REPUBLIC OF SOUTH AFRICA

LABOUR OF SOUTH AFRICA COURT, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2799/11

In the matter between:

NATIONAL PETROLEUM REFINERS (PTY) LIMITED **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY **First Respondent**

ADV RONNIE BRACKS NO **Second Respondent**

PRETORIUS NG **Third Respondent**

Date of hearing: 21 May 2013

Date of judgment: 29 October 2013

Summary: Review application. Breakdown of trust due to negligent disregard of safety rules.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an application to review and set aside the arbitration award made by the second respondent (the arbitrator) under case number CHEM 383-10/11 dated 7 October 2011, in terms of which it was found that the dismissal of the third respondent was found to have been unfair. The arbitrator accordingly ordered the applicant to reinstate the third respond.

Background facts

[2] The facts of this case which are common cause appear as follows: the applicant conducts business as a petroleum refiner and also produces ancillary chemical products.

[3] The third respondent commenced employment with the applicant on 2 February 1974. He was at the time of his dismissal employed as a senior process controller at the applicant's Hydrocracker division.

[4] The dismissal of the third respondent arose as a result of his misconduct. He was charged with dereliction of duties due to gross negligence for failing to follow due procedure to shut down the plant.

[5] The charges proffered against the third respondent were as follows:

> 'Clause 6.8(b) dereliction of duties due to gross negligence. In that on 17 December 2010 at 04:58 Nico Pretorius bypassed the draft trip HS25105 thus de-activating a Hydrogen unit safety EDS system. This subsequently led to Reformer not shutting down when the draft pressure was lost at 05:05 on 17 December 2010; and
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> Clause 6.1(b) – contravened or failed to comply with company's operating regulations. On 17 December 2010 at 04:58 Nico Pretorius introduced feedstock (SATGAS) into Reformer at temperatures below 710° C outlet B25001, not following procedure. This subsequently led to further catalyst coking/catalyst deactivation at lower temperatures'

[6] A disciplinary hearing convened on 07 January 2011 was held and the third respondent pleaded guilty to all the charges. The third respondent was found guilty on charges of dereliction of duty due to negligence; gross negligence and disorderly conduct; insubordination; and contravention or failure to comply

with company conditions or employment. He was subsequently dismissed on 22 February 2011.

[7] The third respondent was dissatisfied with his dismissal, and consequently referred his alleged unfair dismissal to the first respondent. After the matter remained unresolved due to the failed conciliation, the matter was arbitrated. The second respondent found the dismissal of the third respondent to be substantively unfair because the sanction of dismissal was not appropriate. The arbitrator formed the view that the appropriate sanction would have been a final written warning. The arbitrator then ordered the reinstatement of the third respondent with payment of four month's salary.

The applicant's case

[8] The background to the first charge is common cause. The incident that gave rise to the first charge occurred on 17 December 2010 when during the early hours of the nightshift the team experienced an emergency shutdown of the plant.

[9] In an attempt to restart the plant the third respondent bypassed all the eight switches which is a procedure usually done when carrying out maintenance. The approach adopted by the third respondent resulted in gas and fuel being introduced at the temperature below the prescribed one, resulting in the rise in pressure. The rise in pressure results in the automatic shutdown of the plant. That did not occur on the day because the third respondent had reactivated the hand switches which he had previously bypassed.

[10] The failure to enter the automatic emergency shutdown resulted in an explosion which caused minor injuries to the person who the third respondent had sent to check on the alarm.

[11] The case of the applicant at the arbitration hearing was that had the third respondent not bypassed the eight hand switches the system would have safely shut down.

[12] In relation to the second charge the case of the applicant at the arbitration hearing was that gas was introduced into the furnace at a lower temperature than prescribed, resulting in the damage to the catalyst. It was further the case of the applicant that the third respondent was aware of the rule regarding

the introduction gas and the method in restarting the plant. The consequence of deviation from applicable policies and procedures resulted in damage for the applicant amounting to R37,8 million.

[13] It was not disputed that the foreman of the third respondent was present at the time that he (third respondent) bypassed the switches. In dealing with the emergency the third respondent did not seek the advice or assistance of the foreman. The reason for not seeking advice or assistance was that the foreman did not know the plant.

[14] The case of the applicant was also that this was not the first time that the third respondent had dealt with the emergency shutdown.

The respondent's case

[15] The third respondent did not dispute the case against him both at the disciplinary and the arbitration hearings. In mitigation the third respondent stated the following:

a. He was under pressure to have the plant restarted,
b. He was working on two units at the same time,
c. He did not receive assistance from the outside personnel
d. It did not appear to him as if anyone was willing to assist him.

Grounds for review

[16] The applicant contends that the arbitration award is a reviewable for reasons related to material errors of law and facts, failure to properly assess the evidence properly placed before the arbitrator. The applicant further contends that the arbitrator failed to apply his mind to the appropriate measures of the sanction which had been imposed.

The arbitration award

[17] The arbitrator accepted the contention of the third respondent after pleading guilty to the charges that the sanction of dismissal was too harsh. The arbitrator also found that the trust relationship between the parties had not broken down and therefore the dismissal was justified.

[18] In finding that the dismissal to being inappropriate the arbitrator took into account the following factors:

i. the length of the service of the third respondent with the applicant

ii. that the referred respondent had a clean record will stop

iii. that at the disciplinary hearing the applicant did not seek the dismissal of the third respondent but rather that he be given a punishment less than the dismissal.

[19] As concerning the finding that there was no breakdown in the relationship the arbitrator based his finding on the fact that the third respondent was not removed from his workstation and that he remained there for a period of 30 days after the commission of the offence.

Evaluation

[20] The test to apply in determining whether the decision of the arbitrator is reviewable is that of the reasonable decision maker set out in *Sidumo v Rustenburg Platinum Mines Ltd* .[1] This is an objective test which entails an objective determination of the fairness or otherwise of the dismissal having regard to the totality of the evidence and the issues which way before the arbitrator.

[21] In the present matter the issue of whether the third respondent was guilty or not did not arise because the third respondent pleaded guilty to the charges. This essentially means that the third respondent was aware of the rule governing misconduct that led to the charges which were filed against him. Thus the issue of the existence and or reasonableness of the rule governing conduct also did not arise.

[22] The two issues that the arbitrator had to determine had to do with the fairness of the sanction and whether the trust relationship had broken down between the parties to justify a dismissal.

[1] 2008 (2) BCLR 158 (CC).

[23] I deal first with the issue of fairness of the sanction and the factors which the arbitrator took into account in arriving at the conclusion that the dismissal was too harsh. As indicated above, the question that arises in this review is whether the arbitrator took into account the totality of the evidence and the circumstances of the case in arriving at the conclusion that the dismissal was too harsh. And more importantly the issue is whether the arbitrator appreciated the task he was confronted with and accordingly weighed all the relevant factors necessary for the assessment of whether or not the sanction of dismissal was appropriate.

[24] The court will only scrutinise the exercise of the discretion by the arbitrator in order to determine whether the decision reached by the Commissioner, is one which falls within the band of reasonableness.

[25] The factors to take into account in assessing the fairness of the sanction are stated in *Samancor Crome Limited v Industrial Bargaining Council* in the following terms:[2]

> '33 Turning then to fairness of the sanction, the question is whether a reasonable decision maker would have arrived at a conclusion that the sanction of dismissal was fair. (*Sidumo* at para 110). In deciding the reasonableness or otherwise of an award in this regard, a court of review must take the following considerations into account: firstly, the duty to determine whether a dismissal is fair or not rests with the commissioner. 'The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view.' (*Sidumo* at para 75) To this extent a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances. (*Sidumo* at para 79).
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> 34 Secondly, the decision whether or not the sanction imposed by an employer is fair in a particular case is a value judgment which the commissioner is required to make on the basis of his/ her own sense

[2] (2011) 32 ILJ 1057 (LAC) at para 34 to 35.

> of fairness. Thirdly, each case must be decided on its own merits and with due regard to the totality of the circumstances - an objective approach (*Sidumo* at paras 64 and 68). In doing so the commissioner will 'necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed a sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his of her long service record. This is not an exhaustive list.' (*Sidumo* at para 78.) Other factors may include the seriousness of the misconduct and the gravity thereof with relation to the continued employment relationship as well as the employee's previous disciplinary record and personal circumstances, the nature of the employee's job and the circumstances of the infringement. The list is not exhaustive.'

[26] In my view, the arbitrator misconceived the task he had to perform in focusing only on the mitigating factors and failing to take into account the aggravating factors and in particular the reason for the rule which the third respondent had breached. The arbitrator also failed to take into account the totality of the facts and the circumstances of the case.

[27] The evidence as presented which had not been disputed indicated that because of the nature of the applicant's operation there is a policy of zero tolerance to non-compliance with policies and procedures by employees. It has not been disputed that the applicant's operations are hazardous and thus require a high level of safety and security.

[28] The arbitrator also placed undue reliance on the long service and the clean record which the third respondent had with the applicant. She in this regard failed to weigh that against the seriousness of the offences and the consequences thereof. In *De Beers Consolidated Mines Ltd v CCMA and*

Others, [3] it was held that long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability but that does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it.

[29] It is apparent that after failing to follow the proper operational procedures the third respondent decided to act on his own and not seek assistance or advice from his superiors as soon as he was confronted with the emergency. In adopting that attitude and acting in the manner he did the third respondent placed not only his own safety in jeopardy but also that of the other employees. It was as a result of his conduct that the applicant suffered significant damage to its property and one of its employees was injured.

[30] Turning to the issue of breakdown in trust relationship, again the arbitrator failed to appreciate the task that confronted him. In considering whether the trust relationship had broken down between the applicant and the respondent, the arbitrator in my view, the arbitrator accorded undue weight to the testimony of the witness of the applicant, Mr Moloi who testified that he felt sorry for the third respondent and accordingly recommended that rather than a dismissal, a final written warning ought to be given as a sanction. It is apparent that the arbitrator did not consider the seriousness of the offence including the testimony of the applicant's witness that the first respondent would no longer be trusted as a result of the incident.

[31] The fact that the applicant did not suspend the first respondent immediately after the incident is indeed a factor to consider in assessing the breakdown in the relationship. It is however, not determinative of whether the trust relationship is sustainable. In the circumstances of this case I do not believe that the fact that the applicant retained the services of the third respondent for a period of 30 days after the incident outweighs the nature and seriousness of the offence and the consideration of trust. It seems to me that on the facts of this case it would be unfair to expect the applicant to retain the employment of the third respondent in circumstances where he no longer can be trusted in as far as in as far as his own safety and that of the others concerned.

[3] (2000) 21 ILJ 1051 (LAC).

[32] In light of the above, I find that the arbitration award of the arbitrator stands to be reviewed and set aside. I do not, however, belief that it would be fair to allow costs to follow the results.

Order

[33] In the premises the following order is made:

1. The arbitration award made by the second respondent under case number CHEM 383 – 10/11 dated 7 October 2011, is reviewed and set aside.
2. The arbitration award is substituted with an order to the effect that the dismissal of the first respondent was for a fair reason and accordingly the claim of unfair dismissal is dismissed
3. There is no order as to costs.

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Molahlehi, J

Judge of the Labour Court of South Africa

Appearances**:**

For the Applicant: Danie Pretorius of Fluxmans Inc

For the First Respondent: Advocate J.M. Bezuidenhout

Instructed by: Bezuidenhout Van Zyl & Associates