IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case No: C948/08
Not Reportable

In the matter between:

FOOD AND ALLIED WORKERS UNION on behalf of VOKWANA	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
J M JACOBS *N.O.*	Second Respondent
CAPE OIL AND MARGARINE (PTY) LTD	Third Respondent

Date of hearing : 20 April 2011

Date of judgment : May 2011

JUDGMENT

VAN VOORE AJ:

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (the LRA) to review and set aside an arbitration award of the second respondent (the commissioner) dated 22 October 2008, substituting that award with a finding that the dismissal of Mr Vokwana (Vokwana) was substantively unfair and

reinstating Vokwana into the employ of the third respondent (the company). Alternatively, the applicant seeks an order that the dispute be remitted back to the first respondent (the CCMA) for arbitration before an arbitrator other than the commissioner.

[2] Vokwana was employed by the company as a laboratory analyst. The company is a fast moving consumable goods company and its range of products includes margarine. One of Vokwana's duties was to conduct a solid fat content (SFC) test during each shift on which he worked. The purposes of the test include ensuring that any difficulties or problems in relation to the products are timeously detected so that the company is then in a position to take steps in an attempt to resolve the problem. The allegations of misconduct against Vokwana were:

> "Failure in routine analysis (Solid Fact Content) (SFC) of final product) Sunshine D Lite tub (1kg) on 08/08/2008
> The above led to non-conformance of the product resulting in a product recall, as the product was not spreadable as per product specification (product hard due to contamination)".

[3] Vokwana was dismissed following a disciplinary hearing. Vokwana referred an alleged unfair dismissal dispute to the CCMA. The commissioner determined that Vokwana's dismissal was procedurally and substantively fair. It is that award of the commissioner which Vokwana seeks to have reviewed and set aside.

[4] During the day shift on 8 August 2008 Vokwana was required to conduct an SFC test (the test). The test was not done. Some of the product (Sunshine D margarine) produced on that day did not conform to the company's usual requirements in that the margarine was hard and would not spread easily. As a consequence numerous customers who had purchased margarine registered complaints with the company. The company decided to recall the affected product and suffered financial harm. These facts are undisputed.

[5] Vokwana conceded that he did not conduct the test. Vokwana offered various explanations for not conducting the test. These explanations were the following.

5.1 He did not have time to do the test. He was unable to conduct the test at the time as there was a 'moisture problem' and that he was attending to that problem.

5.2 The employees work as a team and the "practice" is that when one of them is not able to conduct the test then another would do so.

5.3 He expected his colleague, Clement Ntita (Ntita), employed by the company as a technician, to complete the test as was the "practice". Ntita should have done the test.

5.4 He could not do the test as a previous sample had burnt and he did not have permission to go into the cold storage area to obtain a further sample.

The arbitration award

[6] The commissioner made a number of factual findings including the following:

6.1 It was Vokwana's responsibility to carry out the test on 8 August 2008 and that he did not do it.

6.2 Vokwana was negligent as he did not conduct the test

6.3 Vokwana did not inform Mavis Vanyaza (Vanyaza) or Miriam Israel (Israel) that the test had not been done.

6.4 Vokwana knew what was expected of him and did not fulfil his duties.

6.5 Vokwana "failed to own up to what had happened."

6.6 The company suffered financial loss.

[7] The commissioner also found that Vokwana was not "totally honest and failed to own up to what had happened."

[8] The commissioner's award records the following:

> "51 the applicant clearly didn't act as a diligent and responsible employee under the circumstances. This caused the Respondent great financial loss as the whole batch of margarine had to be recalled. Numerous customer complaints had been received and the respondent's image and credibility in the industry was negatively affected.
>
> 52 I thus find that the applicant was negligent in the performance of his duties and that this negligent led to damage of the respondent's property or products leading to a financial loss for the employer.

> 53 Considering whether the applicant was grossly negligent in the performance of his duties I find that the applicant carried an enormous responsibility to do his work diligently and with the utmost care.
>
> 54 In cross-examination Israel testified that the Applicant made a bad judgment call in not doing the SFC test and it was a big oversight.
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> 55 Such an oversight cannot be accepted, especially in the case of the applicant where he had worked for the respondent for 28 years. The applicant clearly knew what was expected of him but didn't do it.
>
> 56 I also considered that the applicant failed to own up to what had happened. He wanted to involve other persons in the matter while he didn't act responsible.
>
> 57 I thus find that under the circumstances the respondent was able to prove that the applicant acted grossly negligently and that the sanction for gross negligence was dismissal."

The review grounds

[9] The applicant's review grounds are the following:

9.1 The commissioner's finding that the dismissal was fair is not rational or justifiable in relation to the reasons given / or the material properly before her and another reasonable person may come to a different finding.

9.2 The commissioner's finding that the applicant had made the continued employment relationship intolerable is, with respect, baseless as the company produced no evidence to demonstrate that Vokwana's repeated commission of gross negligence nor was any evidence adduced to suggest that it was more than likely that the applicant may commit the offence again.

9.3 The commissioner's undue reliance on the evidence of enormous financial harm caused to the company by Vokwana, when such evidence was not substantiated in any serious way by the company.

[10] In oral argument the applicant's representative also submitted that the commissioner consulted a gross irregularity by, *inter alia*, not expressing an opinion or 'material issues' alleged to be relevant to the dispute. This criticism is misguided and I will return to it later. Further, in oral argument, the applicant's legal representative submitted that the ground of review is that the award is one that no reasonable commissioner could make having regard to the evidentiary material before the commissioner.

[11] Whilst accepting that it was his responsibility to conduct the test, Vokwana, and in the same breadth, testified that 'there were other things which [he] was doing.' In effect Vokwana claimed that he did not have time to do the test and that he expected Ntita to conduct the test. However there was no evidence that Vokwana asked Ntita, or indeed another employee to conduct or to complete the test. Vokwana further testified that he did not have access to the cold storage section. This was offered in light of the fact that Vokwana did indeed place a sample in the oven, that the sample had burnt and that he needed another sample to "re-do" the test. The evidence of Israel was that Vokwana simply had to redo the test. Vokwana's version that he did not have access to the cold storage area was not put to the company's witnesses when they gave their evidence. I should add that Ms P Addison (Addison),

the company's representative, when cross-examining Vokwana, disputed Vokwana's version that he did not have access to the cold storage area. Addison was also a witness at the arbitration proceedings.

[12] The undisputed evidence was that production stopped at 13h45 and that Vokwana had until approximately 17h45 to conduct the test. It was common cause that the tests are carried out whilst the margarine lines are running and that it takes between an hour and an hour-and-a-half to carry out the test. Vokwana had from 08h06 to conduct the test. This was the undisputed evidence of Vanyaza.

[13] Israel, on behalf of the company, testified that if a sample had burnt in an earlier attempt to do the test then Vokwana had to redo the test. Vokwana had in fact attempted to carry out the test and that the sample had burnt. It is not disputed that Vokwana did not ask Ntita or any other colleague to assist in this attempt to conduct the test. It is also not disputed that no evidence was led that Ntita or any other of Vokwana's colleagues were aware that he had placed a sample in the oven. In the circumstances, even if Vokwana seeks to rely on an alleged 'practice' that colleagues would assist, there was no evidence that his colleagues were aware of his attempt to conduct a test or that he had called for their assistance on the day in question.

[14] The record of the arbitration proceedings does reveal that Vokwana did not take responsibility for the failure to carry out the test. Vokwana did indeed offer a number of explanations for the fact that the test was not carried out. The

commissioner's assessment and conclusion that Vokwana was not "totally honest and failed to own up to what had happened" is not one that is without foundation. In the face of the various explanations or defences offered by Vokwana, in particular his unsubstantiated claim that Ntita should have done the test and the he 'alone' was not responsible, the commissioner's assessment falls within a range of reasonable assessments. It is the commissioner who presided over the arbitration proceedings and observed Vokwana during the process of him giving evidence.

[15] It was also contended that Vokwana's conduct did not amount to gross negligence and that the commissioner did not have a basis for his finding of gross negligence. The undisputed facts before the commissioner were that that an SFC test must be done on each shift, that Vokwana was employed as a laboratory and was required to do the test, that Vokwana did not do the test, that Vokwana did not ask one of his colleagues to do the test, that the Vokwana and the company's other employees appreciated the importance of the test, that Vokwana did not inform Vanyaza or Israel that the test was not done, that the product did not conform to the ordinary specifications, that customers complained and that the company recalled affected product and suffered financial loss. Those facts are a sufficient basis for the finding of gross negligence.

[16] The fact that the company did indeed suffer financial harm was undisputed. In argument, Vokwana's legal representative conceded that the company did indeed

suffer financial harm. In the circumstances, the allegation as to the commissioner's undue reliance on unsubstantiated financial harm is not sustainable.

[17] In argument Vokwana's legal representative submitted that Vokwana had in fact showed remorse. This does not find support in the record of the arbitration proceedings. Whilst it is so that Vokwana accepted that the test was not done and that it ought to be have been done, Vokwana refused to accept personal responsibility and in fact offered a range of explanations including that he and his colleagues work as a team and that, therefore, he is not responsible alone or individually, that a colleague ought to have carried out the test, that he could not carry out the test because he was attending to a "moisture problem", that he did not have sufficient time to carry out the test and that he could not "redo" the test because he did not have access to the cold storage section of the plant. This is not consistent with an employee showing remorse. In the circumstances, the commissioner's assessment and finding on this question is not only supported by the material properly before him but is well supported.

[18] What remains is whether or not dismissal was the appropriate sanction or put differently, whether Vokwana's continued employment was 'intolerable'. On this score the commissioner's arbitration award records, *inter alia*, the following:

> "53. Considering whether the applicant was grossly negligent in the performance of his duties I find that the applicant carried an enormous responsibility to do his work diligently and with the utmost care.

54. In cross-examination Israel testified that the applicant made a bad judgement call in not doing the SFC test and it was a big oversight.
55. Such an oversight cannot be accepted, especially in the case of the applicant where he had worked for the respondent for 28 years. The applicant clearly knew what was expected of him but didn't do it.
56. I have also considered that the applicant failed to own up to what happened. He wanted to involve others in the matter while didn't act responsible.
57. I thus find under the circumstances the respondent was able to prove that the applicant acted grossly negligently and that the sanction for gross negligence was dismissal.
58. In terms of the case of *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) a commissioner is required to determine whether or not the employer's decision to dismiss the employee was fair. The commissioner must assess the fairness of the dismissal objectively taking into account the totality of the circumstances. The Court also set out the facts and circumstances that may be relevant to the question whether dismissal was an appropriate sanction.
59. Taking the totality of the circumstances into account I find that the employer's decision to dismiss the employee was fair.

...

62. The conduct of the applicant was so serious that it made the continued employment relationship intolerable."

[19] The commissioner had before him evidence that Vokwana, employed as a laboratory analyst, did not conduct the test. The test was an important part of his job. Vokwana repeatedly refused to accept personal responsibility and in doing so went as far as saying that Ntita should have done the test. The consequences of the failure to do the test were serious. Customers complained and the company had to recall the

affected product. The company suffered financial harm. Vokwana, an experienced man, knew what was required of him and failed to do it. Faced with these facts and circumstances, the commissioner's conclusion that Vokwana's conduct was so serious that it made the continued employment relationship intolerable is hardly surprising. The commissioner had regard to the ordinary and well known principles of our law on dismissal as an appropriate sanction including length of service, the employee's personal circumstances, the nature of the job, the seriousness of the misconduct and the consequences of the misconduct and the fact that the company considered whether Vowana could be employed elsewhere in the business.

[20] It is not the applicant's case that the commissioner acted in bad faith or capriciously. The fact that another commissioner might come to a different conclusion on sanction is not the test. In respect of sanction it is, amongst other factors, required that the commissioner's decision be a reasonable one or that it falls within a band of reasonable decisions. On the material properly before the commissioner, the applicant has not made out a case that the commissioner's decision was one which no reasonable decision maker would arrive at. In argument in this Court the commissioner's award was criticised for not spelling out in chapter and verse, or differently put, detailing every twist and turn of the commissioner's thinking so as to establish that the commissioner had 'investigated every alley' and had discounted irrelevant factors and had taken into account only relevant factors. That is not the test for review of arbitration awards. The commissioner heard the evidence of various witnesses and considered such documentary evidence as was presented by the

parties at the arbitration proceedings. The material facts were largely undisputed and many of those facts were common cause. The commissioner's award in respect of her findings is a reasoned one. The commissioner, having regard to the facts, concluded that Vokwana's conduct was grossly negligent, that Vokwana had a fair hearing and that dismissal was the appropriate sanction. The commissioner has, on the basis of the material properly before her, given a reasoned arbitration award.

[21] The award falls to be reviewed and set aside if the commissioner's decision is one which no other reasonable commissioner could make. An instructive assessment of what section 145 of the LRA requires is to be found in the judgment of Van Niekerk J in *Pam Golding Properties (Pty) Ltd v Erasmus and Others*.[1] In that matter Van Niekerk J held that:

> "18. In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness. The Court is also empowered to scrutinise the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that the result is nonetheless capable of justification."

[1] (2010) 31 ILJ 1460 (LC)

[22] The commissioner's assessment of the evidence and conclusions of fact and approach to sanction are supported by the evidence at the arbitration proceedings. It cannot properly be said that the arbitration award is tainted by misconduct or a gross irregularity as contemplated in s145 of the LRA. The arbitration award does indeed fall within a band of reasonableness.

[23] Under our law it is not permissible for the Labour Court, on review, to interfere in a matter such as the present.

[24] In the circumstances I make the following order:

1. The review application is dismissed with costs.

VAN VOORE AJ

Appearances:

For the applicants : T Ralehoko of Cheadle Thompson and Haysom

For the respondent : B MacGregor of Macgregor Erasmus Attorneys