

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR167/17

In the matter between:

**AIR LIQUIDE (PTY) LTD**

**Applicant**

and

**NKGOENG N.N.O (AS ARBITRATOR)**

**First Respondent**

**THE NATIONAL BARGAINING COUNCIL FOR  
THE CHEMICAL INDUSTRY**

**Second Respondent**

**JAN BRITS MDLULI**

**Third Respondent**

**Heard: 5 February 2019**

**Delivered: 29 November 2019**

**Summary: Application to review and set aside arbitration award.**

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**JUDGMENT**

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**RAPHULU, AJ**

Background

- [1] The Third Respondent was charged with misconduct for being absent from work, gross dishonesty and gross insubordination. He was found guilty of gross dishonesty and was dismissed.
- [2] The First Respondent held that based on the evidence led, the Third Respondent was at work and his dismissal was accordingly substantively unfair.

Submissions on review

- [3] The Applicant contends that in light of the evidence led at the arbitration proceedings, the First Respondent's award that the Third Respondent's dismissal was substantively unfair is not one that a reasonable decision maker could arrive at.
- [4] The Applicant contends that the Third Respondent was asked to report at the Applicant's site office but never arrived at the site office that day. Further that the Third Respondent worked at the site closely with his colleague Mr Robert Mashia ("Mashia"), as they are the only two employees stationed at the site, however, Mashia testified that he never saw the Third Respondent that day. The Applicant also contends that a large level of trust was placed on the Third Respondent and Mashia to report properly for work and to carry out their duties, as they were the only staff members permanently on site.
- [5] An attendance register is present and is signed by the Third Respondent, but Mashia had it in his vehicle on the day in question. The First Respondent accepted that based on the evidence led, there was a practice to complete the attendance register the following day, and that since it was only the Third Respondent and Mashia completing such attendance register, it is not possible that Mashia did not see whether the Third Respondent had completed it on the day in question or not. However, the Applicant contends that this cannot be accepted as proper

evidence as a basis for a finding in the absence of this aforementioned 'practice' being put to any of the Applicant's witnesses.

- [6] The Third Respondent produced a document at the arbitration proceedings purportedly showing that his access card had been used at the canteen on the day in question as proof of his presence at work, but the Applicant contends that the access card could have been used by another person and further that the Third Respondent failed to produce his witness which was called to testify on the authenticity of this document.
- [7] The Third Respondent alleged that he worked at boiler four on the day in question and that there was no paperwork to prove this because he was working on foreign cylinders. The Applicant contends that the First Respondent held that the issue of foreign cylinders was irrelevant, but then proceeded to make the point in his award that the Third Respondent could not adduce paperwork for his work on boiler four because it was work on foreign cylinders.

#### Analysis of evidence

- [8] On the one hand, I give consideration to the site in question; the nature of the working relationship between the Third Respondent and Mashia; the fact that there is no paperwork to show for the work done by the Third Respondent on the day in question (and the purported reason for this); the fact that both Mashia and Mr. Mohamed Kazim ("Kazim") never saw the Third Respondent on the day in question (despite communication to the Third Respondent which may have been interrupted but at the very least did get across to the Third Respondent that Kazim was on site and looking for him).
- [9] On the other hand, I give consideration to the canteen report showing that the Third Respondent's card was used there on the day in question; the attendance register which was only completed after the day in question

purportedly because of the practice that Mashia kept it in the boot of his car; Mashia's evidence that he did not see whether the Third Respondent had completed the attendance register on the day in question - despite the fact that only he and the Third Respondent were stationed at the site in question; and the photographs of the cylinders that were purportedly taken by the Third Respondent on the day in question.

### Analysis

[10] As regards my analysis of the canteen report and the Applicant's contention that the Third Respondent failed to produce his witness to prove the authenticity of this document, I give consideration to the size and number of employee's on the site in question. If it was indeed the case that another employee used the Third Respondent's access card to enter the canteen, the relevant question is then, on the probabilities, who this employee would be, particularly when the Third Respondent and Mashia are the only two employees on the site, as contended by the Applicant. As no evidence was led by either parties on the veracity of the canteen report, I can only reasonably conclude that the First Respondent was correct in finding that the Third Respondent used his access card to enter the canteen and that he was at work on the day in question.

[11] The review test is based on reasonableness. In my view, it is not beyond the realm of reasonableness for the First Respondent to rely on the canteen report, and hold that the Third Respondent was at work that day, and accordingly that his dismissal was substantively unfair.

[12] Accordingly, I make the following order:

### Order

1. The application for review is hereby dismissed.
2. There is no order as to costs.

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L. Raphulu  
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: S. Snyman of Snyman Attorneys

For the Respondent: Shahista Carrim of Nabeel Noorbhai Attorneys

LABOUR COURT