



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1666/09

In the matter between:

SASOL OIL (PTY) LTD

Applicant

and

TOM P DUNYWA

First Respondent

AUPA MBHELE

Second Respondent

**NATIONAL BARGAINING COUNCIL
FOR THE CHEMICAL INDUSTRY**

Third Respondent

B MBOVANE N.O.

Fourth Respondent

Heard: 6 August 2024

Delivered: 07 February 2025

JUDGMENT

DAVE, AJ

Introduction

- [1] This is an opposed application to review and set aside an arbitration award dated 14 May 2009, issued by the Second Respondent (the Commissioner) under the auspices of the First Respondent (the Council) under case number FSCHEM224-08/09.

Background

- [2] The Third Respondent ('Tom') and the Fourth Respondent ('Aupa') prior to their dismissals, were employed by the Applicant as Fuel Driver Operators, i.e. truck drivers.
- [3] An incident occurred on 15 August 2008, when Mr Percy Bvuma (an external person not employed by the Applicant) ('Bvuma') witnessed two individuals siphoning fuel from a petrol tanker at the Applicant's premises (a truck stop). Bvuma had arrived early that morning to check on his vehicles when he came around a corner in his vehicle and his lights shone on the individuals. When the individuals looked up, Bvuma could see their faces. Bvuma also saw the equipment that was used to drain the petrol from a section of the truck. In order to drain the petrol from the truck, the truck needs to be switched on and idling. Bvuma also noticed orange cones held in place by a plastic bag and three blue containers next to the truck. The two individuals ran away in different directions after one attempted to hide under the truck. After reporting the incident to security, Bvuma later saw the same two individuals in the vicinity and identified them as the individuals who he had seen that morning.
- [4] Consequent to the above, Aupa and Tom were charged with theft. The charge against them reads as follows:

'It is alleged that you contravened the Sasol disciplinary code for employees Rule 5(c), theft in that, on the 15 August 2008, you intentionally were in the unlawful possession and involved in the attempted removal of the property of the Company, fuel in various containers, in order to deprive the Company of the specific goods, or attempt to commit the aforementioned.

Alternative charge to charge 1:

It is alleged that you contravened the Sasol disciplinary code for employees Rule 5(d), unauthorized possession in that on the 15 August 2008 you were in the unauthorized possession and or involved in the removal or attempted removal of fuel belonging to the Company'.

- [5] Both were found guilty and dismissed. They appealed their dismissals, however the finding of dismissal was upheld. They thereafter referred an unfair dismissal dispute to the Council. In her award, the Commissioner found the dismissals to be procedurally fair but substantively unfair. The Commissioner ordered reinstatement with effect from 1 June 2009 without loss of service and benefits, and ordered the Applicant to pay each five months' salary as back pay equal to R46 740.00.
- [6] In its review application, the Applicant, in essence, contends that the Commissioner failed to properly determine the evidence before her, and secondly, that the determination of the Commissioner is not what a reasonable arbitrator would have come to on the available evidence. The Applicant contends that the Commissioner committed a gross irregularity in her failure to apply her mind to the evidence placed before her and in rejecting the Applicant's evidence without proper consideration thereof.

Evidence before the Commissioner

- [7] The evidence before the Commissioner in relation to the incident was the following:

Incident of attempted theft:

- 7.1 Johan Quinn ('Quin') the person appointed to investigate the incident, testified that the key to the truck in question was placed in the security box by the previous driver of the truck after he had ended his shift on 14 August 2008 (i.e. the day before the incident) and handed in the key to security;

- 7.2 Quinn further testified that the C track system that is installed in the truck is a device that monitors the vehicle from the moment the ignition is turned on. The report recorded that the truck's ignition was turned on at 04h23 on 15 August 2008 and it idled for a few minutes until the ignition was turned off at 04h30. The section on the petrol tanker (the Alfonshaar box) requires a minimum pressure in order for the compartment to enable the product remaining in the pipes to flow out. This pressure is obtained by enabling the engine to idle for a few minutes to build up pressure;
- 7.3 Bvuma testified that at around 04h00 on 15 August 2008, he drove into the truck stop where he turned his car at the second lane of the parking at an estimated distance of 30 meters, and he saw two people looking directly at him. Bvuma testified that Tom was wearing a blue hat with a white stripe on it and that Tom was *"looking at me straight"*.
- 7.4 Bvuma further testified that Aupa ran under the truck and was on all fours and then ran away. He observed four blue containers three of them were full of petrol and the other one was half full. He also found an orange cone and a plastic bag. In his statement to the police Bvuma stated *"I know the two persons I saw in the truck parking area by face and not by name. I would recognise them if I see them again"*.

Identification of Aupa and Tom at the security office

- 7.5 On 15 August 2008 the security footage captures the two individuals entering the security office at 04h15. In observing the video footage presented at the arbitration, an arm is seen reaching towards an object in the security office. Tom and Aupa are seen leaving shortly thereafter. Anne Herbst (Herbst), the head distribution manager employed by the Applicant, testified about the location of the key box and that it is situated in the same place the arm reached out to.
- 7.6 Aupa and Tom's version is that they did not take the key from the key box but instead attended at the security office to submit themselves to

a breathalyser test. Herbst testified that it was unlikely that the two individuals intended to take a breathalyser test inside the security office as it is an *ad hoc* test and not a scheduled test and that it is done *“outside in the public eye, underneath the canopy. They don’t take you into a closed office to do it. The policy states that are not allowed to”*.

7.7 Quinn testified on the breathalyser policy that:

“Randomly, on some mornings, the security will stop people entering the premises to blow, to see if they’re under the influence. They don’t do it every morning. So there is no reason for them to stop there and go in and tell security that they are here and can blow. And they are not allowed to blow in the office, they must be outside the office. And at that stage, when you see the people entering the premises, there were no security guards on the outside. So they weren’t stopped by a security.”

7.8 Bvuma testified that he phoned to report the incident to the Applicant and drove to the security office. While at the security office, he saw Aupa and Tom walking together and immediately identified them pointing them out to the security.

Aupa at the Admin building / management office

7.9 Quinn testified that video evidence shows footage of Aupa on the stairs of the admin building coming down from the first floor at 04h47. He testified that during the investigation he asked Aupa why he had gone to the first floor. Aupa informed him that he wanted to use the toilet.

7.10 Herbst testified that the admin building does not belong to the Applicant. In this regard she stated the following:

“.....on the video footage you can clearly see Aupa running into the commercial office next door. That is the truck stop people who operate the forecourt and the premises, running up the stairs, halfway up the stairs he pulled a beanie over his face and then he ran back out again. It is not our building, we do not have any offices there or facilities there, that is different people from the commercial side.”

- 7.11 Under cross examination, Herbst was asked what inference the Applicant drew from the footage. She answered as follows:

"The statement from [Bvuma] is correct. He saw a person running to the pumps and then where did Aupa go? He went up the building as per the video footage and out again".

- 7.12 Bvuma testified that after he pointed out Aupa, *"security asked Aupa what he was doing upstairs, "Aupa Replied that he wanted to make coffee"*.

- 7.13 Also before the Commissioner was the statement of Andries Mzekwa, a security guard who was on duty on the morning of the incident stating that:

"at the [security] office I went to get the radio to call Sasol Officer (Security). At the office I passed a man at the stairs that was going to the 1st floor. I asked the man what is he doing there. He replied that he was busy making tea. There are no facilities to make any tea or coffee at night."

- 7.14 Herbst testified that Aupa gave conflicting versions as to why he was in the management office and evidence on the absence of a bathroom on the first floor and the absence of tea or coffee facilities. She testified that:

"If you look at the building next door, there is not a kitchen, so I'm not sure how they wanted to make coffee. Here is a room that is marked "kitchen" but there is nothing in it except a small bar fridge. There is no kettle, no coffee, no sugar, no milk. Bathroom, there is a bathroom at the truck stop, in that building at the office on the bottom floor, or the ground floor, but he ran past the bathroom on the video footage, straight up the stairs, and back out, immediately, out the door."

Searching Aupa's car

- 7.15 Herbst testified that she was present when security searched Aupa's car. She stated that:

"We opened the boot. In his book I found 2 'tregters'. I asked him why it was in his boot, he said to me his fuel gauge was not working and sometimes he ran out of fuel, so he needs that to put fuel in his vehicle."

- 7.16 Herbst did not find any other container in his boot where he could have put petrol inside should his vehicle stop somewhere.
- 7.17 Herbst further testified that after searching the vehicle, there was nothing inside it that would indicate that Aupa had taken a shower. Herbst also testified that Aupa and Tom did not have any lockers in the area where they could have kept a toiletry bag, or a towel.
- 7.18 Quinn testified that when security searched Aupa's vehicle, there was no face cloth, soap or towel in the car.

Aupa and Tom's early arrival a work

- 7.19 Aupa and Tom arrived at the truck stop early on 15 August 2008 between 04h00 and 5h00. Video footage placed them both at the security office at 4h15.
- 7.20 Herbst testified that Aupa and Tom's shift started at 06h00. She testified that she asked Aupa and Tom why they were at work so early and they replied: *"they always come in early to shower"*. She further testified that the clocking cards established the history of the arrival times of Aupa and Tom: *"In the formal investigation I went and pulled out all the clock cards. They only clocked in every morning at six o'clock.....there was no time record that indicated they start earlier. They could have been here earlier, but that only clocked in at six o'clock"*.
- 7.21 According to Aupa and Tom, they arrived on the scene only after Bvuma arrived and so the argument goes that it couldn't have been them that he identified. On this point, under cross examination, Bvuma is confused about his time of arrival. However, Quinn testified in his security report according to security footage that on 15 August 2008

Bvuma arrived at the truck stop at 4:28 to inspect his fleet of trucks. Furthermore, the written statement made by Bvuma to the police was before the Commissioner. Bvuma made two statements, one taken by the police on 15 August 2008 and the other taken by Johan Wilkens, ('Wilkens') an investigator from the Applicant. The police statement taken on the 15th of August 2008 states:

"1. On Friday 2008/08/15 between 4:15 and 4:30 I arrived at Sasol truck stop to check on my drivers. As I drove into the parking area I saw two persons at the truck."

Aupa's version regarding taking a shower

7.22 Aupa testified that he parked at the wash Bay, took his toiletry bag and went to the showers. He states that he had a toiletry bag in his possession. Herbst testified that Aupa's car was searched. Nothing was found to indicate that he had showered.

7.23 Aupa testified that Herbst was not truthful in her testimony regarding the two bottle tops present in the boot without a container as well as the absence of a toiletry bag.

Subsequent pointing out

7.24 Bvuma testified that he met with Quinn during the investigation. He stated the following:

"[Johan] came they by block...office, we went around the block. Him, he was standing there by the ATM machine. I told Johan, I said, Johan this is the guy who was at the scene. He was wearing the very same hat that he was wearing that day of the incident."

7.25 Quinn confirmed Bvuma's separate pointing out of Aupa and Tom. Quinn testified that:

"Percy identified Tom and Aupa as the two persons he saw on the 15th of August 2008. He saw them again on the 2nd of September 2008, and pointed them out positive to the investigators."

The review test

- [8] The review test is well established. In the seminal case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*¹, the Court held that:

‘... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’

- [9] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*², affirmed the test to be applied in review proceedings and held that:

‘[16] In short: A review 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 which was reasonable to justify the decisions he or she arrived at.’

- [10] In *Herholdt v Nedbank Ltd and Another*³ the Court stated:

‘..... 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 affect, as well as the weight and relevance to be attached to the particular effects or 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 really unreasonable’.

Findings of the Commissioner and evaluation

- [11] The Commissioner, in her award, considers the possibility of Bvuma having only seen “two figures” and associated them with Aupa and Tom as the people who arrived earlier than the usual time. She states:

‘Mr Bvuma testified that he identified the Applicants when his lights fell on them. None of the statements he gave to the Company investigators and to

¹ [2007] 12 BLLR 1097 (CC) at para 110.

² [2014] 1 BLLR 20 (LAC).

³ (2013) 34 ILJ 2795 (SCA).

SAPS members pointed at any of the Applicants. This I found to be strange and of significance especially that as it would appear the Applicants were at all material times in the vicinity if not in the company of the very first security personnel to whom the incident was reported immediately after it was discovered. What comes to mind is questions like could it be that he only saw two figures and associated that with the applicants as the people who arrived earlier than the usual time?

[12] The Commissioner rejected Bvuma's evidence based on her conclusion that his statements to the Applicant's investigators and to the SAPS fail to point out Aupa and Tom. However, the record reflects that when Bvuma testified about the identity of Aupa and Tom, he did so with certainty and he did so on a number of occasions. It is clear from Bvuma's testimony that he had no doubt about the identity of Aupa and Tom. He also testified that he did not know Aupa or Tom, that he had no vendetta against them and had no reason to fabricate his evidence. The record reflects that whilst he was confused about the exact time of arriving at the truck stop, he conceded under re-examination that he could have been mistaken about the time he arrived and that had he checked he could have been wrong. This seemed to have been ignored by the Commissioner when reaching her conclusion about Bvuma possibly being mistaken about the identity of Aupa and Tom. In addition, Bvuma pointed out Aupa and Tom both on the scene of the incident to security as well as on a separate occasion to the Applicant's investigating team. In the face of this evidence, to draw an inference that he may have only seen "two figures" and associated that with Aupa and Tom is not, in view of the evidence, a reasonable inference and not what another arbitrator would have found.

[13] Furthermore, the Commissioner relied on the fact that statements made to the investigators and to SAPS did not point out Aupa or Tom. To conclude that Aupa and Tom were not, based on this, involved in the theft especially when measured against Bvuma's positive eye witness testimony, is unreasonable and not a conclusion another arbitrator would have reached on the totality of the evidence. The Commissioner then bolsters her view by connecting this fact to the fact that Aupa and Tom were in the vicinity at all times and in the

company of the security personnel to whom the incident was reported. To give significance, as she did, to this connection and to attach the weight that she did, and to then and consequently question Bvuma's certainty in his identification of Aupa and Tom, is in my view irrational and unreasonable and not what another arbitrator would have found.

[14] Whilst there may be nothing untoward about Aupa and Tom's early arrival at site, the remaining evidence given by the Applicant's witnesses upon which the probabilities are based, is ignored. Furthermore, by applying her observation at her inspection in *loco* to trump Bvuma's positive eye witness testimony, is neither rational nor reasonable. In this regard, the Commissioner drew a negative inference of what she assumed Bvuma could not see without that evidence being before her.

[15] The Commissioner then reaches the following conclusions:

"Taking all the factors into consideration I find that although the offence was committed the applicants were not involved. The Company associated them with the offence solely because of the time of arrival and what seems to be the movement of the arm in the footage, which they said was the removal of the key - apparently the only key that was hanging on the key box on the day in question. If that was the case where were the keys for other vehicles that were parked on the premises. The inference drawn is that the keys were left in the vehicles and therefore the vehicles might have been ignited by other employees especially looking at the time difference between their arrival and the arrival of Mr Bvuma. The company had to find the culprits and they were the most convenient people to point the finger at."

[16] The Applicant did not associate Aupa and Tom with the offence solely because of the time of arrival and the movement of the arm in the footage. The Commissioner's inference that she then draws regarding the keys in the face of evidence that was before her i.e. that the key for the truck in question was placed in the key box the night before and not left in the truck, is unreasonable. Secondly there was significant evidence given by other witnesses for the Applicant to support the probabilities relied upon by the Applicant, and with specific reference to Bvuma's eye witness testimony. With

this, and bearing in mind the contradictions in Aupa's evidence, the Commissioner failed in her assessment of the Applicant's evidence which led her to reject the Applicant's case. In doing so, the Commissioner unreasonably disregarded the veracity of Bvuma's testimony and the corroborating evidence placed on record before her and this resulted in an unreasonable award.

Conclusion

[17] I find that the Commissioner failed to properly apply her mind to the evidence, ignored material facts or evidence and that she failed to weigh up the probabilities in line with the versions before her. The probabilities clearly favoured the Applicant. Therefore, and based on what has been set out above, in particular the grounds of review raised by the Applicant and the totality of the proceedings before the Commissioner, an irregularity exists that would justify this Court reviewing and setting aside the Commissioner's award. The findings reached by the Commissioner are not that which a reasonable decision maker could reach on the material facts and evidence.

[18] In the circumstances, the review application must succeed.

[19] Insofar as costs of the application is concerned, I have a discretion and I have considered that whilst the dispute between the parties has a long and protracted history, I have decided not to award costs.

[20] In so far as the relief claimed is concerned, I am in a position to make the following order.

Order

1. The arbitration award dated 14 May 2009 issued by the Second Respondent under case number FSCHEM224-08/09 is reviewed and set aside and is substituted with the following order:

"The dismissal of Tom P Dunwya and Aupa Mbhele is substantively fair".

2. There is no order as to costs.



L Dave
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate P Kirstein
Instructed by : JR Attorneys Inc.

For the Third and Fourth Respondents : Mr S Snyman of Snyman Attorneys