



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2327/10

In the matter between:

NATIONAL UNION OF MINEWORKERS

FirstApplicant

MARABA, PHILLIP

SecondApplicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

FirstRespondent

TERRENCE SERERO, NO

SecondRespondent

DRASET (A division of Aveng (Africa) Limited)

ThirdRespondent

Heard: 26 April 2012

Delivered: 1 November 2012

Summary: Review: Arbitrator failing to address issues in dispute. Award reviewable Referred back for hearing de novo

JUDGMENT

GUSH J

- [1] This is an application by the applicants for an order reviewing and setting aside the second respondent arbitration award under case number GAJB 8719/10 and directing that the matter be referred back the first respondent for arbitration *de novo* before a Commissioner other than the second respondent.
- [2] The applicants in this matter are the National Union of Mineworkers, the first applicant, the union of which the second applicant is a member. I shall for convenience simply refer to the first and second applicants collectively as the applicant. The applicant was employed by the third respondent prior to his dismissal.
- [3] The applicant was employed by the third respondent as a bracket assembler in May 1999. On 17 February 2010, the applicant was suspended by the third respondent and pursuant to being served with a notice to attend a disciplinary enquiry that took place on 23 February 2010. At the conclusion of the disciplinary enquiry, the applicant was dismissed, and, dissatisfied with his dismissal, he referred a dispute to the first respondent who in due course after conciliation appointed the second respondent to arbitrate the dispute.
- [4] The "alleged transgressions" which led to the applicant's dismissal was recorded in the notice of the disciplinary enquiry handed to the applicant as:
- ‘1 refusal to obey a reasonable instruction refused to work. Whilst trying to solve a L. L. Problem, asked Philip to wait while waiting for Teboho he walked off, even asking again (Alex MacDonald) to come back – he did not come back.
- 2 gross insubordination, seriousness respect. While you talking to him he walked all and told me I will be disciplined.’
- [5] The record of the disciplinary enquiry records that the applicant was dismissed after being found guilty of the following:
- ‘1 refusal to obey reasonable instruction;
- 2 gross insubordination’

- [6] The facts and circumstances which led to the applicant's dismissal appear from the evidence led at the arbitration and the record of the disciplinary enquiry.¹ The essential facts relating to the incident or altercation which led to the applicant's dismissal are to a large extent common cause. At the arbitration, the third respondent led the evidence of two witnesses. The first witness was a Mr Quass; the third respondent's factory manager, and a Mr Spath, the chair of the disciplinary enquiry. The applicant himself gave evidence and he called no other witnesses.
- [7] Quass's evidence was that on the day in question he was conducting an inspection of the plant. Quass was advised by a supervisor by the name of Macdonald that he was experiencing difficulties with an employee nicknamed Irish who was apparently refusing to perform certain functions as he, Irish, believed he was not being paid to perform such tasks. Quass instructed Macdonald to call Irish. When Macdonald returned he advised Quass that Irish refused to speak to him. Quass decided that it would be appropriate to summons a shop steward to deal with the situation and instructed Macdonald to call a shop steward. Macdonald returned with the applicant.
- [8] Quass asked the applicant to which union he belonged to which the applicant replied that Quass knew to which union he belonged. As the applicant did not answer the question Quass then asked the applicant the following question "are you still part of NUM?" The applicant replied "you see you do know". This Quass felt was disrespectful. Quass then asked the applicant to call Irish. According to Quass the applicant was not very cooperative and the the applicant had had asked him a number of questions including wanting to know why Quass wanted him to call Irish.
- [9] Quass explained that this had had the effect of "getting [him] a bit worked up" and he had walked away from the applicant in order to "calm himself down". He had then returned to where Macdonald was standing and the applicant had walked away back into the plant. It is clear from his own evidence that he, Quass, had become angry with the applicant and had walked away from the applicant. When Quass returned to where MacDonald was standing he

¹ Transcribed record of arbitration pages 10 – 19.

explained that a further altercation ensued. Quass's evidence was that as the applicant was walking away he had said to the applicant that if he did not call Irish he would be forced to take disciplinary action against Irish. According to Quass the applicant responded by telling him that "you will be disciplined".

- [10] Quass decided that he could not allow the applicant to speak to him "... as a factory manager ... like that" and told the applicant that he was going to phone the plant manager to explain the situation. This he did and told the factory manager "we" need to take action because the applicant was "not trying to support [him] and to try and solve the problem and that the applicant was responding to him aggressively and uncooperatively and was showing disrespect. Whilst he was on the phone the applicant had returned to the factory despite requests to come back.
- [11] Save for relatively minor discrepancies the incident as described by the Quass the factory manager was to all intents and purposes similar to the applicant's evidence. As is set out below the essence of the applicant's challenge to the substantive fairness of his dismissal that the second respondent was required to consider was the legitimacy of the instruction given to the applicant by Quass and whether the circumstances of the altercation between Quass and the applicant warranted a sanction as severe as dismissal.
- [12] The applicant in addition to challenging the substantive fairness of his dismissal also challenged the procedural fairness of his dismissal. The applicant's grounds for challenging the procedural fairness was that as he was a shop steward the respondent was obliged to inform and consult the union irrespective of the disciplinary enquiry and that he was entitled to be represented by a union official but was refused representation. It was common cause that the third respondent did not consult the union and had refused the applicant such representation.
- [13] A further issue in contention was the applicant's averments that the two charges of misconduct were in essence a duplication. In respect of the procedural irregularities the third respondent called Spath the chairperson of

the disciplinary enquiry. The issue of the duplicated charges and the failure to consult the union was canvassed extensively during Spath's evidence. Despite this the second respondent makes no reference whatsoever to Spath's evidence in his award save for the following "however it is correct that the chairperson, Mr H Spath advised the applicant that external representation was not permitted as per the companies disciplinary code."² the only other reference to the pursuit of fairness appears in the penultimate paragraph of the second respondent's analysis where the second respondent concludes that the failure to allow the applicant union representation was not the a material procedural defect and that it was sufficient to simply inform the union that a shop steward was to be subjected to an enquiry without discussing the merits of the charges.³

[14] The specific issues which the second respondent was to decide are clearly set out in the third respondent's heads of argument in the arbitration. The third respondent lists the issues to be decided as follows:

- (a) no union official permitted to represent accused in disciplinary hearing
- (b) charges unclear or duplicated
- (c) Chairman biased
- (d) reason for dismissal not valid
- (e) instruction not work-related
- (f) no such a rule in disciplinary code⁴

[15] Conspicuous by its absence in his award, is any attempt whatsoever by the second respondent to address any of these issues, save for his desultory comments regarding the first issue listed above.

² Award para 3.9

³ Award para 5.7.

⁴ Bundle of documents page 42.

[16] The applicant's grounds of review to all intents and purposes mirror the issues listed above in that the applicant averred in his founding affidavit that the second respondent should have held that:

- (a) his dismissal was procedurally unfair in that the union had not been consulted;
- (b) the charges of misconduct were duplicated;
- (c) the second respondent should have found that the instructions given by Quass were unreasonable; and
- (d) his conduct did not amount to either insubordination or a refusal to obey instructions.

[17] The applicant's case, in argument, was that by failing to do so the second respondent committed reviewable irregularities or came to a decision that a reasonable arbitrator could not have reached given the material before him.

[18] Considering the second respondent's award, apart from its brevity, there are a number of concerns which manifest themselves. These are:

- (a) Firstly and most importantly the second respondent appears to justify the dismissal of the applicant's application on the spurious grounds that the applicant had not "challenge[d] the company version".⁵ There can be no doubt from the record that the applicant's version was at all times patently clear to all parties to the arbitration. The issue regarding the applicant's so-called failure to put his defence to the third respondent's witnesses appears in the third respondent's "Heads of Argument"⁶. In fact the second respondent appears unjustifiably to have adapted for the purposes of his award the averments made by the third respondent's representative in the paragraph headed "ARGUMENT" in the "Heads of Argument"⁷.

⁵ Award para 5.1 and 5.5.

⁶ Bundle of documents page 42.

⁷ Bundle of documents page 44.

- (b) Secondly as regards the second respondent's somewhat pejorative reference to the applicant's "brief testimony" there could be no doubt regard being had to the record as to the nature and basis of the applicant's challenge to the fairness of his dismissal.⁸ The transcript of the entire arbitration runs to some 148 pages of which the applicant's evidence comprises 56 pages. It is clear from the applicant's evidence that at all times the applicant challenged the legitimacy of the charges levelled against him both insofar as the charges amount to a duplication and on the grounds that the instruction to the applicant's shop steward in the circumstances was not a legitimate instruction. These issues were clearly issues which the second respondent was required to decide which he clearly did not.
- (c) Coupled with the second respondent's failure to even refer to or consider the third respondent's disciplinary code is the second respondent's failure to consider in any manner whether dismissal was an appropriate sanction in the particular circumstances of the matter.

[19] In coming to his award, the second respondent to have unjustifiably relied upon and accepted the third respondent's submission that the applicant had not challenged the third respondent's evidence. In so doing the second respondent and failed to consider or deal with those issues which on the third respondent's own submissions he was required to. For these reasons, I am satisfied that the second respondent's award is reviewable and falls to be set aside.

[20] The applicant sought an order that the matter be referred back to be arbitrated *de novo*. In the circumstances, I make the following order:

- (a) the arbitration award under case number GAJB 8719/10 is reviewed and set aside;
- (b) the matter is referred back to the first respondent to be arbitrated *de novo* before a Commissioner other than the second respondent;

⁸ Award para 4.1.

- (c) there is no order as to costs

D H Gush

Judge

APPEARANCES

FOR THE APPLICANT:

G I Hulley

Finger Phukubje Inc Attorneys

FOR THE THIRD RESPONDENT:

E Hutchinson

Moodie and Robertson Attorneys