's finger print has been captured or overrode, the necessary proof of delivery documents are printed four copies of each;
- 10.7 the applicant signs all the copies and provides them to the driver for countersignature;
- 10.8 the driver signs all the documents and provides two copies to the applicant;
- 10.9 the applicant already closed the transaction by printing the documents;”

[13] The testimony of the third respondent reflects that he did his duty as set out in the agreed facts minute. Any error he may have made when overriding the finger print, i.e. the leaving out of a full stop, could not reasonably be determined as a basis for finding that he had been involved in fraud. His

actions in alerting his superiors when the driver drove off without signing the documents belie such intent. It was not disputed that the booms were not working thus the driver was able to drive off unaided. When asked why the third respondent would have alerted his superiors if he was involved in fraud or falsification, Deline Groenewald was unable to provide an explanation.

- [14] Having considered the record before the Arbitrator, I do not find that any mistakes of fact by the Arbitrator could have led me to a *prima facie* finding of unreasonableness in this review. Nor can it be said that she misconceived the nature of the enquiry. The third respondent had been suspected of being part of a syndicate stealing the applicants' products along with the two other employees who were dismissed and he was charged with them in the same disciplinary enquiry. His sounding of the alarm and suspension of the driver after the truck driver left with the load was not disputed in evidence at the arbitration nor was it explained why one Neels, also an operator to whom he reported the problem, subsequently unsuspended the driver on the system. Neels was not present to testify at the arbitration.
- [15] In addition to the above, I do not find any basis to discern that the Arbitrator was biased in her interaction with the parties. Her conduct was well within the parameters of her function as set out in section 138(1) of the Labour Relations Act<sup>3</sup> (LRA).
- [16] The arbitrator found that the third respondent had been negligent 'at most' in his failure to ensure that he retained the copies of the documentation in a situation in which the driver drove off without returning same. She made this remark in the context of finding that the third respondent was not grossly negligent as charged. She took into consideration that the third respondent had a long employment relationship with the applicants and a clean disciplinary record. It was submitted that given that the Arbitrator had made the statement regarding negligence, she should not have awarded reinstatement. In as far as this remedy is concerned, the Constitutional Court reiterated in SA

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<sup>3</sup> Act 66 of 1995 as amended.

*Commercial Catering and Allied Workers Union and Others v Woolworths (Pty) Ltd*)<sup>4</sup> that:

“[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in s 193(2) applies, namely that the affected employees do not wish to continue working for the employer; the employment relationship has deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for the employees to return to the position that they previously filled; or the dismissal is found to be procedurally unfair only.”

[17] Arguments made before the Arbitrator on behalf of the applicants regarding reinstatement were premised on the guilt of the third respondent, i.e. that he was grossly negligent and had committed fraud and that the trust relationship had irretrievably broken down. However absent guilty findings in respect of the charges against the third respondent, no objective basis was established by the applicants to show that reinstatement would be intolerable or impracticable.<sup>5</sup> Given that the dismissal was found to be substantively unfair, there is no need for me to consider the issue of procedural unfairness.

[18] In all the circumstances, and taking into consideration the costs incurred by the individual third respondent in opposing the review, I make the following order:

Order

1. The review application is dismissed with costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

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<sup>4</sup> (2019) 40 ILJ 87 (CC).

<sup>5</sup> See: *Sasol Nitro v National Bargaining Council for the Chemical Industry and Others* (2017) 38 ILJ 2322 (LAC).

For the Applicants:

Instructed by: Fluxmans Inc

For the Third Respondent: G Gibson

Instructed by: Senekal Simmonds Inc

LABOUR COURT