THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1174/21

In the matter between:

FRASER ALEXANDER (PTY) LTD **Applicant**

And

COMMISSION FOR CONCILIAITON MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER MARTIN RABIE *N.O.* **Second Respondent**

HOTELICCA OBO MNDENI DUBAZANE AND TITANO SHASHAPE **Third Respondent**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed 3 March 2025.

JUDGMENT

NGWENYA, AJ

Introduction.

[1] The Applicant, Fraser Alexander, has approached this Court in terms of section 145 and/or section 158(1)(g) of the Labour Relations Act ("LRA"), seeking to review and set aside an arbitration award that was issued by the Commissioner in favour of two former employees of the Applicant – the Third Respondent.

[2] The Applicant seeks an order of substitution that the dismissal of the two former employees, was substantively fair, alternatively a remittal of the matter to the CCMA for redetermination.

[3] The application is opposed by the Third Respondent. The Third Respondent filed an answering affidavit, prior to the delivery of the Applicant's supplementary affidavit, which in terms of the Rules of this Court is delivered prematurely, as the Applicant has a procedural right to file a supplementary affidavit following the delivery of the record of proceedings. Notwithstanding this fact, I approached the matter as opposed, given that an answering affidavit was filed and that the Third Respondent was represented in these proceedings by a legal practitioner from the Legal Aid Board.

[4] Before considering the review application, it is appropriate to provide the relevant factual background.

The Relevant Factual Background

[5] The Applicant, employed both former employees as general workers during 2018. As general workers, the former employees' duties included: (i) deposition of tailings on the dam; (ii) the opening and closing of valves; (iii) guarding of the slime deposition; (iv) operating the barge; (v) fastening and loosening of pipes and (vi) any operational requirements.

[6] Both former employees worked on shifts, a day shift from 6am to 3pm or a night shift from 3pm to 6am.

[7] The events which are the subject of these proceedings took place on 26 August 2020, and took place during the night shift. Both the former employees were on duty. On that evening a spillage occurred.

[8] On 11 September 2020, the Applicant charged both former employees with the following allegations of misconduct: *"Gross Negligent (Neglected Deposition Point While At Work)".* (sic)

[9] Both employees pleaded guilty to the allegations of gross negligence. It is pleaded that the former employees were given an opportunity to explain the events of the night shift in question and as a consequence the Chairperson of the disciplinary hearing accepted the plea of guilty. Both the Applicant and the former employees presented their submissions in respect of sanction and the Disciplinary hearing chairperson issued a sanction of dismissal.

[10] Following their dismissal from the Applicant, the former employees referred an unfair dismissal claim to the Commission for Conciliation Mediation and Arbitration ("CCMA").

[11] During May 2020, the Commissioner issued an arbitration award in terms of which he found that the dismissal of the former employees by the Applicant was substantively unfair, and the Applicant was ordered to reinstate the former employees.

[12] The Applicant thereafter launched the present review application.

The Test on Review

[13] The test for review to be applied is well known.

[14] In **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others**[1], the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: '… *Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'.*

[15] This means that the award in question is tested against all the facts before the Commissioner to ascertain if it meets the requirement of reasonableness. In conducting this test, it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.

[16] In **Herholdt v Nedbank Ltd and Another**[2] the Court said:

> *"A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable. …"*

[17] It is against this backdrop that the review application should be considered.

Analysis

[18] The Commissioner determined two issues, the existence of the rule, which the Applicant contends was breached and secondly whether in fact the rule was breached. I cannot fault the Commissioner's conception of the ambit of the enquiry he was required to undertake.

[19] In relation to the first issue, the Commissioner found that, having considered the totality of the evidence, the rule, which the former employees were obliged to comply with existed and that the rule was not to neglect the depositions. There is no

[1] (2007) 28 ILJ 2405 (CC)
[2] (2013) 34 ILJ 2795 (SCA) para 25

challenge to this finding and indeed the evidence presented confirms that the former employees were aware of the rule and were obliged to comply with the rule.

[20] In relation to whether, the rule had been breached, the Commissioner found that the former employees had not breached the rule and that the Applicant had failed to prove that the former employees had neglected their depositions. The basis of these finding by the Commissioner is that:

a. The former employee, Mr Dubazane, had testified that he had conducted the last inspection at 2:50am and walked to the pump station to switch off the pump at 3:00 am.

b. That the Applicant only noticed such spillage at 3:00 am, after the former employee's shift. Therefore *"[A] lot could have happened in the 10 minutes that Applicants [former employees] walked to the pump station to close the pumps"*.

c. That the spillage occurred after the knock off time and that the former employees were not required to work after their knock-off time.

[21] There are, in my assessment a number of issues with the Commissioner's findings in respect of whether the former employees had committed misconduct. The starting point is that the Commissioner, having accepted the existence of the rule, appears to have misconceived, the nature of the rule.

[22] The rule required the former employees, during the course of their shift, not to neglect the deposition points. The misconception of the nature of the rule caused the Commissioner to fixate on the fact that the spillage took place after the former employees' shift. However, as the evidence presented indicated, the blockage or choking was discovered and/or seen by the former employees during the course of their shift. I agree with the Applicant that the time of the spillage, in the context of this case, was irrelevant, because the blockage and choking which caused the spilling was seen by the former employees during the course of their shift.

[23] The misconception additionally caused the Commissioner to ignore relevant evidence. The Applicant contends that the Commissioner failed to take into account and/or consider the following evidence:

a. That the Applicant's witness Mr Kgositsiele, testified that the former employees were required to *"always constantly check"*, the situation.

b. That the shift of the former employees ends at 03:00am because the Plant, ie the mine itself that produces the slurry that spilled, shuts down at that time.

c. The exact time of the spillage is a red herring, because, the two employees were aware of the blockage in some of the pipes on the night in questions which they realised might lead to a spillage.

d. That it was common cause that there was another paddock to which the two former employees could and should have diverted the flow of the slurry.

e. That there as a blockage of serious proportions is admitted by the two former employees in the statement that were given in the disciplinary enquiry.

[24] In **Head of Department of Education v Mofokeng & others**[3] the LAC held: '…

"[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 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 enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her."*

[25] In my assessment, the errors of fact by the Commissioner, pleaded by the Applicant, are supported by the record of proceedings and rise to the level of *Mofokeng*, and have a distorting effect on the result arrived at.

[3] (2015) 36 ILJ 2802 (LAC) para 32

[26] The Commissioner focussed on the time at which the spillage was discovered or took place, but failed to have regard to the evidence of the statements of the two former employees that they were aware, prior to their knock-off time that *"one pipe on the paddock was starting to almost chocked"* and *"when we went up again for our last inspection, we find out that 2 pipes inside the paddock were blocked and only two were almost blocked. Therefore water started to go back because even the paddock was almost full of the slurry."*

[27] The former employees, did nothing about the blockages or choking and, as the allegations of misconduct allege, neglected the *deposition while at work.* On the basis of the evidence presented by the Commissioner, there was no basis to find that the Applicant failed to prove that the former employee's had committed the misconduct as alleged.

[28] Accordingly, the Commissioner's arbitration award is not one which a reasonable decision maker could have arrived at, taking into account the totality of the evidence presented.

[29] In so far as remedy is concerned, there is no reason to remit the matter for rehearing. The record is complete and the Court is in as good a position as any arbitrator to make a determination. Having considered all the evidence presented in the arbitration, the dismissal of the former employees was in my assessment substantively fair.

Costs

[30] The position in this Court is as articulated by the Constitutional Court in ***Zungu***[4] as follows:

> [24] **The rule of practice that costs follow the result does not apply in Labour Court matters**. In Dorkin, Zondo JP explained the reason for the departure as follows:

[4] Sibongile Zungu v Premier of Province of Kwa-Zulu Natal (2018) 39 ILJ 523 (CC)

> "The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. **The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness**. And the norm ought to be that costs orders are not made unless the requirements are met. **In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court."**

[31] This Court has a discretionary power, in terms of section 162 of the LRA, and such power must be exercise with due regard to legal requirements and fairness.

[32] There is no reason in this case to depart from the position that costs do not follow the result in labour disputes.

[33] In the premise I make the following order:

Order:

[34] The review application is upheld and the arbitration award dated 21 May 2021 issued under the auspices of the first respondent, under case number NC2538-20 is reviewed and set aside.

[35] The arbitration award is substituted with a decision that: *"The dismissal of the Applicants, Messrs. Mndeni Dubazane and Titano Shashape, by the Respondent, Fraser Alexander (Pty) Ltd is substantively fair"*.

[36] There is no order as to costs.

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate P Belger

Instructed by: Beneke Gantley Incorporated

For the Third Respondents: Mmasello Madiwana – Legal Aid South Africa