

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no.: JR 2537/17

In the matter between:

HESTONY TRANSPORT (PTY) LIMITED

Applicant

and

VENTER PN N.O.

First Respondent

**NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT AND LOGISTICS
INDUSTRY**

Second Respondent

FASO, BUTINYANA DICK

Third Respondent

Heard: 11 January 2019

Delivered: 12 July 2019

Summary: Review application. Employee dismissed as a result of irregularities in respect of diesel consumption. The issue of procedure was in contention. Manner in which arbitrator considered evidence in respect of alleged procedural irregularity inadequate. Review application accordingly granted.

JUDGMENT

SNIDER, AJ

Background facts

[1] This is an unopposed review application. There was a notice of intention to oppose filed by the Third Respondent on 24 November 2017, but it does

not appear from the papers before me that the Third Respondent took any further steps to oppose the matter.

- [2] The Third Respondent was employed by the Applicant as a driver and was dismissed from its employment, after approximately eight years of service, on 30 December 2016, pursuant to a disciplinary enquiry.
- [3] The matter was arbitrated before the First Respondent on 31 August 2017 and 30 September 2017. As far as the substantive aspects of the matter are concerned the arbitrator found in favour of the Applicant that the dismissal was substantively fair.
- [4] In respect of the procedural aspects of the dismissal the First Respondent found that the dismissal was procedurally unfair and made an award in favour of the Third Respondent, that the Applicant compensates the Third Respondent in an amount equivalent to two months' salary, being the aggregate sum of R17 304.00.¹

The evidence of Martin Nell

- [5] In essence this matter concerns the manner in which the First Respondent considered and treated the evidence of the Applicant, particularly the evidence of Martin Nell ("Nell"), who presided over the disciplinary hearing.
- [6] The case for the Third Respondent was that he was unable to speak English, and required that the disciplinary enquiry be conducted in Afrikaans. Nell gave evidence in relation to the language issue as follows² -
- 6.1 the records reflect that Afrikaans was spoken at the disciplinary enquiry as that was the preference of the Third Respondent;³
 - 6.2 the only parts of the hearing that were in English were words like "consumption" or "Diesel". Such words were "*used to explain it in*

¹ Pleadings bundle page 22

² The evidence of Nell appears from page 22 to 33 of the bundle entitled [INDEX TO RECORD]

³ Page 24

- English*” and then translated back to Afrikaans;
- 6.3 the Third Respondent did on occasion say that “*hy’t nie verstaan nie*”. Nell would then try to elaborate on the relevant concepts in English and then explain them in Afrikaans;
- 6.4 certain English terms were used but no actual conversation took place in English;⁴
- 6.5 Nell denied that the Applicant tried to stop the hearing and denied that he would ever refuse someone an interpreter;
- 6.6 it was abundantly clear that the Third Respondent could not understand English;⁵ and
- 6.7 whereas some of Nell’s notes may have been in English, this is not a reflection of language in which the enquiry itself took place.

Grounds of review

- [7] The Applicant’s main ground of review is that the First Respondent failed to deal with the evidence, specifically the evidence of Nell, on a proper basis, and never gave any reasoning for why he preferred the evidence of the Third Respondent over that of Nell.
- [8] In support of this ground of review the Applicant also mentions the following:
- 8.1 Nell’s evidence was corroborated by one Phillip Jones (“Jones”);
- 8.2 the testimony was corroborated by the documentary evidence, and
- 8.3 the First Respondent never told Nell that he was unable to follow what was happening in the hearing (although a version was put to Nell that the Third Respondent asked for the hearing to be halted because he did not understand).
- [9] There were a number of other issues raised by the Applicant such as:

⁴ Page 30

⁵ Page 32

- 9.1 there was no basis for the First Respondent not to have preferred the testimony of Nell and Jones;
- 9.2 the evidence of each of the Applicant's witnesses was corroborated by the others, and was similarly corroborated by the documentary evidence. The failure of the Third Respondent, at any stage, to have asked for an interpreter, points to him having understood or having been able to understand "small parts"⁶ of the hearing that were in English and which were, on Nell's version, translated for the Third Respondent;
- 9.3 the Third Respondent never told Nell, even on his own version, that he was not able to follow the hearing;
- 9.4 the First Respondent appeared to be motivated by considerations of sympathy;
- 9.5 the First Respondent failed to comply with the provisions of the Labour Relations Act⁷ (LRA) pertaining to the conducting of fair and proper arbitration proceedings in terms of the LRA;
- 9.6 factual findings made by the First Respondent did not correspond with the evidence and documents placed before him;
- 9.7 the First Respondent exceeded his powers in terms of the LRA;
- 9.8 the First Respondent did not properly, rationally and justifiably apply his mind to the facts or the law in this instance;
- 9.9 the First Respondent failed to afford the Applicant a fair and proper hearing in the circumstances and failed to properly conduct the arbitration proceedings, and
- 9.10 the award made by the First Respondent is not justifiable in relation to the reasons given for it. The award is not rational on its merits or outcome and is not an award a reasonable decision maker could arrive at.

The award as it refers to the issues in dispute

⁶ Page 21 of the pleadings paragraph 34 of the award

⁷ Act 66 of 1995, as amended.

[10] The First Respondent dealt with the issue of procedural fairness inasmuch as it related to the question of whether the matter was heard in English or Afrikaans, and whether this impacted on the Third Respondent's understanding of the proceedings in three paragraphs which bear repeating at this stage⁸ -

“[34] The Applicant raised no issue that the hearing was conducted in Afrikaans and it is his case that parts were concluded in English and that he therefore failed to understand the entire hearing. It was not disputed that certain parts (albeit small parts) were conducted in English without an interpreter assisting the Applicant.

[35] There exists no reason why the Chairperson did not obtain the services of an Interpreter and he deviated from the preferred language despite the fact that the right to understand proceedings is a cornerstone of the LRA. The Applicant was in fact deprived of a very basic right.

[36] The internal hearing was not conducted in a fair manner and the process was unfair. It therefore follows that the dismissal was procedurally unfair.”

Analysis

[11] The First Respondent in this matter was confronted by a dispute of fact which was material and central to his determination of the procedural fairness of the disciplinary enquiry.

[12] On the one hand he had the version of Nell, as corroborated by Jones, that to the extent that any English terminology, and it only referred to terminology, was used during the conduct of the disciplinary enquiry, the meaning of same was conveyed to the Third Respondent. On Nell's version, corroborated as aforesaid, these were the only instances in respect of which English was used.

- [13] In cross-examination by the Third Respondent's representative it was put to Nell that parts of the hearing were conducted in English. Again Nell maintained that certain terms were used but no actual conversations took place in English.⁹ It was also put to Nell that the Third Respondent tried to stop the hearing and asked for an interpreter.
- [14] The First Respondent was duty bound to resolve these factual disputes, yet did nothing more than state, as set out above that "*there exists no reason why the Chairperson did not obtain the services of an Interpreter when he deviated from the preferred language ...*" and on that basis found that the dismissal was procedurally unfair. What he failed to resolve was whether, indeed, Nell had been fully cognisant of the Third Respondent's inability to converse in English, and had made sure that any English terminology was understood by the Third Respondent.
- [15] The Labour Court, for example in *Lukhanji Municipality v Nonxuba N.O. and Others and Assmang Limited (Assmang Chrome Dwarsriver Mine) v CCMA and Others*¹⁰ as well as the Labour Appeal Court, see for example, *House of Flowers and Others v Radebe and Others and NUM and Another v Rustenburg Platinum Mine and Others*¹¹ have found that the technique described in *Stellenbosch Famers Winery Group Limited Another v Martel et Cie and Others*¹² applies equally to Commissioners.

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court makes findings on –

- a) the credibility of the various factual witnesses;
- b) their reliability; and
- c) the probabilities.

As to (a) the courts findings on the credibility of a particular witness will

⁸ Pleadings page 21 paragraphs 34 to 36

⁹ Page 30 of the Index to Record

¹⁰ [2007] 2 BLLR 130 (LC) para [27] and [2015] 6 BLLR 589 (LC) para [42]

¹¹ [2014] 4 BLLR 366 (LAC) para [15] and (2015) 1 BLLR 77 (LAC) para [43]

¹² 2003(1) SA 11 SCA para [5]

depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

- i. the witness's candour and demeanour in the witness box,
- ii. his bias, latent and blatant;
- iii. internal contradictions in his evidence;
- iv. external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curricular statements or actions;
- v. the probability or improbability of particular aspects of his versions;
- vi. the calibre and cogency of his performance compared to that of other witnesses testifying about the same incidents or events.

As to (b), witnesses reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above

- i. the opportunities he had to experience and observe the event in question; and
- ii. the quality, integrity and independence of recall thereof.

As to (c) this necessitates an analysis and evaluation of the probability and improbability of each party's version of each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the courts credibility findings compel it in one direction and a valuation of the general probabilities in another. The more convincing the former the less convincing will be the latter. But when all factors are equiposed probabilities prevail."

[16] There are various degrees to which a commissioner may be held to follow the approach set out above.¹³ The First Respondent in this instance

¹³ See for example: *Solidarity on behalf of van Zyl v KPMG Services (Pty) Limited and Others* 2014 35 ILC 1656 (LC) para [16] to [17], [16] In summary, complaints about errors made in the treatment and assessment of evidence by an arbitrator will normally be bound up in an attack on the overall reasonableness of the result, and will not in themselves constitute separate grounds of review to be determined independently from the result (as they did under the 'latent irregularity' or 'dialectical unreasonableness' approach).

[17] While arbitrators should always aspire to meet the exacting standard A set by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions B are immune from appeal, and the legislature has set a high bar for

seemed to have done nothing at all to resolve the evidentiary issue. It seems as if he was not aware of the task that he was required to perform in order to resolve the evidentiary questions that lay before him.

[17] It is however still necessary to view the manner in which the First Respondent treated the evidence through the lens of the review test, and determine whether his conduct renders the award reviewable.

[18] Regard must be had to the test for review as set out in *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*¹⁴:

“... whether the decision that the arbitrator arrived at is one that falls in a band of decision to which a reasonable decision maker could come on the available material.”

[19] In my view the conduct of the First Respondent falls short of the test in *Sidumo* and his conduct renders the award reviewable. Accordingly in my view the award falls to be set aside.

[20] All that remains for me to consider is whether the award should be set aside and replaced with an award that the Third Respondent's dismissal was procedurally fair or, alternatively, whether the procedural issue should be remitted back to the Second Respondent to be heard afresh by a Commissioner other than the First Respondent.

[21] Because this matter involves an issue of credibility, and having not heard the witnesses, I am unable to substitute my finding for that of the First Respondent on the issue of the procedural fairness of the dismissal. I am simply not in as good a position as the First Respondent to decide the matter.

[22] I do not intend to make any order as to costs given that the matter was not

reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.

¹⁴ [2007] 12 BLLR 1097 CC

opposed.

[23] Having considered this issue I make the following order:

Order

1. The award of the First Respondent, only to the extent that he found the dismissal of the Third Respondent procedurally unfair, is reviewed and set aside;
2. The issue of the procedural fairness of the dismissal is referred to the Second Respondent to be heard by a Commissioner other than the First Respondent, and
3. There is no order as to costs.

Snider, A J
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: A J Posthuma of Snymans Inc. Attorneys