Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 987/13

In the matter between:

XSTRATA SOUTH AFRICA (PTY) LTD (MOTOLO PLATINUM MINE)	**Applicant**
and	
FEDERATED MINING AND ALLIED INDUSTRIES UNION obo MMABULA MOKGOTLO	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
HAROLD NTALE MATSEBE *N.O*	**Third Respondent**

Heard: 4 December 2015

Delivered: 11 October 2016

Summary: (Review –dismissal for theft-reasonableness of findings on misconduct and relief)

JUDGMENT

LAGRANGE J

Preliminary issues

[1] Before the review application can be considered, two preliminary issues must be dealt with.

[2] The employee, the first respondent, was excessively late by more than 18 months in filing her answering affidavit. She filed a condonation application in which she sought to explain the delay. Her explanation was severely lacking in material detail about the timing of events and the main reason advanced was that the parties were engaged in settlement discussions and it was only when those did not yield any favourable outcome that she proceeded to oppose the matter. A fuller picture emerged from the applicant's answering affidavit in the condonation application. On that version, which I must accept in the absence of any replying affidavit, the Federated Mining and Allied Industries Union which had supposedly represented the employee during the arbitration proceedings, disavowed the official credentials of the person who had represented her at the arbitration proceedings. The applicant only learnt of this in early March 2014 and accordingly served the review papers on the employee at her residential address by registered post on 20 March 2014. On 28 May 2014, the employee confirmed having received the review application on 28 March. She further provided an alternative postal address for future correspondence. On 30 May 2014, the applicant's attorneys advised the employee to file her answering affidavit and to seek *pro bono* legal assistance in doing so. The applicant agreed to indulge the late filing of the answering affidavit provided it was done by 30 June 2014. However, it was only some 15 months after that deadline that her attorneys of record filed a notice of intention to oppose the application. Furthermore, according to the applicant it was a mere two days between 27 and 29 October 2015 that the parties spent trying to settle the matter, after which the employee filed her answering affidavit on 30 October.

[3] What emerges from the above is a yawning gap of at least 15 months between the time that the employee must have been fully aware of what was required of her in the event she wished to oppose the matter and the noting of her opposition. The delay in filing her answering affidavit is not

explained by the couple of days spent attempting to settle the matter. It is noteworthy in her skimpy explanation that she does not explain why she never pursued the advice to try and obtain *pro bono* legal representation, if she was unemployed as she claimed. In the circumstances, I see no reason why the matter should not be dealt with on an unopposed basis notwithstanding the poor merits of the review application.

[4] In light of the above, it is strictly not necessary to consider the preliminary point raised by the applicant relating to the alleged lack of authority of the deponent to the founding affidavit authorising him to depose to it. In any event, even if I am wrong, I am satisfied that in the absence of a challenge to the authority of the applicants attorney's to bring the review application, the challenge to the deponent to the applicant's papers must fail. See ***Unlawful Occupiers, School Site v City Of Johannesburg***.[1]

Review Application

[5] In this review application, the employee had been dismissed for theft on account of being found with five bars of soap and two toilet rolls in her bag when she left work on 6 July 2012. The arbitrator found that the employer ('Xstrata') had failed to prove a charge of theft.

[6] The essence of the arbitrator's reasoning relating to the charge of theft was as follows:

> "7.8 The case of respondent seem to be based on common rule. While common law applies to theft it cannot be applied in this instance.
>
> 7.9 In this case applicant took home soaps and toilet papers that were issued to her for her own an exclusive use. This is different from taking out soaps that replaced in the showers for use by all employees whenever they so desire.
>
> 7.10 In this instance the applicant was free to use the soaps and the toilet papers in any manner she so desired. She could have given them a way to any other employee if she so chooses."

[1] **2005 (4) SA 199 (SCA)** at 206-7, para [14].

No alternative charge was laid against the employee, but the arbitrator, perhaps unnecessarily, nevertheless commented on the employer's allegation that there was an unwritten rule against employees taking home soaps issued to them for their personal use. In that regard he held:

> "7.11 In the absence of any specific rule, policy or directive on the use, storage or removal of such items it will be difficult for any employee to reasonably know they ought not to be taken out of the mine, in more or less the same manner as overall's, boots et cetera. Common law theft will not apply to this instance.
>
> 7.12 Applicant introduced a witness who testified that employees do take soaps out as no rule or directive exist[s]."

[7] The employee had worked at the mine change house as a change house attendant since 2008. She had issued soaps and toilet paper to other employees as part of her work. Each employee at the mine is issued with a bar of Protex soap and a roll of toilet paper monthly. It was common cause that the employee had five bars of soap and two toilet rolls in her bag when she was searched by mine security officers on leaving mine premises. Her explanation for having the items was that they were issued to her for her personal use but that when it was cold she did not use the soap issued by the mine, but used her own liquid soap. She had stored the unused soaps in her locker and was not aware of any rule preventing her from taking home the soap which had been issued to her for her personal use.

[8] At the disciplinary enquiry evidence was given by a mine overseer, Mr M Papala ('Palala') that she had been summoned by the security manager when the items were discovered in the employee's bag and he claimed that she had said that the buyers of soap and toilet paper were remainders of the soap and toilet paper she had issued to other workers. He claimed that he had said to her that she was not supposed to take them, but he could not remember her response. At the disciplinary enquiry the employee testified:

> "I left the mine as usual on Friday morning. When I got to the security gate that searched me and found five Protex bar soaps and two toilet rolls and I was accused of stealing Protex soaps that I have collected like any other

> person. I tried to tell them that I have collected them on a monthly basis but [the security manager] ask me why are they so many. I told him that I collected them and put them in my locker because when it is winter I use body wash, Lux bodywash so that Friday I take them home under the impression that they are mine."

[9] At the arbitration hearing, the employee said that Palala's statement that she had told him that the soap in her bag were remainders had not been challenged because she thought she could not dispute it whilst he was giving his testimony and in any event the supervisor had testified that there were never any leftovers.

Grounds of review

[10] Xstrata attacks the award on the basis of a number of grounds. I will ignore the 'catch-all' grounds cited in the founding affidavit and below I will only deal with those where a factual basis for particular grounds of review were laid in the founding affidavit. The applicant did not supplement its grounds of review.

Arbitrator's evaluation of the evidence of misconduct

[11] Xstrata contends that the arbitrator misconstrued the evidence of Palala that there was no rule which existed prohibiting employees from taking the items home because the arbitrator assumed that in the absence of proof of a written rule, it did not exist. The arbitrator also allegedly failed to give "due consideration" to the evidence that all employees are searched on departure from the workplace and she would not have been prevented from leaving the workplace if it was a practice that employees were allowed to remove such items from the workplace. Further, it was improbable that the employee would not have been aware of such a prohibition as the change house attendant.

[12] Secondly, the employer argues that the arbitrator provided no plausible basis for preferring the employee's version over Palala's version about the explanation she gave for having the items in her possession. It cites the passages from the award quoted in paragraph [3] above as evidence of

the arbitrator's alleged "failure to properly evaluate the evidence before him and to properly take into account the applicable legal principles".

[13] In light of the above, Xstrata submitted, that the arbitrator had failed to consider relevant evidence and had considered irrelevant evidence on the question of whether or not the employee committed misconduct which amounted to a failure to apply his mind and misconduct or a gross irregularity on his part.

Alleged failure to consider the relevant factors affecting a remedy

[14] The arbitrator reinstated the employee on the following basis:

> "Applicant testified that she requests reinstatement. I am inclined to grant applicant to wish of reinstatement is no evidence exist(s) that she cannot be absorbed back into the respondent's employment."

Xstrata contends that it was apparent that the relationship had irretrievably broken down because the employee had been in a position of trust as the custodian of the items that she issued to herself and her fellow employees, which she had broken by taking items home she was not authorised to do. In failing to take account of these factors the applicant contends that he also failed to consider relevant evidence or take into account irrelevant evidence amounting to misconduct and a gross irregularity.

Evaluation

[15] It is now trite law that if an applicant claims that an award should be reviewed and set aside on account of a failure to consider evidence or for giving undue prominence to certain other evidence, that alone cannot justify the setting aside of an award. In ***Head of the Department of Education v Mofokeng and others***[2] the LAC summarised the correct approach to evaluating the significance of an arbitrator's alleged failings relating to the assessment of evidence:

> "[32] ... Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant

[2] [2015] 1 BLLR 50 (LAC) at 60-61.

considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

(emphasis added).

The arbitrator's findings on misconduct

[16] The first point that needs to be made is that the employee was charged and dismissed for theft not with a breach of an alleged unwritten rule prohibiting employees from taking home such items issued to them for their personal use at work. It is clear that the arbitrator correctly focused on the theft charge and that an important consideration for him was that the items were issued for her personal use.

[17] Secondly, other than the evidence that the employee was stopped and searched, there was no evidence about the regularity of searches or whether indeed anyone else had ever been charged with breaking the alleged unwritten rule. More importantly, it was never part of Palala's evidence, nor was it put to the employee that the security officers would not have stopped her if she had not breached the unwritten rule, and it is somewhat disingenuous of the applicant to accuse the arbitrator of failing to take account of this factor in reaching his conclusions. In fact, the only time the reason for her being stopped by the security officers came up at all in the evidence was when employee's statement at the disciplinary enquiry was read out by Palala for another purpose.

[18] However, if regard is had to that evidence for the purpose of considering the reason for her being detained at the gate after the items were found in her possession, it is noteworthy from that statement that she claimed the security manager had challenged her on why she had 'so many' bars of soap. If anything, that evidence tends to suggest that the issue for the security manager was the *number* of soap bars she had in her possession rather than the mere fact that she had company issued soap in her possession. Consequently, such evidence as there was about the reason she was stopped could just as well support an inference that if she had only one soap bar in her possession, she would have been allowed to pass.

[19] Moreover, on the evidence, there was a dispute of fact about whether or not it was a practice for employees to take home the personal items they had been issued with. While Palala testified to the existence of the unwritten rule, the employee and her own witness testified to the existence

of the practice. In the circumstances, even if I assume in the applicant's favour that it was necessary for him to decide on the existence of the supposedly rule, it cannot be said to have been irrational on the arbitrator's part to have concluded that the applicant had failed on a balance of probabilities to prove that the alleged unwritten rule did exist.

[20] On the question of the conflicting versions of what the employee's explanation was for having the items in her possession, and whether the arbitrator was not unreasonable in accepting her explanation, the issues relating to the assessment of the evidence are more complicated. The employee's version was captured in her statement made at the disciplinary enquiry quoted in paragraph 8 above. What she said to the security officer was neither corroborated nor contradicted by other evidence. The evidence of her offering a contrary explanation was Palala's evidence that she had said the soaps were remainders from the soap she had issued to workers.

[21] During the disciplinary enquiry, the employee never challenged his version under cross-examination. When asked why she did not challenge his account in the disciplinary enquiry, her explanation was that Palala 'had the platform' when he was giving his version. In other words, she felt it was his opportunity to speak and she would give her version later. *Albeit* that she was represented at the enquiry, this is not an implausible view for a layperson to hold. In support of her explanation for the number of bars of soap in her possession, the employee gave evidence that during the colder part of the year she did not use the soap bars at work to wash, but used liquid soap of her own, which was not an implausible account of why she had five in her bag, even though an equally plausible but inculpatory inference consistent with Palala's evidence of what she told him could also be drawn. If that was all the arbitrator had to consider, it is difficult to see how his conclusion could be labelled irrational.

[22] However, even if the failure of the employee to challenge Palala's account of her explanation at the disciplinary enquiry was excusable, he was still never challenged under cross-examination during the arbitration hearing that his version of her explanation at the time was inaccurate or a lie.

Rather, he was challenged on the policy relating to whether or not employees were entitled to take home and used soap they had been personally issued with. The arbitrator never dealt with the employee's failure to challenge Palala's version of the defence she had offered to him at the time. This is important because that defence entailed an implicit admission that she had decided that any excess bars of soap which had not been issued to employees were hers to appropriate for her own use. It also highlighted the fact that she was in an ideal position to do this because she was the person who issued the soap.

[23] The fact that Palala's account was not challenged ought to have forced the arbitrator to confront the inescapable difficulty of the employee having apparently given two very different and mutually exclusive explanations within a short period of time, firstly to the security manager and secondly to Palala. Moreover, if the account she gave to Palala was accepted then the inescapable secondary inference to be drawn from that is that she took items that had not been issued to her for her own personal use but were entrusted to her to issue to others, which would amount to theft, which would decisively have shifted the case in the employer's favour. I agree with the applicant that before delving into issues of credibility, an arbitrator should decide if the matter can be decided on the relative probabilities of the versions. However, where Palala's version of what the employee said was uncontradicted at either the disciplinary enquiry or the arbitration and likewise her version of what she said to the security manager was also uncontradicted it is difficult to see how the arbitrator could evaluate the central question whether she was guilty of theft without considering questions of credibility. The reason for this is that if the employee never aired her explanation for having the soap from the time it was found in her possession until her statement at the disciplinary enquiry, it necessarily follows that Palala must have fabricated his version of what she said to him. On the other hand, if the uncontradicted version of what she explained to Palala is accepted, then it casts serious doubt on her version that she gave an exculpatory explanation to the security manager and it is more likely that this version only emerged at the disciplinary enquiry for the first time.

[24] Clearly, this was a very material issue for the arbitrator to consider. The next question is whether this would, in all likelihood have led to a different outcome. In this regard, the arbitrator would have had to consider the effect of the complete failure of the employee to challenge Palala's account of what she said to him in the arbitration proceedings when obviously it was something that had to be disputed if it was not true. Whereas, Palala could not testify about what she had allegedly said to the security manager, he could testify on what she said to him and if she wished to challenge his evidence about that, she was in a position to do so. However, even at the arbitration the employee never put an alternative version to him about what she allegedly did say. It is noteworthy that even when the employee testified herself, she never gave her own account of her conversation with Palala, but merely rhetorically asked how she could have given such an explanation when there had been evidence that there never was any left-over stock of soap bars. Consequently, the arbitrator could only have analysed the evidence on the basis that Palala's version of what the employee told him was effectively undisputed. The arbitrator would then have been compelled to consider if it was credible that the employee had given an explanation which provided a better defence to the charge of theft to the security manager but then gave a more incriminating explanation to Palala. Since, the latter's version was effectively undisputed, it fell to the employee to provide a plausible explanation her changing story to avoid the inescapable inference that her innocent explanation was only offered for the first time at the disciplinary enquiry, after she had more time to consider a defence. This in turn would obviously impact adversely on her credibility.

[25] In short, by failing to deal with the mutually exclusive versions of the employee's explanation for having the bars of soap in her possession, in his assessment of the probabilities relating to the question of guilt, the arbitrator failed to deal with critical material evidence and his failure to do so meant that he avoided having to resolve a central evidentiary question in the case. Moreover, had he not failed in this regard, he would have been compelled on the undisputed evidence, that ought to have been directly challenged, to make a finding on the credibility of the employees

version of the explanation she had given when initially apprehended with the items in her back. In turn, it would have been very difficult for him to avoid the conclusion that less blameworthy explanation she provided the disciplinary enquiry was an *ex post facto* version designed to provide a better defence than she had initially advanced. In these circumstances, I am therefore satisfied that had the arbitrator not omitted to deal with the relevant evidence in assessing the probabilities, the result in all likelihood would have been different and he would have found that the employee probably was guilty of theft.

Arbitrator's determination of a remedy

[26] The applicant's view that the evidence clearly showed that it would be intolerable to reinstate the employee, is squarely premised on the assumption that its view of her guilt must be accepted as the only plausible interpretation of the evidence. If my conclusion on the arbitrator's findings on guilt is wrong, then I would also be disinclined to set aside the arbitrator's order of reinstatement because in the absence of her being guilty of the charge, there was no other evidence provided by Palala why, even if the employee was found not guilty of the charge it would be impracticable or intolerable to reinstate her.

Order

[27] The first respondent's late filing of an answering affidavit is not condoned and the matter is dealt with on an unopposed basis.

[28] The arbitration award issued by the third respondent under case number LP 6545-12 is reviewed and set aside and the arbitrator's finding in paragraph 8.1 of the award is replaced with a finding that the dismissal of the first respondent was both procedurally and substantively fair.

[29] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	P Itzkin instructed by Edward Nathan Sonnebergs Inc.
FIRST RESPONDENT:	MZ Seima instructed by Thakadu Inc.