THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 753/13

In the matter between:

FAR NORTH PLASTICS CC **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER PIET SHAI *N.O* **Second Respondent**

ANDRIES PETRUS BRITS **Third Respondent**

Heard: 17 July 2018

Delivered: 18 September 2019

JUDGMENT

PIENAAR, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside an award made by the Second Respondent (the Commissioner). In his award, the Commissioner found that the Third Respondent's (Brits) dismissal was procedurally fair but substantively unfair and ordered compensation amounting to R 52,000.

[2] The basis for the review is that the Commissioner committed a gross irregularity in conducting the proceedings and that, as a result, he reached

[1] Act 66 of 1995, as amended

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a conclusion which no reasonable decision-maker could reach. Thus, it is the Applicant's contention that the Commissioner erred in his finding that the dismissal of Brits was substantively unfair and that Brits need to be compensated.

<u>The facts</u>

[3] Brits commenced employment as a technician of extruded machines with the Applicant on 01 September 2011. There was a dispute between Brits and his employer with regard to the assembly of the intruder machine on 21 and 22 August 2012 and the operation thereof on 27 August 2012.

[4] Consequently, Brits was charged with –

4.1 Gross misconduct contrary to Brits' fiduciary duty in the workplace in that Brits on or about 20 and 21 August 2012 disregarded an instruction to put an extruder Brits worked on back together;

4.2 Gross misconduct contrary to Brits' fiduciary duty in the workplace in that Brits, on or about 27 August 2012, failed in his duties to start the extruder before 11h00. Brits ultimately had the extruders only running at 16h30. Brits' actions amount to gross dereliction of duty, and or gross negligence.

[5] On 06 September 2012, after a disciplinary hearing, Brits was dismissed.

[6] At the Arbitration proceedings, various versions of events were put forward to the Commissioner. It was Brits' version that he had not received any instruction to assemble the extruder on his own on Monday, 20 August 2012. Rather, the production manager of the Applicant Mr Naude had informed Brits that they would assemble the extruded machine together at a later stage. Consequently, Brits denied that he failed to carry out an instruction.

[7] Although conceding that he and Naude had dissembled the extruder the previous Friday, he submitted that Naude had indicated on the Monday that they would assemble the extruder together. He enquired when they would

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undertake to do such a task, to which Naude informed Brits that it would be done later as the machine would not run that Monday and the following day.

[8] On 21 August 2012, he enquired with Naude and was informed that they would do the work later. On the same day, Brits fell ill and requested to go to the doctor. On Wednesday, 22 August 2012 he was booked off sick and he informed the Factory Manager, Mr Oosthuizen. Upon his return, on 27 August 2012, Oosthuizen informed him that he had failed to carry out the instruction. He informed Oosthuizen that he had never received any such instruction from Naude in that he was told that they would assemble the extruder together.

[9] He further testified that when Oosthuizen later returned, he informed him that Naude admitted that he did inform Brits that they would assemble the extruder together. This gave him the impression that the matter was resolved.

[10] Brits further testified that on 31 August 2012, Oosthuizen called him and asked him to resign. This refusal was met with an ultimatum that, should he fail to do so, charges would be levelled against him. He was surprised by the issue of the charges as he thought the matter had been resolved.

[11] Conversely, Oosthuizen testified that, on 20 August 2012, he went to the Applicant's premises (the factory) and instructed Naude to instruct Brits to assemble the extruded machine. Oosthuizen admitted to being uncertain whether this had actually transpired but that he was confident Naude had given the instruction due to Oosthuizen's "trust" in Naude. Two days after giving this instruction, Oosthuizen noted that the Extruded machine had not been assembled. Oosthuizen conceded that the extruder operator was not present on the day in question and that Brits did not operate the extruder on a daily basis.

[12] Furthermore, Naude, although conceding to having dissembled the extruder with Brits the previous Friday, denied that he told Brits to wait for him to assemble the extruder together. Moreover, he denied that it was the first

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time Naude was doing the job. Naude maintained that he gave Brits the instruction to assemble the extruder in the morning and that Brits should inform him if he encountered a problem. He conceded that he had assisted Brits to dissemble the extruder the previous Friday and on Monday instructed him to assemble the extruder.

[13] Naude was questioned if the instruction was urgent. In answer, he admitted that he did not know whether or not the instruction was urgent given that the extruder was only put together and started on 27 August 2012 (six days later). Furthermore, the extruder had not been assembled for a period of one week in the absence of Brits given that he had been booked off sick from 21 to 26 August 2012.

[14] He admitted that the operator who normally operates the extruder was not present and Brits was assisted by one other employee. He testified further that, on the day that the instruction was given, Brits took a lunch break so that he could collect his daughter from school. He indicated that he had no problem with that however, he could not recall whether he reported this to Oosthuizen.

<u>The arbitration award</u>

Charge One

[15] The Commissioner stated in his award that the evidence of Naude and Brits were of a conflicting nature and, consequently, the credibility of the two witnesses came into question. In particular, the Commissioner made an adverse finding on the credibility of Naude as, on more than two occasions, Naude could not recall essential facts such as what he had reported to Oosthuizen regarding Brits or whether he personally saw that the instruction had not been complied with. Furthermore, Naude stated that he could not remember whether he had reported the fact that Brits had taken leave in order to fetch his child from school to Oosthuizen.

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[16] The Commissioner considered the evidence, which Naude could not accurately recall, as material evidence given the fact that the charges centred around Brits' non-compliance with the instruction.

[17] Further inconsistencies were evident to the Commissioner in that Naude testified that Brits was instructed to carry out the instruction alone for the purpose of learning to do it by himself but also testified that he offered Brits assistance but Brits chased him away.

[18] In contrast to Naude's versions, Brits testified that when he was struggling with the extruders, Naude was smoking and was merely watching him do the work.

[19] The Commissioner found that the version of Brits was more probable given that it was Brits' uncontested evidence that on two occasions he went to Naude to ask him about when the assembling of the extruder would be done. The Commissioner concluded that this was not the demeanour of an individual with an intention to defy any instruction.

[20] Another important factor considered by the Commissioner was that the machine was left unassembled for about seven days while Brits was on sick leave which is consistent with the testimony of Brits. The Commissioner ultimately found the version of Brits more probable than that of the Applicant.

Charge Two

[21] With regard to the second charge, the Commissioner concluded that the Applicant's belief that the extruder only started to run at 16h30 was incorrect. The documentary evidence reveals that machine B and F started to run at 08h00, machine A started to run at 10h00, machine C started to run at 12h00 and machine D and E started to run at 16h00. Therefore, the Applicant's version that the machines only started running at 16h30 is incorrect.

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[22] Furthermore, Brits testified that he was not the person who started the machines on a daily basis and that he had encountered problems given that he was working without assistance.

[23] Ultimately, the Commissioner found that Brits was not the person who started the machines on a daily basis, and thus could not have been reasonably expected to be as efficient in carrying out the instruction as the operator.

[24] After the assessment of the evidence, the Commissioner reached the following conclusion:

> "In brief looking at the charge and how the events unfolded on the days in question the employee could be charged with poor work performance or ordinary negligence. However, the fact that the employer orchestrated the results as aforementioned, the employee was not the person who started the machines on a day-to-day basis (he had to do this as the operator was not in on the date in question and could not have been as efficient as him), the fact that most machines were old. I do not find the Applicant guilty on the second charge."

<u>Analysis of the award</u>

[25] In my view, the Commissioner's analysis is accurate and the conclusion that flows from it is logically sound.

[26] The Commissioner has correctly considered the two competing versions of the witnesses and has applied probability assessment to them. In doing so, the Commissioner was correct to find that the Applicant had failed to prove that it had issued a reasonable instruction which Brits had failed and/or refused to comply with.

[27] The essential ingredients of an assessment of the credibility of the witnesses is the consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the Commissioner.

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[28] Cele AJ (as he then was) observed in *Lukhanji Municipality v Nonxuba NO and others*[2], that while the LRA requires a Commissioner to conduct an arbitration hearing in a manner that the Commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the Commissioner from properly resolving disputes of fact when they arise.

[29] In *SFW Group:Ltd & another v Martell et Cie and others*[3], the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms:

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless

[2] [2007] 2 BLLR 130 (LC).
[3] 2003 (1) SA 11 (SCA).

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be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail (at paragraph 5 of the judgment). "

[30] In *Harmony Gold Mining Company Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Court stated the following:

> "What the analysis above makes clear observations of demeanor are merely one factor among many in assessing credibility and many factors bearing on credibility will be apparent from the transcript of evidence. It is also obvious that credibility findings based on observation of the witness are not the only or the first recourse in assessing credibility and even less so in evaluating probabilities. Adjudicators should be wary of making definitive credibility findings based on their supposed omniscient ability to detect unreliable evidence solely from observing a witness."

[31] In *Assmang Limited (Assmang Chrome Dwarsriver Mine) v Commission for Conciliation Mediation And Arbitration and Others*[5] the approach to the question whether the onus has been discharged was dealt with as follows:

> "Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

[32] One of the Commissioner's prime functions was to ascertain the probabilities of the conflicting versions before him. As I have noted, the Commissioner have done as much.

[33] The Commissioner correctly assessed the improbabilities preferred by the Applicant's witnesses. The Commissioner appears to have considered the

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[4] (2018) 39 ILJ 1059 (LC).
[5] (2015) 36 ILJ 2203 (LC) at para 40.

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prospects of any partiality, prejudice or self-interest on either parties' part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability.

[34] The Applicant’s grounds for review relate mainly to the Commissioner's failure to take into account relevant facts and his failure to apply his mind to the evidence before him.

[35] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[6] the review test was established and was confirmed in *Herholdt v Nedbank*[7] where the court held:

> "the results which is substantively unreasonable in the sense that no reasonable Commissioner, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it. So it is clear that notwithstanding its excurses on latent irregularities and dialectical unreasonableness, the LAC was alive to Sidumo and applied it correctly. There is therefore no basis for this court to interfere with its decision".

[36] The Commissioner correctly stated that the two versions must be weighed against each other and the one that is most probable must succeed. The decision-making powers ultimately lies with the Commissioner unless it is concluded that a reasonable decision-maker could not have arrived at such a decision.

[37] In the present instance, at the risk of repeating what I have stated above, it is sufficient to observe that the Commissioner properly applied his mind to the contradictions in Naude's evidence at the disciplinary hearing. The Commissioner correctly dealt with the improbability that Naude's instruction was to let Brits carry out the instruction on his own so that he could learn, whereas at the same time he offered his assistance.

[38] The Commissioner also dealt with the credibility of Brits as a witness in that he gave coherent evidence without any contradictions. Apart from obvious

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[6] (2008) 28 ILJ 2405 (CC).
[7] (2013) 34 ILJ 2795 (SCA).

behavioural difficulties and destructiveness at the hearing, Brits appeared to have been an overall credible witness. The Commissioner correctly concluded that the version of Brits was more probable than that of Naude's.

[39] On this basis I do not believe that there is any gross irregularity committed by the Commissioner in the conduct of the arbitration proceedings. Thus, the Commissioner's ultimate finding that Brits' dismissal was substantively unfair resulting in compensation of R52 000,00 is entirely reasonable.

[40] The following order is accordingly made:

Order

1. The review application is dismissed with costs.

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Pienaar AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: G J Geldenhuys of Geldenhuys Attorneys

For the Respondent: Mr H Bucksteg

Instructed by: A Ramsay Attorneys

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