Not reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 504 / 07

In the matter between:

KELEPILE ISRAEL MARUPING	**Applicant**
and	
NBCCI	**First respondent**
WMA RELEFETA N.O.	**Second respondent**
BP SOUTH AFRICA (PTY) LTD	**Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an application to review and set aside an arbitration award of the arbitrator, Commissioner WMA Ralefeta (the second respondent). The first respondent is the National bargaining Council for the Chemical Industry (NBCCI). The third respondent is the applicant's former employer, BP South Africa (Pty) Ltd.

[2] BP dismissed the applicant on 24 November 2006. The reason for the dismissal was that:

2.1 he had sold company product (i.e. petrol) illegally;

2.2 he had offered diesel to a customer's employee; and

2.3 he failed to account for 473 litres of unleaded petrol which was left on board a tanker truck by his colleague previous day.

[3] The arbitrator found on a balance of probabilities that the dismissal was procedurally and substantively fair. The award was delivered on 23 August 2007.

[4] The applicant seeks to review the award on the grounds:

4.1 He was not allowed legal representation at arbitration.

4.2 The arbitrator refused to postpone the hearing.

4.3 The arbitrator failed to consider the evidence before him properly and thus committed a reviewable irregularity.

[5] The Bargaining Council did not keep a proper record and the parties had to reconstruct the arbitration record with the assistance of the Commissioner, who had regard to his handwritten notes. The applicant also submits, as an overarching review ground, that the arbitration should be remitted because of the absence of a proper record.

BACKGROUND

[6] The applicant was employed as a driver of a fuel tanker. BP sells fuel, i.e. petrol and diesel. One of the applicant's main duties was to deliver fuel to BP customers. One of those customers is Natro in Rustenburg. The applicant was dismissed for gross misconduct, in that he unlawfully sold company product to employees of Natro on 28 October 2006. It was alleged that he sold 25 litres of unleaded petrol (ULP 93) to one employee, Sylvester Mosala; and that the offered 25 litres of diesel to another employee, Elias Phiri. It was further alleged that he failed to account for 473 litres of ULP 93 that was left on board the truck by the previous driver.

THE RECORD

[7] At the arbitration, the two employees of Natro, messrs Mosala and Phiri, gave evidence implicating the applicant. BP also called Mr J Monare, the depot manager, to explain the documentation relating to deliveries and excess fuel. The applicant testified on his own behalf. Only Monare's evidence was properly recorded and transcribed.

[8] However, the arbitrator's handwritten notes are available. His notes tie up with his summary of the evidence in his award. The award is fairly detailed, comprising eight typewritten pages in single spacing in what appears to be an eight-point font. The award summarises the evidence of each witness in turn, including the cross-examination of each witness. The parties' attorneys also had a reconstruction meeting together with the arbitrator in an attempt to reconstruct the record. The minutes of that meeting, comprising 10 pages, was also made available to the court. At the arbitration, BP also relied on documents in the form of trip sheet reports. Those reports also form part of the record before me.

[9] I am satisfied that the record is sufficient for the purpose of this review. I am able to determine on the reconstructed record whether the decision of the Commissioner was reasonable. The enquiry before the arbitrator was a fact based one, as described in *Sidumo & another v Rustenburg Platinum Mines Limited & others:*[1]

> "The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of section 138 of the LRA, the commissioner should do so fairly and quickly. First, he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based. This involves an enquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct."

[1] [2007] 12 BLLR 1097 (CC)

SUBSTANTIVE FAIRNESS

Illegal disposition of fuel

[10] At the arbitration, the arbitrator's notes reflect that an employee of Natro, one Sylvester Motala (also known as Tau), testified that the applicant sold him 20 litres of petrol for R50 on 28 October 2008. The record of the internal disciplinary hearing also served before the arbitrator and was placed before me. Mosala's evidence at the disciplinary hearing was consistent with his evidence at arbitration.

[11] The other Natro employee, Elias Phiri, also testified in the disciplinary hearing and at the arbitration. His evidence is consistent that, on 28 October 2006, the applicant gave him a plastic container filled with 25 of diesel. He did not pay for it.

[12] It is so that the applicant denied these allegations. However, the evidence of the two employees was consistent and was not dented under cross-examination. The arbitrator found on a balance of probabilities that the applicant had committed misconduct by offering fuel to these two employees. That conclusion is not unreasonable and is not open to review.

[13] The arbitrator made a small error when he said that the applicant sold fuel to both witnesses. In fact, what the evidence shows, is that the applicant sold fuel to one employee and gave it to the other for free. This error is inconsequential. The fundamental point is that the applicant was unlawfully disposing of his employer's property. That constitutes dismissible misconduct. It does not make the arbitration award reviewable.

Failure to account for 473 litres of petrol

[14] The depot manager, Monare, explained the issue of the unaccounted petrol at the hand of documentary evidence at the arbitration. Mr *Dell*, who appeared for the applicant, complains that this constitutes hearsay evidence. However, the applicant never objected or queried the veracity of

the trip sheets at the arbitration. In fact, he admitted that he did not check the compartments to see if the previous driver had left excess fuel in it. He also conceded that it was his responsibility to do so. I am not persuaded that the arbitrator committed a gross irregularity by having regard to the documentary evidence. As the Labour Appeal Court pointed out in *Edcon Ltd v Pillemer NO & others:*[2]

> "Arbitration proceedings are intended to be resolved quickly and informally. The Commissioner's admission of hearsay evidence, especially in circumstances where the admitted evidence is not disputed, does not constitute a reviewable irregularity."

[15] The trip sheet reflects that the truck contained 473 litres of excess petrol when it was assigned to the applicant on 28 October 2006. The applicant admits that he did not check the fuel remaining in the truck, but claimed at arbitration that he did not do so because he did not have a safety harness. In his award, the arbitrator concluded that this excuse was unacceptable. Firstly, the applicant used this mistake to use the fuel for his own gain. Secondly, he was well aware of the company rule and it did not justify his departure from the company rule. Thirdly, he made no effort on the day to find a safety harness.

[16] These findings are not unreasonable. The arbitrator's conclusions are rationally connected to the evidence before him. It is not so unreasonable that no reasonable arbitrator could have come to the same conclusion.

PROCEDURAL FAIRNESS.

Legal representation

[17] The applicant submits that there is a dispute between the parties as to whether or not the applicant had applied for legal representation at the arbitration hearing. The Commissioner did not deal with the issue of legal representation in the award itself.

---

[2] [2008] 5 BLLR 391 (LAC)

[18] However, in the reconstructed record the Commissioner recorded that the applicant was comfortable to proceed with the matter without legal representation. This was confirmed by both the arbitrator and by BP's representative at the reconstruction meeting. It is common cause that the applicant's erstwhile attorney, Mr Cloete, was not present at the arbitration.

[19] In any event, it is only in exceptional cases that legal representation would be allowed at a misconduct arbitration. In terms of CCMA rule 25(1)(c), if the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties are not entitled to be represented by a legal practitioner in the proceedings unless –

the commissioner and all the other parties consent; or

the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.

[20] This was not a case that warranted legal representation at arbitration in any event. Although it is by no means clear that the applicant requested legal representation, even if he had done so, and in the absence of agreement, it would not have been unreasonable for the arbitrator to decline it.

[21] By the same token, there is nothing on the record or in the award to show that the applicant asked for a postponement in order to obtain legal representation. Such a postponement would in any event have been futile in circumstances where the applicant was not entitled to legal representation. This ground of review must also fail.

COSTS

[22] I have come to the conclusion that the arbitrator's award is reasonable and is not open to review. However, I do not deem it appropriate in law or fairness to saddle the applicant with a costs order. This matter has taken four years to reach finality, due to a large extent to the incomplete record and attempts to reconstruct it. During this period the applicant has had to incur significant costs for his own legal representation. In my view, this is a matter in which each party should pay its own costs.

ORDER

[23] The application is dismissed. There is no order as to costs.

_____

STEENKAMP J

Date of hearing:	2 December 2010
Date of judgment:	10 December 2010
For the applicants:	CM Dell
	(Heads of argument drafted by S Grobler)
Instructed by	Horn & Van Rensburg, Boemfontein
For the respondent:	FA Boda
Instructed by	Eversheds, Sandton