



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1208/18

In the matter between:

AEL MINING SERVICES LTD

Applicant

and

PATRICK SISHONGA

First Respondent

**GENERAL INDUSTRIES WORKERS UNION
OF SOUTH AFRICA ('GIWUSA')**

Second Respondent

ELIAS KHUTSO MPAI N.O.

Third Respondent

**NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY ('NBCCI')**

Fourth Respondent

Heard: 21 May 2024

Delivered: 04 February 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant is, AEL Mining Services Ltd, a company carrying on business in the explosive industry. The arbitration proceedings took place under the auspices of the fourth respondent, the National Bargaining Council for Chemical Industry (Council). The third respondent, Elias Khutso Mpai (commissioner) issued the arbitration award dated 4 June 2017.

[2] The date of the award appears to have been erroneously referred to as 4 June 2017. This is so because the arbitration proceedings took place on 23 April 2018 and 29 May 2018 respectively. Consequently, the date of the award could not have been on 4 June 2017 which was almost a year prior to the commencement of the arbitration proceedings. Furthermore, it appears that the commissioner signed the arbitration award on 7 June 2018.

[3] In the arbitration, the commissioner concluded that the dismissal of the first respondent, Patrick Lebelo Sishonga (employee) was substantively unfair but procedurally fair. The commissioner ordered the applicant to reinstate the employee and further ordered payment to the employee an amount of R165 000 for the period that he was out of employment.

[4] The applicant received the arbitration award 13 June 2018. The review application was launched on 27 July 2018. The applicant was granted condonation for the late filing of the review. This Court further granted an order, reinstating the review application of the applicant.

The relevant facts

¹ Act 66 of 1995, as amended.

[5] The employee was employed by the applicant on 10 September 2011 as an Operator. The employee was subjected to a disciplinary enquiry. The employee was charged with the following misconduct:

‘Theft in that on the 15th June 2017, you allegedly assisted George Masindi in removing Harness Wire from Mogalakwena Mine Site in a fraudulent manner for personal gain.’

[6] The applicant alleged that the two boxes of Hannes wires (blasting wires) stolen by Masindi are worth approximately R10 000. The employee was found guilty as charged and the sanction of summary dismissal was imposed.

[7] The employee then referred a dispute of unfair dismissal to the Council. The matter was eventually resolved by arbitration and the commissioner issued the arbitration award. During the arbitration proceedings, the applicant led the evidence of Mr. Pheeha Felix Emmanuel Seema and Mr. Frans Thole. The employee testified on his own behalf and Masindi further testified on behalf of the employee.

[8] During the arbitration, the employee denied that he participated in the theft of harness wires. The employee’s case was that he did not assist Masindi to remove the Harness wires as he was not ready to do so.

[9] The applicant’s case in the arbitration was that Mr. Frans Thole viewed a video footage and saw Masindi removing four boxes of Harness wires. Masindi is seen in the video talking to the employee. Later on, Mr. Thole spoke to Masindi. Masindi confirmed that he took the harness wires. Masindi informed Mr. Thole that the employee knew everything about the theft of the harness wires. In essence, the evidence of the applicant was that the employee assisted Masindi to remove the harness wires from the mine site. Masindi was dismissed for theft.

[10] The commissioner concluded that the employee did not commit theft. The commissioner concluded that there is nothing that linked the employee to the theft of harness wires and that the only area where the employee could have been wrong

related to his failure to blow the whistle on Masindi 's intention to remove the Harness wire from the mine site.

Grounds for review

[11] The applicant submitted that the commissioner's award is reviewable on the following grounds: The arbitration award represents an award to which no reasonable decision-maker could come to having regard to the material evidence before him. The approach adopted by the arbitrator in the conduct of the arbitration proceedings had the effect that he elevated the standard of proof to proof beyond reasonable doubt as opposed to the applicable standard of proof on a balance of probabilities.

[12] The arbitrator failed to identify and then determine the true nature of the dispute between the parties, it having been whether Sishonga (employee) was guilty of acting in concert with Masindi in the theft of wires. It is submitted that the evidence established, on the balance of probabilities, that the two had acted with common intention of appropriating, as well as acted together in planning the appropriation of the wires, until Sishonga got cold feet and decided not to collect the wires from where they had been hidden by Masindi.

Submissions by the parties

[13] Mr. Cithi, on behalf of the applicant submitted that the label attached to a misconduct in a charge sheet is irrelevant. It was submitted that the employee had knowledge of, and relevant to, misconduct and criminality (i.e. theft of the Harness Wires from its premises by the employee and Masindi, and the employee failed to inform management. The employee's failure to inform management about the theft, enabled Masindi to remove the harness wires from the mine premises for personal gain. As a result of his conduct, the applicant suffered a financial loss to the value of R10 000. The employee knew exactly what was the nature of the complaint against him.

[14] During the disciplinary hearing, the employee knew that the complaint against him was that he had knowledge regarding the theft of the harness wires and he assisted Masindi to remove the harness wires. It was made clear to the employee during the disciplinary hearing that, the applicant's case was not that the employee stole the harness wires.

[15] Mr. Cithi submitted that irrespective of the label assigned to the misconduct in the charge sheet, the commissioner was required to determine and assess whether the misconduct committed by the employee was destructive of the employment relationship. The commissioner was required to look beyond the charge sheet and look at the nature of the dispute.

[16] It was submitted that if the commissioner concluded that there was no evidence establishing the charge, then the commissioner was required to determine the issue on the aspect that he found. In this case, the commissioner concluded that the evidence does not establish theft, but rather that the employee could have been wrong when he failed to blow the whistle on George Masindi's intention to remove the harness wires from the mine site. This was the issue that the commissioner was required to determine. Therefore, the substantial part of the dispute was not resolved by the commissioner.

[17] Mr. Cithi submitted that the applicant accepted that the employee did not remove the harness wires from the mine premises. The issue is that the employee had knowledge that Masindi intended to commit theft and the employee failed to inform the applicant. The applicant opened a theft case against Masindi. The definition of theft used by the commissioner in the arbitration award, relates to a criminal definition of theft. This was not theft in the criminal context. The commissioner therefore misconstrued the nature of the inquiry.

[18] The commissioner was concerned with the label attached to the misconduct as contained in the charge sheet and not concerned with the conduct of the employee.

[19] Mr. Khomola on behalf of the employee submitted that the applicant approached this Court on the basis of the statement made in the disciplinary hearing. The commissioner is not bound by the proceedings in the disciplinary hearing as the commissioner is required to listen to the evidence afresh. The employee did not take the utterances made by Masindi seriously i.e. Masindi wanted to steal the harness wires. Two boxes of harness wires were removed by Masindi.

[20] Masindi took the boxes of harness wires and loaded them into a vehicle. He then drove to the vegetation outside the mine premises. Thereafter, Masindi spoke to the employee. Masindi committed the theft alone. The employee did not believe that theft will materialize. Mr. Thole confirmed that in terms of their policy, there is no charge relating to withholding of information.

Evaluation

[21] The test for review is well known. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine v CCMA and Others*², the Labour Appeal Court (LAC) held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her: evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[22] In *Head of Department of Education v Mofokeng and others*³, the Court said:

‘[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter- related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis,

² (2014) 35 ILJ 943 (LAC) at para 16.

³ (2015) 36 ILJ 2802 (LAC) at para(s) 31- 32.

reasoning or defect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA): such as failing to apply the mind, taking into account irrelevant considerations, ignoring the relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[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, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors 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.'

[23] During the arbitration proceedings it was not the applicant's case that the employee committed theft. The word 'theft' referenced in the charge sheet, should not have been considered by the commissioner in his arbitration award. The issue which the commissioner had to determine that related to the charge sheet was whether the employee assisted George Masindi in removing the harness wires from Mogwalakwena Mine Site in a fraudulent manner.

[24] In the arbitration award, the commissioner focused on the definition of theft as referenced in the charge sheet. It is indeed correct that the applicant did not lead evidence that the employee committed theft. This was not the applicant's case and it was not the issue that the commissioner had to determine.

[25] The applicant's case in both the disciplinary hearing and the arbitration was that the employee with full knowledge, assisted Masindi to remove the harness wires and failed to report the theft to the applicant. By failing to report the theft, the employee assisted Masindi in removing the harness wires. The applicant's case had nothing to do with the theft that was committed by the employee. As per the opening statement in the arbitration proceedings, the applicant representative stated:

'The applicant was then charged for allegedly assisting Masindi in removing those harness wires. So, the charge is very simple, that had he disclosed to the employer the intentions of Masindi, the wires would not have been removed. So, what we are going to argue is that there is a known obligation on employees that if there is any wrongdoing you must report which he had failed to do⁴.

[26] During the arbitration proceedings, Mr. Thole testified that:

'He (employee) said to us he had knowledge , he spoke to George Masindi, he had knowledge about the activity of removing harness wire off site for personal gain, because George Masindi spoke to Patrick, Patrick Sishonga about those harness wires that he is going to remove and he pointed to the area where he is going to hide them and he requested Patrick Sishonga to remove them from site for him, and Patrick Sishonga says he did not remove them on site⁵.'

[27] The above evidence of Mr. Thole is consistent with the statement made by the employee dated 17 June 2017⁶. The above evidence of Mr. Thole and the written statement of the employee were simply ignored by the commissioner. This constituted gross irregularity on the part of the commissioner. Ignoring material evidence had the effect of rendering unreasonable outcome.

⁴ Index: record page 129 line(s) 15- 21.

⁵ Index: record page 171 line(s) 17- 23.

⁶ Index record pages 67- 69.

[28] By focusing on the word theft as contained in the charge sheet, the commissioner misconceived the nature of the enquiry and consequently produced an unreasonable outcome. The commissioner failed to properly apply his mind to the evidence before him. I agree with the submission of Mr. Cithi, that the commissioner failed to resolve the substantial part of the dispute between the parties i.e. whether the employee assisted George Masindi to remove the harness wires from the mine site and the conduct of the commissioner constituted gross irregularity and rendered unreasonable outcome.

[29] By focusing on the word 'theft' as contained in the charge sheet, the commissioner took into account irrelevant considerations and ignored the relevant considerations. The commissioner was fully aware of the issue that he needed to determine. This is illustrated by the following findings in paragraph 68 of the award:

'There is nothing that linked the Applicant to theft of the Harness wire in this case, The only area where the Applicant 'could have been wrong' to the Respondent relates to his failure to blow the whistle on George Masindi's intended removal of the harness wire from the mine site. That however, is not what he was charged for hence he cannot be found guilty on that.

[30] The commissioner failed to appreciate that the failure of the employee to report to management the intended theft by Masindi, assisted Masindi in removing the Harness from the mine site, which assistance was the crux of the charge levelled against the employee.

[31] It is not expected that the employers must craft disciplinary hearing charge sheets with precision and comprehensiveness akin to a criminal Court indictment. All what the employer is expected to do is to comply with item 4(1) of schedule 8 of the Code of Good Practice. Item 4 provides that:

' Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a

form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee...'

In this case, the employee was reasonably aware of the allegations levelled against him and he was able to properly defend himself. The employee was not prejudiced by reference to the word 'theft' in the charge sheet.

[32] The commissioner's arbitration award was disconnected to the material evidence which was before him. The employee was clearly aware that he had to report the theft committed by Masindi to management⁷. The existence of the rule in respect of reporting to management any unlawful activity, was a common cause factor during the arbitration proceedings.

[33] Consequently, given the totality of the evidence before the commissioner, the outcome reached by the commissioner was unreasonable and the arbitration award must be reviewed and set aside.

[34] In the premises the following order is made:

Order

1. The arbitration award issued by the third respondent under case number: LPCHEM46-17/18 is hereby reviewed and set aside.
2. The arbitration is remitted back to the fourth respondent to be heard de novo before another commissioner other than the third respondent.
3. There is no order as to costs.

H. Molotsi

Acting Judge of the Labour Court of South Africa

⁷ Index – record page 279 at line(s) 1- 6.

Appearances:

For the Applicant: Mr D Cithi
Instructed by: Tabacks Attorneys Inc

For the Respondent: Adv M khomola
Instructed by: Mohale Incorporated

LABOUR COURT