

SOUTH AFRICA / JUDGMENT

Ezulwini Mining v Commission For Conciliation Mediation and Arbitration and Others (JR452/12) [2014] ZALCJHB 31 (18 February 2014)

[2014] ZALCJHB 31

COURT

Labour Court Johannesburg

BEFORE

Chavoos

CASE / FILE NUMBER

JR452/12

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REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No JR452/12

In the matter between

EZULWINI MININGApplicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATIONFirst Respondent

COMMISSIONER FAIZEL MOOI N.OSecond Respondent

NATIONAL UNION OF MINE WORKERS obo WABILE, S.A.....Third Respondent

Heard: 15 January 2014

Delivered: 18 February 2014

Summary: Review of arbitration award in terms of section 145(2) of the LRA – Commissioner misconceiving the nature of the complaint which affected the outcome of the award thereby, committing a gross irregularity in the proceedings in terms of section 145(2)(a)(ii) of the LRA – award set aside

CHAVOOS AJ

Introduction

[1] This is an application for review in terms of section 145(2) of the Labour Relations Act, 66 of 1995 as amended (the “LRA”) to review and set aside the award of the Second Respondent (the “Commissioner”) under the auspices of the Commission for Conciliation, Mediation and Arbitration (the “CCMA”). In terms of his award, the Commissioner found that the dismissal of the Third Respondent was substantively unfair and ordered his reinstatement with no loss of salary. The reinstatement was to occur on 8 February 2012 or any other date negotiated by the parties.

Background

- [2] The Third Respondent was employed by the Applicant as a Safety Officer responsible for the health and safety of underground and surface operations from 16 January 2009 to 3 October 2011.
- [3] He was, pursuant to a disciplinary hearing, found guilty of a failure to immediately report the contravention of a non-negotiable standard determined by the CEO in that on 30 August 2011 he, during a routine inspection at 550 Level 4 South, identified a tip area not barricaded and a sub-standard grizzly (a grizzly is an instrument that is put on top of an opening around the tip area to prevent someone falling into the opening) but failed to immediately report it to the safety manager and CEO as per the CEO’s instruction.
- [4] A non-negotiable was an item identified to have caused majority of serious and/or fatal accidents in the mine and surrounding mining communities.
- [5] It was common cause at the arbitration proceedings that the CEO had issued the instruction that five non-negotiables had to be reported to him. I refer to this term interchangeably as safety hazards.
- [6] The instruction to report a non-negotiable was given by the CEO after a fatal accident on the mine, following a meeting between the CEO and employees at which the employee (“Wabile”) was present.
- [7] There is a factual dispute as to whether the hazard which fell under one of the non-negotiable safety issues that needed to be reported was to be reported immediately upon it being detected. This issue appeared to be the main focus of the Commissioner’s enquiry on which his findings are based.

- [8] The sub-standard condition / hazard was identified by the employee on 30 August 2011.
- [9] It was not disputed at the arbitration that the reason for the need to bring the safety hazard to the attention of the CEO was because in previous instances, whilst the hazard was recorded, no action was taken to correct the decision.
- [10] According to the Mine Manager, he identified a missing grizzly segment during an investigation. This has not been previously reported.
- [11] According to the employee, he identified the hazard on 30 August 2011 in what is called a stop-and-fix book and stopped work in the area until he was satisfied for work in the area to continue. The shift boss, Mr Vakutetwa, signed his field book whilst underground on 30 August 2011.
- [12] The employee cites this as the reason for not reporting the issue to the CEO ie that the issue had been rectified.
- [13] The incident was also documented in a document entitled “Self declaration of a development end”.
- [14] The shift boss, mine overseer and production manager all signed the document on 30 August 2011.
- [15] It was put to the employee during his cross examination that the shift boss, mine overseer, production manager, mine leader and team leader, in fact all the individuals who are alleged to have signed the self declaration of a development end report document which the employer relies on to prove that the hazard was identified and fixed on 30 August 2011, were dismissed for non-negotiables. The employer was not in a position to admit or dispute this contention.
- [16] A contradictory document which formed part of the bundle of documents used at arbitration was put to the employee where it was alleged that the shift boss recorded in a different document that the hazards identified by the employee on 30 August 2011 would only be fixed on 15 September 2011, which supported the employer’s version that when an inspection was conducted on 13 September 2011, the hazards identified by the employee on 30 August 2011 were not rectified.
- [17] According to the employee, the reason why the shift boss had recorded such information was because the shift boss informed him “that he wanted to bring some other boss to make additional support”.
- [18] When the shift boss Mr Vakutetwa testified as to why he recorded that the opening around the tip was still supposed to be fixed and that the date recorded as to when it would be fixed was 15 September 2011, (an indication that the tip had not been fixed on 30 August 2011), his response was as follows ‘the tip is being fixed every day because that this is too small. There is labour. They are basically ready every day. That date I was writing there that this report because he told me on the 15th it would be better then’. Vakutetwa admitted that he was

dismissed for one of the five non-negotiables.

The arbitration award and analysis

- [19] It is apparent from the Commissioner's arbitration award as well as his findings that his main focus was whether the hazard was to be reported to the CEO and Mine Safety Manager immediately even if it had been attended to. He went on to find that no time limit was set to report the incident if it was rectified on the same day and accordingly, the employee could not be found guilty if he rectified the issue the same day but did not make the report the same day. This was a mitigating factor for the Commissioner in finding that the employee was not guilty.
- [20] The difficulty with the Commissioner's reasoning is that there was no evidence led about a discussion with the CEO that in the event of the issue being rectified the same day, this was not to be reported to the CEO and Mine Manager. On the contrary, Mr Mokone the manager replied that this was not clarified and I take this to mean that it was never discussed. The instruction was simply to immediately report any one of the five non-negotiable safety issues to the CEO which was not done. The instruction given by the CEO is understandable. He has onerous obligations in terms of legislation to ensure Health and Safety and there appears to have been previous reported incidents that were never rectified. By having a non-negotiable reported to him, he could personally ensure that the issue had been rectified. It is common cause that the issue had not been reported to him immediately as per his instruction. It was also not in dispute that the issue was a life threatening one. It accordingly cannot be said that the employee was not guilty of the charge.
- [21] The issue was not as the Commissioner put it whether the Applicant rectified the tip area and grizzly on 30 August 2011 when he noticed a problem. On the contrary, it was whether the hazard which had been identified was reported to the CEO and Mokone the Mine Safety Manager immediately.
- [22] It is common cause that the issue was not reported to the CEO the same day when the hazard was discovered. According to Mokone the issue was only brought to his attention on 13 September 2011.
- [23] The Commissioner found that the balance of probabilities favoured the hazard being rectified on 30 August 2011 due to the following:
- 23.1 the stop and fix document issued by the employee to Vakutetwa shows that work had to be stopped for the hazard to be fixed;
- 23.2 the self-declaration of a development document signed by Vakutetwa;
- 23.3 the mine overseer, production manager, miner and team leader confirming that the issue had been rectified on 30 August 2011;

23.4 the fact that the employee was not charged with falsifying documents and Vakutetwa's testimony which corroborated the employee's testimony that he counter-signed such documents on 30 August 2011.

- [24] This was despite the fact that Vakutetwa's report contradicted the employee's version in that according to the document completed by Vakutetwa, the hazards were still to be fixed and were only completed on 15 September 2011 which was two days after the hazard come to the attention of the mine safety manager. The reasons given by Vukutetwa and the employee for this recordal in the report were contradictory.
- [25] He instead found that the area was again in a state of disrepair on 13 September 2011 but that this could have been due to the fact the scrapper constantly damaged the tipping area. Had this been the case, it begs the question as to why no evidence was lead to demonstrate that as a result of the tipping area being constantly damaged on a daily basis, this had been identified on a daily basis, and recorded by the safety officer on a daily basis. This was put to Vakutetwa in his cross examination which he could not explain.
- [26] The Commissioner also makes a credibility finding against Vakutetwa stating that he was not a good witness as he could not provide any explanation why he indicated that the problem would be rectified on 15 September 2011 as opposed to 30 August 2011. On the other hand he finds that Vakutetwa's testimony corroborates that of the employee's.
- [27] The Commissioner also fails to apply his mind to the fact that all the witness who testified on behalf of the employee were dismissed for non-compliance of a non-negotiable safety standard.
- [28] It is of concern to me that the crucial piece of evidence namely annexure B1 which identifies the contradiction in the employee's case namely that the hazard was fixed on 15 September 2011, although submitted as part of the bundle of documents to the Commissioner, did not form part of the record when the record had been filed with this court.
- [29] There have been two recent judgments which now authoritatively set out the requirements for a successful review for gross irregularity under section 145 of the LRA .

[30] The judgments are:

30.1 Herholdt v Nedbank Ltd (COSATU as amicus curiae) (2013) 34 ILJ 2795 (SCA. The court held:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the

proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. 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 particular facts, are not in and of themselves sufficient for an award to

be set aside, but are only of any consequence if their effect is to render the outcome unreasonable’.

30.2 Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others (JA2/2012)

[2013] ZALAC 28 (4/11/2013):

‘What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the

reasonableness test established by Sidumo. The gross irregularity is not a self-standing ...It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications.

Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guessworkground insulated from or standing independent of the Sidumo test.

‘Where an arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome

‘(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he [or she] was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?’

[31] Accordingly, the Applicant must show not only that the Commissioner misconceived the nature of the enquiry or did not apply his mind to a crucial and material issue but also that a reasonable commissioner would have done so and would have reached a different conclusion. These judgments introduce a materiality requirement, An irregularity must be material to the outcome.

In my view the test has been satisfied,

[32] It is clear that the Commissioner proceeded with the wrong line of enquiry in respect of the charge proffered against the employee in finding that he was not guilty of the charge. It was common cause that the issue was not reported to the CEO which was the nub of the charge. The employee was accordingly guilty for not reporting the Hazard to the CEO irrespective of whether the problem had been rectified. The Commissioner exceeded his powers by trying to establish whether this instruction was still applicable if the issue had been rectified. In doing so, he committed a gross irregularity which influenced the outcome of his award. Having made a credibility finding against one of the witness, he had failed to apply his mind

to the fact that all the other witnesses who testified on behalf of the employee were also dismissed for non-compliance with non-negotiable safety standards and that their evidence ought to have been treated with some trepidation. Any reasonable commissioner would have applied his mind to the aforesaid issues and had the Commissioner applied his mind to such issues, the result would have been different.

[33] The Commissioner in my view has failed to have regard to the material facts which has presented the Applicant from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. He misconceived the nature of the complaint against the employee which resulted in him finding the employee not guilty. A reasonable commissioner would not have come to the same conclusion if one has regard to all the material facts that was before commissioner.

[34] There was no substantive evidence led on sanction as the sole focus of the arbitration was on contravention of the charge. There is insufficient evidence on the record insofar as the break-down in the relationship of trust is concerned or for that matter the operational risk to the business in order to make a finding on the appropriate sanction. The Applicants Counsel correctly pointed out to me that the Applicant has not requested that this court substitute the findings of the CCMA. It has simply requested for the matter to be remitted back to the CCMA. In the premise I make the following order:

34.1 The arbitration award issued under case number GAJ27733-11 dictated 27 January 2012 is reviewed and set aside.

34.2 The matter is remitted back to the CCMA for determination before a commissioner other than the second respondent.

34.3 There is no order as to costs.

Chavoos AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: A.J. Nel instructed by Geldenhuys Van Ryneveld Inc.

FOR THE THIRD RESPONDENT: M.E.S Makinta of Makinta Attorneys

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Prepared on 11 October 2026 · Esheria