**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**CASE NUMBER: JR134/04**

In the matter between:

**Eddie Matjiu**

**Applicant**

and

**National Bargaining Council For Chemical Industries** **First Respondent**

**E. A Potgiter N.O** **Second Respondent**

**African Explosive Limited** **Third Respondent**

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**JUDGMENT**

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**CELE AJ**

**INTRODUCTION**

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("The Act") to review and set aside an arbitration award dated 5 December 2003 issued by the second respondent while acting under the auspices of the first respondent. The third respondent in whose favour the award was issued opposed the application.

**Background facts**

[2] The applicant commenced employment with the third respondent on 18 January 1995 as an operator. He received training at number 9 Pressure Oxidation Plant (POP), qualified and then passed out as a Process Controller in 1995. He was then moved to number 11 POP where he received further training, qualified and similarly passed out. He then continued to work as a Process Controller and was based at number 11 POP.

[3] The work of an operator, as well as that of a Process Controller included the monitoring of the nitric acid plant. Such monitoring was done through a computer system which itself monitored certain parameters on the plant. The operators were able to see on the computer system as to what would be going on in the plant. There is a drawing of the plant on the computer screen with indicators for pressure, temperature, flow rates, etc. The system also has built in components used to operate things such as level control. The system also has trouble shooting and textual type functions or interlocker, the interlocking system counteracts a wrong command and up to a point, is able to assist the controller. That system could be used to shut the plant down when there appears to be an operational problem. The system would be

referred to as DCS.

[4] In April 2003 one Mr Carel Oosthuizen was an operator trainee in plant number 9. The production manager issued a directive that Mr Oosthuizen was to work under the supervision of Mr Kelvin Pillay's shift for one shift circle. After that he would be assessed and if found qualified would pass out. Mr Pillay was the supervisor of the applicant. The applicant heard about the directive and requested to be supplied with a copy thereof. It was furnished to him through an E-mail letter dated 8 April 2003. The directive effectively placed Mr Oosthuizen under the supervision of the most senior personnel in Mr Pillay's shift section.

[5] On 12 May 2003 the applicant reported for duty at plant number 11 while Mr Oosthuizen was on duty at plant number 9. The applicant was the most senior personnel in his section. Plant number 9 experienced an operational problem and consequently tripped. The plant was then put on a blow out, with the apparent aim of establishing the cause of the trip on the compressor vibrator system, but tripped on surge. The applicant attended to the problem. It was later established that water was coming out of the drain system, when under normal circumstances, it would not.

[6] On 17 June 2003 Mr Oosthuizen was issued with a notice to attend an internal disciplinary hearing for gross negligence which resulted in plant number 9 being damaged on 12 May 2003. He was found guilty but was suspended for three days without pay and received a final written warning.

[7] On 1 August 2003 the applicant was similarly served with a notice to attend a disciplinary enquiry to face a charge described as:

> "alleged gross negligence in that on the 12th May 2003 after the No 9 nitric acid plant had tripped, that he did not exercise due care in advising C Oosthuizen on what to do and that resulted in the plant being put on blow out when the conditions were unsuitable for

doing so"

[8] The internal disciplinary hearing was held on 5 August 2003. He was found to have committed the act of misconduct with which he had been charged and was dismissed on 8 August 2003. His attempt at appealing against his dismissal was in vain. On 15 August 2003 he referred a dispute about an unfair dismissal to the first respondent for conciliation. A con/arb hearing was set down for 30 September 2003 but failed to resolve the dispute which the applicant thereafter referred to arbitration. The second respondent was the arbitrator and he found that the dismissal of the applicant was fair. It is that finding which the applicant now seeks to have reviewed and set aside.

**The arbitration proceedings**

[9] The applicant challenged only the substantive fairness of his dismissal. This dismissal was not placed in dispute by the third respondent. Three witnesses were called at the instance of the third respondent whereas two were called by the applicant.

[10] The evidence of Mr Greger, the Production Manager, was mainly around the *modus operandum* of the computer system of the plant. According to him, a computer screen was equipped with alarm signs which could very easily be seen in the control room on the display. He said that the advice given to Mr Oosthuizen by the applicant, as reported to him, was not, in the circumstances suitable as it was bad advice.

[11] In his evidence Mr Fourie said that he was tasked with the investigations of the incident of 12 May 2003. He conceded that the problem with plant number 9 had started with the previous shift

and damage was caused to the plant. He testified that according to his investigations, had the applicant and Mr Oosthuizen reacted to the warning sings on the computer screen and had they followed the operating instructions, damage to the plant would be minimal.

[12] Mr Oosthuizen testified and said that he was supposed to work under supervision of plant 11 controller, on the day in question. According to him one working with the plant could either be in or out of the control room. He said that, at the crucial time to the incident, he was outside of the control room while the applicant was inside. He testified that he had discussed the operational problem with the applicant and the applicant said that the plant was to be put on a blow out, to solve the tripping. He said that the applicant did not inform him that the computer screen in the control room showed high levels. He testified that while he was still outside, the applicant said that the plant was to be put on a blow out again. He said he had not had such experience before and accepted advice given by the applicant.

[13] Mr Pillay testified for the applicant. He testified that there was an arrangement made between him and Mr Greger to place Mr Oosthuizen under supervision of his (Mr Pillay's) team but that the details of it were not traversed. He said that he informed the applicant of the arrangement and that he was then to assist Mr Oosthuizen if there were any problems. He testified that the number 9 and number 11 plants were not problematic as they were low risk plants with their own control systems that could monitor temperature, pressure, etc.

[14] The applicant testified that he was aware of a company rule that, for the operation of the machinery which ran for 24 Hours, a

person with a pass out in a shift, supervised the one who had not passed out. He said that on 12 May 2003, he came to relieve the operator for plant 11. By then the operator for plant 9 was not present. He said that he saw Mr Oosthuizen in the DCS and asked, what he was doing there, Mr Oosthuizen told him that he had been called out for a plant which had tripped. He said that Mr Oosthuizen told him that it was his first time to find the plant in a tripped state and did not know if he had to leave it as it is or to do something. He said that he asked Mr Oosthuizen questions and they deliberated on the issue, finally agreeing that they had to put a plant on a blow out so as to find out if the vibrations were the cause of the tripping. As they did so, he had not himself gone to the plant and could not tell whether there was already water in the compressor parts. He said that according to the DCS there was something wrong with the HP system.

[15] The applicant testified that the only time he went out to the plant was when he had to re-set what he referred to as the EAE system. He said that it was then that he realised that the plant had not re-set. According to him in addition to the EAE system there was the UIC system and that the plant ran with both systems and that when re-setting, one had to consider both systems. He said that he was with Mr Oosthuizen when resetting the plant because he had to show him how to re-set the EAE system and the UIC system. From there, they proceeded to the drains only to realise then that there was steam and water coming out of the drains. He said that he did not make the plant safe since he did not know its condition as he had not been running the plant during the previous shift. He said that when resetting the plant he did so upon the request by Mr Oosthuizen who was in the plant and should have been able to see

its condition as he himself was in the control room. They used a radio to communicate.

[16] According to the applicant, he was not in charge of Mr Oosthuizen, as his supervisor. He appeared not to accept that Mr Oosthuizen was on training and suggested that Mr Oosthuizen had taken over the shift from the previous team of one Mr Skillano, which worked at plant 9.

[17] That in brief is the evidence relevant to the application which the parties led.

**The arbitration award**

[18] The second respondent found it unnecessary to decide whether the applicant was the supervisor of Mr Oosthuizen on 12 May 2003. He noted that the applicant had admitted that he and Mr Oosthuizen both decided to put the plant number 9 on blow out. He found that the applicant had not, by his own admission, considered the clear warning sings on a computer screen, in the circumstances when it was expected of him to exercise more care. He considered the sanction imposed and found that it was appropriate in the circumstances. He considered the question of the alleged inconsistent application of the sanction and found that there was no evidence to support the claim. He consequently found the dismissal of the applicant to have been fair.

**Grounds for review**

[19] The submission by the applicant is that the second respondent:

1. committed a gross irregularity in the conduct of the

proceedings;

2. reached a decision which was unjustifiable and

3. failed to apply his mind to the relevant issues.

**Analysis**

**Gross irregularity**

[20] An irregularity will inevitably relate to the procedure adopted in the course of proceedings either of a tribunal, a court or in the arbitration proceedings. It will therefore not mean or relate to an incorrect judgment. It refers not to the result but rather to the method of a trial. The consequence attendant to there being a gross irregularity is that the aggrieved party will have been prevented from having his or her case fully and fairly determined. See **Ellis v Morgan; Ellis v Desai 1909 TS 576 at 581** and **Goldfields Investment Ltd and another v City Council of Johannesburg and another 1938 TPD 551 at 560**.

**Justifiability**

[21] The test whether an award is justifiable or not, as set out in the case, **Carephone (Pty) Ltd v Marcus N.O and others (1998) 19 ILJ 1425 (LAC),**

> "… is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at"

**Failure to apply the mind**

[22] Where a commissioner has misconceived him or her functions, it

can be said that the unsuccessful party has not been afforded a hearing and that therefore a gross irregularity has been committed justifying the reviewing and setting aside of the Commissioner's award – See the decision in **Toyota South Africa Motors (Pty) Ltd v Radebe and others (2000) BLLR 243 (LAC).**

[23] With these considerations in mind, I now turn to the facts and submissions before me. The applicant submitted that the finding that the dismissal was fair, without considering that the applicant was not Mr Oosthuizen's supervisor or was never instructed to occupy that role, was unjustifiable, amounted to the commission of a gross irregularity and evidenced a failure of the commissioner to apply his mind to the relevant issues. The argument by the applicant was that, the case of the third respondent depended on whether or not the applicant was a supervisor or mentor of Mr Oosthuizen.

[24] The third respondent submitted correctly, in my view, that the applicant confirmed in his own evidence that, not only was he a more senior employee than Mr Oosthuizen, but that by virtue of his position, he was supposed to supervise Mr Oosthuizen during that shift. The applicant's own witness, Mr Pillay, confirmed that his shift was to supervise Mr Oosthuizen. He further said that he discussed the issue with the applicant. It is indeed so, as Mr Pillay also stated, that the nitty gritty of how that would be done had not been dealt with by Mr Pillay and Mr Greger. Even though the second respondent avoided making a finding, there was sufficient evidence for finding that the applicant was, at least, a mentor of Mr Oosthuizen.

[25] The charge alleged, among others, that "…. that he did not exercise

due care in advising C. Oosthuizen on what to do…" In his own evidence the applicant testified that Mr Oosthuizen told him that he did not know what to do when he was confronted by a plant that had tripped. In the form of questions and answers which they engaged in, the applicant clearly advised Mr Oosthuizen on what to do. He took an active participation in blowing the plant out. When he was crossed examined, he made a number of attempts to avoid answering the question whether the computer screen was not alarming or giving a warning on the state of the plant. His attempt at hiding behind, just clicking the computer mouse, to blow out the plant was very transparent. A reasonable Process Controller, placed in his shoes would have seen the computer warnings and would have followed the prescribed procedure in resolving the operational challenge confronting him. On the 12 May 2003, the applicant by his own conduct and by his verbal expressions to Mr Oosthuizen acted with negligence in attending to the tripping plant number 9. In my view, the second respondent, indeed applied his mind seriously to the issues at hand and reasoned his way to the conclusion which I find to be justifiable – See the decision in **Crown Chickens Ltd t/a Rocklands Poultry v Kapp & others (2002) 6 BLLR 493 (LAC) at para 58**. In resolving this issue, it was accordingly not necessary that a finding be made whether the applicant was a supervisor of Mr Oosthuizen.

[26] The second submission by the applicant was that the second respondent committed a gross irregularity in relation to the duties of a arbitrator or by failing to properly construe and make a proper analysis of evidence adduced before him. It was submitted that the gross negligence of the applicant was based on him and Mr Oosthuizen having decided to blow out the plant without ensuring

that the level in the absorption column was at a reasonable level. His defence, it was submitted, was that he said that he did not know what to do in the face of the plant having tripped. He was faced with two options, namely either to leave the plant as it was or to do something. My reading of this part of the record is that he was narrating that which Mr Oosthuizen had told him but he put it in the first person. It must be remembered that, at that stage, he was receiving a report. He was alive to the fact that he was based at plant 11 and not number 9. He could not have said that he, himself was faced with the problem. That is why his evidence continued in this manner:

> "and then I asked him a question, what do you think needs to be done, in correlation to what the instrument guy says. And then we reached an agreement that look, because it is a vibration, the only way to find out if it is a vibration, is to put the plant on blow out. Okay, and, yes…"

[27] The person who did not know what to do therefore would have been Mr Oosthuizen, who was presenting a problem to the controller.

[28] In the further submissions, it is said that there were more people who were negligent in relation to the number 9 plant. I can only agree with the negligence of Mr Oosthuizen and then possibly that of Mr Skillano who worked in the previous shift. The first tripping took place during the previous shift. However this does not in any way exonerate the applicant.

[29] In my view, the second respondent did consider the version of the applicant and how it was presented. He continued to look at the appropriateness of the measure imposed and the seriousness of the

charge. Indeed as the applicant suggests, the second respondent did not go through each and every mitigating and aggravating circumstance. It is clear in the award that he reflected on these factors. The third respondent has drawn my attention to the decision in **Shoprite Checkers (Pty) Ltd v Ramdaw NO and others (2001) 22 ILJ 1603 (LAC)** at paragraph 101 where Zondo JP had this to say:

> "In my view it is within the contemplation of the dispute-resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved."

[30] Evidence which was properly made available to the second respondent is enough for me to find that the dismissal was an appropriate sanction. The sanction imposed is not one that is so egregious that it shocks and alarms this Court, as suggested by the applicant – see also the decision in **Toyota South Africa Motors (Pty) Ltd v Radebe and others (2000) 21 ILJ 340 (LAC) at 355 C-D.** It was in the applicant's own evidence that they tried twice to blow out the plant. In doing so, he had not yet established the reason why it tripped, in the first place. It was in his evidence that he took Mr Oosthuizen outside to the plant to show him how to re-set the plant. It was during that occasion that they went to look at the pipes and only then realised that water was coming out. By then damage had been caused. The contradiction on whether or not the plant could be repaired does not avail the applicant, who had received proper training in the plant number 9 and had even passed

out.

[31] A proper conspectus of all the evidence which was properly available before the second respondent, in my view, points towards the second respondent having applied his mind seriously to the issues at hand and having reasoned his way to the conclusion. I am however, not of the view that this is a case where the applicant was vexatious or frivolous.

[32] Accordingly the following order will issue:

1. The application is dismissed.
2. No costs order is made.

CELE AJ

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**DATE OF HEARING : 08 MARCH 2006**

**DATE OF JUDGMENT : 02 JUNE 2006**

**Appearances**

**For the Applicant** : MS **P NKUTHA (ATTORNEY)**

Instructed by : **LEBEA & ASSOCIATES**

**For the Respondent**: Mr **X MOTJOLO (ATTORNEY)**

**Instructed by** : PERROT VAN NIEKERK & WOODHOUSE INC