THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Of interest to other judges

Case no: PR 98/2013

In the matter between:

PE GOLF CLUB **APPLICANT**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **FIRST RESPONDENT**

KLAAS TITUS NO **SECOND RESPONDENT**

VUYISILE KIBI **THIRD RESPONDENT**

FRED SAULS NO **FOURTH RESPONDENT**

Heard: **7 MAY 2015**

Delivered: **14 MAY 2015**

Summary: (Review – Reasonableness – arbitrator ignoring gravamen of the charge and basing decision on narrowest interpretation of charge – unreasonable in the circumstances – Irregularity in not postponing the proceedings not affecting the outcome of the arbitration – Award set aside)

JUDGMENT

R LAGRANGE, J

[1] This is an application to review and set aside an arbitration award, in which the arbitrator held that the third respondent's dismissal was unfair.

[2] The third respondent in this matter, Mr V Kibi, was employed as a machine operator by the applicant, a golf club. He commenced working with the club in July 1989 and was dismissed on 8 March 2013 for failing to comply with a lawful instruction "…*in that on or about 22 February 2013, you were instructed to check the radiator for cleanliness, which you failed to do".* Kibi's responsibility was cutting the grass and he was also responsible for cleaning the grass cutter machine and the radiator after using it daily. Cleaning the radiator was one of the tasks contained in a check sheet which employees had to tick to signify that they had washed the machine and clean the radiator. The check sheet was explained twice to employees in the year preceding the Kibi's dismissal, using an interpreter.

[3] On 21 February 2013 a random check was conducted of the grass cutting machines and it was discovered that Kibi's machine had not been cleaned, despite him ticking the relevant box on the tick sheet indicating that this had been done. A photograph was taken of the machine by the workshop foreman Mr, W Wagner ('Wagner') on the instruction of the Course Superintendent, Mr P Moolman ('Moolman') before it was used the next day. Wagner testified that it still had not been cleaned after it had been used and returned to the parking bay the next day. Wagner asked Kibi if he cleaned the radiator and he said he had. When he was confronted with the state of the machine on 22 February and the photograph of the machine from the previous day, Kibi did not respond according to Wagner.

[4] The workshop's assistant mechanic, Mr V Mange ('Mange') was more equivocal whether it had been cleaned when Kibi was confronted the next day. He said he could see that Kibi had 'washed' the machine because it was wet. Nevertheless, he also testified that when the cover was taken off the machine there was grass visible in the radiator, though "not much." Mange also testified that Kibi had brought his machine to the workshop from in front of the workshop area which was

a cleaning area very close by. Between that cleaning are and the workshop there was no grass, whereas the other cleaning area known as 'Graham' was about 20 to 30 metres away from the workshop and separated by grass.

[5] According to Wagner, it was the applicant's case that the check sheet served as a standing instruction for all employees to comply with. In May 2012, Kibi had been issued with a final written warning for not complying with a lawful instruction, which was still valid at the time of his dismissal. He had also been suspended for a week from 14 to 18 January 2013, as an alternative to dismissal, for failing to comply with a lawful instruction. Mange testified that the purpose of the check sheet was to ensure that it was followed to prevent damages to the machines. Kibi's explanation for the dirt being on the radiator at the time he was confronted was that it could have accumulated when he took the machine after cleaning it from the washing bay to the store, a distance of approximately 30 m. Kibi denied both that he had not followed the checklist and there was no such lawful instruction from the employer he had failed to comply with.

[6] The arbitrator's interpretation of these events was essentially that he appeared to accept, without making an unequivocal finding, that Kibi had not cleaned the radiator. However, he reasoned that there was no evidence that it was discovered that the radiator had not been cleaned, Kibi had been issued with a direct instruction to clean it. Consequently, the arbitrator was satisfied that the applicant had failed to prove that it had issued Kibi with a lawful instruction in the first place. He found him guilty of a lesser charge of negligence in the performing of his duties. The arbitrator summed up his reasoning thus:

> *"The check sheet is part of [Kibi's] duties and a failure to discharge his duties, amounts to negligence and not a refusal to obey a lawful instruction. There was no instruction given in this case."*

[7] The language of the review application is framed in terms of latent and patents irregularities allegedly committed by the arbitrator.

[8] The patent irregularity complained of is that the matter had been set down for hearing from 09H00 to 13H00 on the day in question. The employer intended to

call Moolman who was not available on that date because he was on leave. The applicant advised the arbitrator after he had dismissed the application for postponement that it had not closed its case. Mr Moolman was a critical witness in the view of the applicant because he had witnessed the state of the applicant's machine on the first occasion and instructed the foreman to take a photo of the machine. He had also witnessed the checklist that Kibi had ticked indicating that the machine had been cleaned.

[9] At the conclusion of the evidence of Mange, the applicant had applied for a postponement on the basis that the allocated time set down for the arbitration process had expired. The application was opposed by Kibi and the arbitrator made an *ex tempore* ruling refusing the postponement. He noted in his award:

> *"The respondent did not provide any compelling reasons why they should could not remain part of the process should the proceedings continue."*

[10] From the transcript it appears that the applicant had unsuccessfully sought to have the hearing postponed because of the unavailability of Moolman on the date of set down. This application was refused and is not the subject matter of this review. In an effort to revive the failed postponement application, the applicant asked the arbitrator to postpone the matter, as it had gone beyond the time allocated by the CCMA on that day. Had the matter been postponed, then the applicant could have led Moolman. The only evidence that Moolman might have given directly bearing on the case would have been about the standing instructions and, perhaps more importantly, to confirm that he had seen the machine had not been cleaned on 21 February and had instructed Wagner to take a photo of the grass in the radiator. It is not clear that this would have added much to the testimony already before the arbitrator, though to the extent that Kibi tried to suggest the photo might have been taken of another machine, he could have testified on that.

[11] I agree that the Commissioner committed misconduct in the course of his duties by not granting the applicant a postponement to call a material witness to corroborate Kibi's failure to clean his machine on the day prior to that on which he was confronted

contrary to what he represented on the checklist. However, in this instance, the arbitrator was satisfied that the machine had not been cleaned on that occasion and his failure to permit the applicant to call Moolman as a witness, ought not have altered his findings on that issue. For that reason alone, there would be no point in setting the arbitration award aside.

[12] The essence of the applicant's attack on the arbitrator's award firstly concerns the arbitrator's failure to consider: its *modus operandi* relating to written instructions; the fact that the checklist was explained to all employees in two sessions, and the previous warnings the employee had received for similar offences. Secondly, the arbitrator adopted an artificially narrow approach in deciding that the standing written instructions encapsulated in the checklist as explained in the sessions with employees, did not amount to an instruction issued to Kibi, because it was not a direct verbal instruction. Lastly, in the light of Kibi's disciplinary record, the arbitrator could not reasonably have believed that dismissal was inappropriate.

[13] There is a close connection between the first and second grounds of alleged latent irregularity. Since the judgments in *Herholdt* [1]and *Kloof Mine* [2], the central question is not how the arbitrator reasoned but whether the arbitrator's conclusions are ones that no reasonable arbitrator could have arrived at on the evidence before her. It is by this standard that the applicant's claim of latent irregularities must be evaluated. However, the arbitrator's reasoning may provide a clue to whether or not the outcome was unreasonable. In other words this means the simple question is whether the arbitrator unreasonably concluded that no instruction had been issued to Kibi. If that conclusion was unreasonable, it must be set aside.

[14] At the outset of the arbitration, Kibi's representative made it clear that his defence was that firstly no instruction had been issued to him on the 22 February 2013 and

[1] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA)

[2] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC)

that secondly there was no instruction he did not comply with. During the course of the evidence it became clear that the applicant's version was that it was not necessary to tell every machine operator each day to clean the radiator. It was part of the instructions contained in the check sheet which required the operator to confirm that the machine had been cleaned. It is also clear from the transcript that Kibi did not dispute that this was the standard procedure, and his representative confirmed during the hearing that they were not challenging the existence of the standing instructions. It is apparent that the main thrust of Kibi's defence was to deny that he had failed to clean his machine and to suggest that Wagner was trying to set him up for dismissal. In closing argument, Kibi did not advance the defence that there was no instruction to clean the radiator, but focussed on arguing that the employer had not proven he had failed to do so.

[15] Instead of focussing on this defence, the arbitrator adopted an approach which disregarded the standing instructions, which were common cause, and considered the matter from the perspective of the narrowest reading of the charge, even though this defence had not been pressed by Kibi. By so doing, the arbitrator essentially argued the case for Kibi on a different basis from the defence he had chosen himself, despite it being common cause that he was expected to clean the machine as part of his duties and despite the uncontested evidence that the importance of completing the tasks on the checklist had been impressed on the machine operators. The arbitrator nevertheless concluded that Kibi was guilty of neglect in the performance of his duties, whereas it had never been part of his defence that he had forgotten to clean the radiator. His defence was premised on a claim that he had ticked the checklist because he had complied with it, including the task of cleaning the radiator.

[16] There was also undisputed evidence that the last occasion when Kibi had been disciplined and suspended was for failing to complete the check sheet for three days in a row. That was less than a month before he was charged with the misconduct that led to his dismissal.

[17] In these circumstances, the arbitrator adopted an exceptionally narrow interpretation of whether the applicant had failed to comply with an instruction. The absence of a further oral instruction issued on or about 22 February did not logically mean that Kibi was not already under clear instructions to clean the radiator. The arbitrator correctly identified that he needed to determine if the applicant had breached a reasonable rule. The substance of the rule broken on this occasion was a standing order to clean the machine and in particular the radiator, and not only if an oral instruction was issued. Moreover, the importance of compliance with the tasks on the checklist was very well known to Kibi and it was not part of his defence that he was unaware of those requirements. Although the ambit of the charge referred to an instruction issued on the day in question, when the nature of the standing instruction was explained at the outset of the arbitration as the basis for arguing that an instruction had been issued, no objection was raised in principle that the charge could only refer to an instruction issued on the day on which it was not complied with. Neither was an objection raised that it was not competent within the scope of the charge to consider the standing instruction as the one that was disobeyed, nor was this proposition put to the applicant's witnesses in cross-examination.

[18] Consequently, I am satisfied that the arbitrator's conception of the charge and the misconduct was artificially and unreasonably narrow, which led him to misdirect himself about the nature of the misconduct at hand. No reasonable arbitrator could have held that Kibi had failed to comply with instructions about cleaning the machine. I note also, that although he says so indirectly, it is clear the arbitrator was satisfied that Kibi had not cleaned the radiator. Otherwise the arbitrator could not have found he was guilty of neglecting his duties.

[19] Because the arbitrator's finding on the charge must be set aside and reversed, the issue of an appropriate sanction arises for consideration. When considering the gravity of the misconduct, it is difficult to ignore the fact that barely a month before, Kibi had agreed to unpaid suspension, as an alternative to dismissal, for not completing the checklist to indicate his compliance with the standing instructions. His actions a month later show that he did not attach any significance to

completing the tasks of the checklist or whether he accurately recorded what he had done. It is true that Kibi had considerable service with the applicant, which militates against severe disciplinary action. On the other hand, it is difficult to see on what basis, there was a prospect that further progress of discipline would have a corrective impact on Kibi's behaviour in the light of the fact that he was already under a final written warning for failing to comply with instructions from the previous year and especially in the light of the most severe warning that he was placing his employment in jeopardy when he accepted suspension without pay only as an alternative to dismissal in respect of misconduct intimately related to the reason he was ultimately dismissed. In addition to this there was the final written warning for similar misconduct that was still valid at the time of his dismissal. In the circumstances, the sanction of dismissal was an appropriate one.

[20] It was suggested that Wagner might have had something against Kibi. There was some evidence that relations between them were not good, but it was pointed out that Wagner could have dismissed Kibi on the previous occasion when Kibi was suspended if his aim was to drive Kibi out. It appears that the difficulties they had stemmed in no small degree from Kibi's feeling that he did not need to be told how to do his job after such long service.

Order

[21] The finding of the second respondent in his arbitration award dated 11 July 2013 issued under case number ECPE 1190-13 that the third respondent was substantively unfair is reviewed and set aside.

[22] The finding of the second respondent is substituted with a finding that the third respondent was guilty of failing to comply with an instruction to clean the radiator of his mowing machine and that his dismissal was fair.

[23] No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court

Appearances

For the applicant: C Unwin of C Unwin Attorneys

For the third respondent: M L Poni of SACCAWU