IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO. C296/2005

In the matter between:

WESSEL JOHANNES HENRICK	
JURIE PIETERSEN	Applicant
And	
ABEL VUMILE MAJILA NO	1ST Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	2ND Respondent
ESKOM: NORTH WEST REGION: KIMBERLY	3RD Respondent

J U D G M E N T

CELE, J

Introduction

[1] The applicant seeks to have the arbitration award dated 24 February 2005 issued by the first respondent as a commissioner of the second respondent, reviewed and set aside, only to the extent of its relief. The first respondent ordered the third respondent to re-employ the applicant, who now seeks an order of reinstatement. The applicant unsuccessfully applied for the rescission of the relief component of the award. He also seeks to have the rescission ruling reviewed and set aside. The application has not been opposed by the third respondent in its capacity as

the erstwhile employer of the applicant.

The background facts

[2] The applicant was employed by the third respondent for a period of about 29 years up to the date of his dismissal. He was employed as a project co-ordinator of the third respondent ("Eskom"). He was based at Kimberley. He was actually a project co-ordinator of the stencilling project that entailed the marking of the support poles of 22 000 kilometres of overhead electrical cables. At the time of his dismissal, he was earning an amount of about R14 835, 00 per month.

[3] The stencilling was done by consultants, who employed their own field staff. The consultants had to verify the work and they were employed to oversee the process. They would then submit invoices to the applicant for payment. There was an issue about whether or not the applicant was office bound or could go out and inspect the actual work that was done in the field. On 3 December, the applicant was served with a notice of a disciplinary hearing and Eskom had preferred three charges against him, these were charges of misconduct. They were described as:

> *"**Misconduct 30** 'Makes a false statement or representation, which relates to or ensues from his duties'*
> *In that-*
> *You certified invoices for payment to the contractor for*

work done, despite the fact that the re-stencilling of the feeders was not completed. (invoices-BNB-Pole-003-Rooipad-Feeder and BNB Pole 004-Sonvlei and Augrabies Feeder).

(Charge 1)

Misconduct 29 *'Commits an act which is detriment to Eskom'*

In that-

You authorised the following invoices with incorrect quantities (invoices BNB-Pole-001 and 002 and 003)

You authorised invoices for incomplete work (BNB-Pole-001 to 004)

(Charge 2)

Misconduct 28 *'Negligent in performing his duties'*

In that you neglected to inform Eskom of the following:

a) Your son was doing work for the contractor and received payment for work done as well as the fact that the work done by your son relates to Eskom business. You certified invoices of the contractor relating to work done by your son.

(Charge 3)"sic

[4] He was subjected to a disciplinary hearing. He pleaded not guilty. However, his plea notwithstanding, he was found guilty and he was discharged. Perhaps I should be more specific about the charges. In terms of the first misconduct, he was dismissed. In terms of the third misconduct relating to his son, it was one day suspension. It would appear that for the first and the second charges it was dismissal, but for the third one involving his son, it was a suspension for one day. His appeal was not successful. The matter was then

referred to conciliation and thereafter to arbitration by the second respondent and the first respondent was appointed to arbitrate it. Various witnesses were called at the arbitration hearing and at the end of it, the first respondent had the following to say:

> "I believe the contention of the Employee that he was acting as a conduit, is unconvincing in this regard. In fact, the testimony of witnesses indicated quite clearly that the person whom they spoke to for the project was the Employee. If the Employee was a go between, why did he not disclose it to the witnesses? I am therefore convinced on a balance of probabilities that the Employee acted in his own right when he employed the witnesses. The Employee I believe had the power to appoint Sub-Contractors. Whether the Employee was advancing self-interest in my opinion is not quite clear from the evidence. In other words not sufficient evidence was placed before me to enable me to draw that inference. I therefore will prefer not to make a finding on this aspect. I believe that the rest of the questions I have posed hereinbefore, have already been answered and as such I do not see the need to repeat myself.
>
> **FINDING**
>
> I am of the opinion that the Employer could not conclusively prove that the Employee was dishonest. I believe the Employee was negligent instead of being dishonest. In the circumstances I believe that the 'dismissal' as a sanction *in casu* is inappropriate. The Employee should rather have received a final written warning, if one has regard to his seniority with the Employer. I therefore find that the Employee's dismissal

was unfair.

COSTS

I make no order as to costs.

AWARD

In the circumstances I find that:

(a) The dismissal of the Employee is unfair.

(b) The Employee must be re-employed on or before the close of business on 28 February, 2005."

[5] The applicant has initiated the present proceedings limited basically to the review of the relief component of the award as I have indicated. The basis of that being that the applicant was basically entitled to a reinstatement as opposed to re-employment, in that the first respondent reached a decision which a reasonable decision maker could not have reached in the circumstances.

Grounds for review

[6] In relation to the review grounds, among others, the following submissions are made by the applicant:

- that the first respondent failed to apply his mind properly, or at all, to the evidence, documentary and otherwise, placed before him.
- that he interpreted the evidence before him in a manner which is so manifestly unjustifiable that it warrants intervention of this Court.
- that he misconstrued fundamental and well known legal principals to the extent that it can be said that the applicant did not have the benefit of a fair hearing.

- that he committed misconduct and gross irregularities in relation to his duties as a commissioner of the second respondent as envisaged by section 145 of the Labour Relations Act. There are further submissions that were made.

[7] In respect of the rescission ruling, the applicant makes out a case that the order that ought to have been issued was one of reinstatement as opposed to re-employment. The submission I have heard today also, coming from Mr Botha for the applicant, is that in terms of section 193, and when one looks at the evidential material led before the first respondent, there really was no basis for re-employment as opposed to reinstatement.

[8] In respect of the rescission ruling, perhaps I need briefly to refer to what the first respondent said. Once there was an application for condonation, he addressed that, but that is not an issue before me. He looked at section 144 of the Labour Relations Act 66 of 1995 ("the Act") and thereafter he says the following:

> "One must bear in mind that the employee seems to believe that I mistakenly ignored his request for reinstatement. This belief is a mystery to me, as I clearly am not bound by the request of the employees, but is rather guided by what is appropriate, under the circumstances, after a thorough consideration of the conspectus of facts placed in front of me. In fact *in casu* I did not at all erroneously, award re-employment, as the

> employee believes, but based on the facts decided that dismissal, was an inappropriate sanction, but the employee should have been given a lesser sanction than dismissal. In addition I am of the view that the employee's misconduct could not be left unpunished, and as such I believe though the employee does not deserve dismissal, but that reinstatement is not an appropriate award, instead that re-employment is the best in the circumstances, especially in the light of the nature of the misconduct the employee has committed."

Evaluation

[9] He therefore declined to change the award. I may point out that in terms of the papers before me, the applicant was re-employed, but he has since resigned from that employment and has found work elsewhere.

[10] Mr Botha has referred me to a number of decisions that are relevant when it comes to the consideration of whether or not an employee ought to be reinstated as opposed to re-employment. One such is *Boxer Superstores (Pty) Ltd v Zuma & Others 2008 ZALAC 7 (9 May 2008)* reported on the www.saflii.org.za work page. It is a judgment by Davis, JA, where he says the following:

> "Mr Smithers correctly referred to the architecture of the Labour Relations Act 66 of 1995 ("the Act") and particularly to section 193(2) thereof. In a case as in the present dispute, where it is found that an employer has not discharged the onus of proving that a dismissal was fair, the competent remedy is that of reinstatement.

> Reinstatement is in fact the default position. Section 193(2) sets out alternative remedies that the Labour Court, or an arbitrator, may utilise other than reinstatement. These include re-employment or compensation."

[11] He has referred me to further cases such as *Sentraal-Wes Koöperatief Beperk v Food & Allied Workers Union & Others (1990) 11 ILJ 977 (LAC)* at 994E, where the following appears:

> "....***prima facie*** if an unfair labour dismissal occurs, the inference is that fairness demands reinstatement and it is for the employer to raise the factors which displays such inference."

[12] In the decision of *Fedlife Assurance Ltd v Wolfaardt2002 (1) SA 49 (SCA) at [12], Froneman,* AJ said the following:

> "Generally speaking, however, employees have gained much that they did not previously have. Their primary remedy now is reinstatement which must be ordered, unless specified conditions exist."

[13] I have already referred to the award. It is clear, when one reads it, that the first respondent did not give reasons why he opted for re-employment as opposed to reinstatement. Such reasons can only be determined when one looks subsequently to what the first respondent says when he is confronted with an applicantion to rescind the order he made in terms of the

relief. Indeed section 193 is clear, the default relief is that of reinstatement. Re-employment has a disadvantage to an employee, because such an employee as is the applicant, would stand to lose years of service and a lot of further benefits that accrue with it, because it means a person who has a long service such as the applicant with 29 years of contributing to the pension fund, would lose the same, but the first respondent was always conscious of the fact that the applicant had these 29 years of service. This is clear, because he did include this in his award, he was alert to the fact that the applicant had 29 years of service.

[14] It is so that section 138 of the Act, permits a commissioner to give brief reasons, but what is important is that a commissioner must sort of give some reasons instead of issuing an order that is not very clear. In this instance, he issued an award, but did not clarify the reasons why he did not reinstate. I would not consider that what the first respondent said in the rescission ruling is necessarily an afterthought, it is difficult to make out what was in the mind of the first respondent at the time of the issuing of the award, but one can safely say that he, when issuing the rescission ruling, was saying out those thoughts that were in his mind when he issued the award itself. I have already indicated that he was alive to the fact that the applicant had 29 years of experience. In my view he would have reflected on this and he though re-employment was the appropriate thing to order.

[15] As already indicated, this is a case where actually the applicant was proved to have committed the acts of misconduct with which he had been charged. In my view, and I have expressed this view to Mr Botha, there are irrelevant considerations that the first respondent allowed himself to be influenced by when he issued the award. If he had not done that, he would easily have pronounced that the applicant is guilty as charged in respect, particularly, of the first and second charges and not to look at these other considerations such as dishonesty or personal gain, because that was not the charge he was facing.

[16] If those considerations were used in order to address the questions of mitigating circumstances, then one would have seen him counting more, such as for instance specifically the experience, that he had a clean record and all of those things. There are a lot of things that he could have said to add on, and against them he could have also pronounced on the nature of the misconduct that the applicant had been found guilty of. So it comes alone and one cannot just say that these considerations were there only to address the sanction. I think he took them as part and parcel of the considerations that reflect on the substantive inquiry whether or not the dismissal was for a fair reason.

[17] In my view, the applicant was indeed guilty of the three charges, particularly the first and the second, as they were framed by the employer. In my view, therefore, I conclude

that the decision reached by the first respondent cannot be described as one that a reasonable decision maker could not have reached. A reasonable decision maker, looking at the totality of the evidence, could have concluded that the employee had committed misconducts, he needed to be punished for them, but that notwithstanding that, he was entitled to re-employment and that being the case, therefore, the application for the review of this award fails.

[18] I therefore make the following order:

1. The application to review the ruling, issued by the first respondent, is dismissed.
2. No costs order is made.

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CELE J

DATE OF HEARING : 10 March 2009
DATE OF JUDGMENT : 10 March 2009

APPEARANCES

FOR APPLICANT : Adv CH BOTHA
Instructed by : A VAN TONDER ATTORNEYS