THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1261/16

In the matter between:

KWS CARRIES **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

B.S MTHETHWA *N.O* **Second Respondent**

WORKERS AGAINST REGRESSION OBO DOMMY MOKWENA **Third Respondent**

Heard: **17 October 2019**

Delivered: **30 October 2019**

Summary: **Review application – breach of a Zero Tolerance Policy on alcohol is a serious misconduct – heavy load truck driver testing positive for alcohol following a breathalyser test - dismissal is justifiable.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an application brought in terms of section 145 of the Labour Relations Act[1] (LRA) by the applicant, KWS Carries (Pty) Ltd (KWS), to review and set aside the arbitration award issued on 18 April 2016 by the second respondent, Mr BS Mthethwa (arbitrator), under the auspices of National

[1] Act 66 of 1995, as Amended.

Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), under case number GPRFBC34659. The arbitrator found that the dismissal of Dommy Mokwena (Mr Mokwena), the member of the third respondent, Workers Against Regression (WAR), was procedurally fair but substantively unfair. He reinstated Mr Mokwena with back pay of the sum of R109 786.82 and without loss of benefits.

[2] WAR is the only respondent opposing the application.

Background facts:

[3] KWS is a logistics company that primarily deals with the transportation of bulk loads within the Republic of South Africa. Mr Mokwena was employed by KWS as a truck driver from 22 July 2008. He was dismissed on 26 March 2015 after he was found guilty of being under the influence of alcohol whilst on duty. At the time of the dismissal, Mr Mokwena was earning a weekly remuneration of R1950.38.

[4] The whole incident that led to Mr Mokwena's dismissal happened on 13 March 2015. He was transporting the load from Idwala Lime Distributors (Idwala), the client of KWS, in the Northern Cape to Idwala in Vereeniging. As he was about to enter the premises of Idwala in Vereeniging, he was selected for a random alcohol test. A breathalyser test performed at the gate displayed a positive result for alcohol. A second breathalyser test was conducted at the premises of KWS using a different instrument, and the result was once more positive. The first test was conducted at 08h15 and the alcohol concertation in Mr Mokwena was recorded as 0.07mg per 1000ml. Whilst the second test was conducted at 10h00 and the alcohol concertation was recorded as 0.08mg per 1000ml.

[5] Mr William Holtzhauzen (Mr Holtzhauzen), Health and Safety Manager at KWS, testified that he was alerted by Idwala that one of their drivers tested positive for alcohol. He instructed Messrs William Chikala (Mr Chikala) and Louw Riekert (Mr Riekert) to go to Idwala to investigate the matter and bring Mr Mokwena back to the premises of KWS. When he first saw Mr Mokwena,

he observed that his eyes were red, speech was slow and hesitant when asked whether he was under the influence of alcohol.

[6] Mr Mokwena denied the allegation that he was under the influence of alcohol. He testified that he had stopped drinking a month before the incident after he was diagnosed with high blood pressure condition.

Review test and application

[7] It is trite that mere errors of fact or law may not be enough to vitiate an award. Notwithstanding, if errors material to the determination of the dispute constitute a misconception of the nature of the enquiry which consequently affect the fair trial of the issues, an award may be set aside on that ground alone. The authoritative pronouncement in this regard remains the Labour Appeal Court's (LAC) decision in *Head of the Department of Education v Mofokeng,*[2] where it was stated that:

> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
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> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. 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 wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in

[2] [2015] 1 BLLR 50 (LAC) at paras 30-33; see also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).

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

[33] 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 inquiry. 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 inquiry, 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, if 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.' (Emphasis added)

[8] Turning to the matter at hand, at the commencement of the arbitration, the arbitrator took time to assist the parties to summarise the issues in dispute. In this regard, the following extract from the transcript is pertinent:

> 'ARBITRATOR: …Now this is my understating of the cases of both parties. The applicant is challenging both the procedure and substance. In the substance, it will be the applicant's case that on the day in question the applicant was not under the influence of alcohol. Two, the applicant also challenging the validity of the instrument and the results of the breathalyser test that was conducted. Three, on the day in question the applicant is going to lead evidence that he was under medication. …On the other hand, …the employer is going to demonstrate that indeed that applicant was under the influence of alcohol and the instrument that was used was in good working condition. There was absolutely nothing wrong with the that instrument, this is why they are confident that the results of the instrument were correct and then this application must be dismissed.'[3] (Emphasis added)

[9] It was the evidence of KWS that the breathalysing instruments utilised to test Mr Mokwena's alcohol concentration were calibrated on 22 December 2014 and were in good working condition and free of any defects. Mr Klingbiel, the Safety Officer at KWS, was adamant during cross examination that as a matter of practice, breathalysers are calibrated every six months in line with the manufacturer's instruction.

[10] The main impugn in relation to the functionality of the breathalyser was that the second test result reflected an increased alcohol concentration in Mr Mokwena's blood, despite being taken two hours after the first test. Mr Klingbiel's explanation was that it is possible to have an increasing reading especially if the alcohol was consumed just before the first test was conducted and the body is still processing the alcohol. This evidence was corroborated by Mr Holtzhauzen.

[11] It was also the uncontested evidence of KWS that it has a Zero Tolerance Policy on alcohol, especially since most of their clients are mines and they also have Zero Tolerance Policies.

[12] The cross examination of all KWS witnesses in this regard was all about the accreditation of the manufacturer of the breathalysing instruments, Alco Safe

[3] Transcript page 30 lines 4 – 21.

(Pty) Ltd (Alco Safe). In fact, the transcript clearly shows that the arbitrator raised this issue *mero muto*. He then descended into the arena and cross-examined the witnesses of KWS on this issue. In the end, he rejected the reliability of the breathalysing instruments solely because Alco Safe was not accredited as a test laboratory in terms of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act of 2006. Notwithstanding, there was no evidence led in this regard and, as clearly shown above, this issue was not in dispute.

[13] Mr Mokwena conceded during his cross examination that the breathalyser tests were part of the standard procedures of KWS and it was not the first time that he underwent the said test. Strangely, the arbitrator found that there were many factors that could have affected the accuracy of the instruments when they were operated to test Mr Mokwena. Since Mr Riekert, KWS's Safety Officer that performed the second breathalyser test, was not an expert, he could not have appreciated the external factors when he conducted the test on Mr Mokwena. This was a sheer speculation on the part of the arbitrator as no evidence was led in this regard.

[14] The increased reading on the concentration of alcohol was explained, though not to the satisfaction of the arbitrator. He preferred to accept the submission by Mr Mokwena's representative that the breathalyser was malfunctioning because of the different readings which showed an increase in the alcohol concentration without any scientific proof as he was convinced that at any given time alcohol concentration in the body must decrease. I agree that there is some truth in the arbitrator's findings. However, in the matter at hand, the question was not about the extent of the alcohol in Mr Mokwena's body. Mr Mokwena conceded that he was aware of the Zero Tolerance Policy and had understood it to mean that he had to be 100% sober as truck driver. Clearly, in the light of the Zero Tolerance Policy, once to alcohol is detected and verified, then that is the end of the matter.

[15] Nevertheless, the arbitrator disregarded the Zero Tolerance Policy. He was unrelenting in his view that not much weight could be put on a breathalyser

test result if it is not supported by the evidence that Mr Mokwena showed signs of being inebriated. Still, he chose to ignore the evidence of Mr Holtzhauzen about his observation of Mr Mokwena's condition on the day of the incident. I do not agree with the submission by Ms Tshobonga, Mr Mokwena's attorney, that the arbitrator did consider Mr Holtzhauzen's evidence in this regard and rejected it. In paragraph 45 of the award, he stated that:

> 'It is also very important and worth mentioning that there was no evidence that on 13 March 2015 and/or he was unsteady in his feet. According to the applicant he was not drunk on 13 March 2015. His appearance was normal and his speech was not slurred. As much as the respondent insisted that the applicant was under the influence of alcohol but there was no evidence to support this version. I therefore deduce from the applicant's evidence that he was not under the influence of alcohol.'

[16] Clearly, Mr Holtzhauzen's evidence that he observed that Mr Mokwena's eyes were red and that his speech was impaired, eloped the attention of the arbitrator. As correctly submitted by Ms Chenia, KWS's attorney, the truth of the matter is that KWS did comply with the requirements to prove that Mr Mokwena was under the influence of alcohol, over and above the breathalyser test result, in accordance with the dicta cited by the arbitrator.

[17] The arbitrator's adverse finding on the credibility of Mr Holtzhauzen and the consequent rejection of his evidence in its entirety is untenable. Even if Mr Holtzhauzen was confused or dishonest about the presence of Mr Klingbiel when the breathalyser test was conducted, that could not justify rejecting his evidence in its entirety. That is so because his evidence was not seriously challenged. Conversely, Mr Mokwena proffered no plausible explanation for testing positive for alcohol. His defence during the disciplinary enquiry was that he was on high blood medication hence he tested positive for alcohol. When it was proven that his high blood tablets did not contain alcohol, he abandoned that defence. Despite the obvious contradictions in Mr Mokwena's evidence, the arbitrator, found him to be honest.

[18] The arbitrator also misdirected himself when he found that the sanction of dismissal was inappropriate. In the light of the nature of Mr Mokwena's duties, a driver of heavy load truck, and the operations of KWS and its clients; the Zero Tolerance Policy to alcohol was a reasonable measure to ensure compliance with safely rules.[4] Mr Mokwena did not dispute the existence of the Zero Tolerance Policy to alcohol. In fact, it was Mr Holtzhauzen's uncontested evidence that Mr Mokwena had been inducted on the importance of the safety rules and that there were constant follow up sessions to remind the drivers of those rules.

[19] Given the carnage on our roads caused by reckless driving, mainly attributed to driving under the influence of alcohol, a deviation from the Zero Tolerance Policy is serious enough to warrant dismissal. In this instance, Mr Mokwena was on duty, having driven from Northern Cape to Vereeniging with the client's cargo. He ought to have been better informed of the consequences of a positive alcohol test result given the Zero Tolerance Policy.[5] Also, Messrs Klingbiel and Holtzhauzen testified that since Mr Mokwena's positive test result for alcohol was picked up by Idwala, the client, it placed KWS's service contract in jeopardy and undoubtedly the employment of his fellow colleagues.

Conclusion

[20] In all the circumstances, I am persuaded that the arbitrator misconceived the nature of the enquiry and consequently there was no fair trial of the issues. Put otherwise, he diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination. Based on this ground alone, the award stands to be reviewed and set aside.

[4] See: *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 32.
[5] See: *XStrata Coal South Africa v Commission for Conciliation Mediation and Arbitration and Others* [2014] ZALCJHB 14 at paras 16 to 18.

[21] I deem it expedient not to remit this matter back to NBCRFLI in the interest of justice. The issues were properly ventilated during the arbitration proceedings and the adequacy of the record of those proceedings is not placed in issue. I am, accordingly, in a position to determine the matter to its finality.

[22] In the light of the findings I have arrived at above, it is clear that the dismissal of Mr Mokwena was substantively fair.

Costs

[23] It is accepted that costs do not follow the result in this Court; but the requirements of the law and fairness are a main consideration. In the matter at hand, I am not persuaded to award costs as the third respondent was not *mala fide* and frivolous in defending the impugned award.

[24] In the circumstances, I make the following order.

Order

1. The arbitration award dated 18 April 2016 under case number GPRFBC34659 is reviewed and set aside and substituted with the following order:

    1.1 The dismissal of Mr Mokwena is substantively fair.

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Ms M Chenia from Cliff Dekker Hofmeyr Inc.

For the Respondent: Ms A Tshobonga from Ndumiso Voyi Incorporated