

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 8/21

In the matter between:

AIR LIQUIDE (PTY) LTD

Appellant

and

NKGOENG N N.O (ARBITRATOR)

First Respondent

THE NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY

Second respondent

MDLULI JAN BRITS

Third Respondent

Heard: 03 March 2022

Delivered: 22 March 2022

Coram: Coppin JA, Tokota et Phatudi AJJA

JUDGMENT

TOKOTA AJA

Introduction

[1] The appellant is a company that supplies cylinder gasses and its principal place of business is situated at Alberton. However, it has, as one of its branches, a gas depot at eMalahleni situated at Eskom Kusile power station (“the depot”). The third respondent was one of its employees stationed there. He was dismissed on 28 June 2016. He referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). After the conciliation failed, the matter was referred to arbitration. The first respondent, the arbitrator, found that the dismissal was substantively unfair and ordered the reinstatement of the third respondent. The appellant approached the Labour Court seeking an order reviewing and setting aside the award. The Labour Court (per Raphulu AJ) dismissed the application. It granted leave to appeal to this Court.

Factual background

[2] The third respondent, Mr Jan Brits Mdluli,(Mdluli) was employed by the appellant on 1 February 2014 as a general worker. There were two employees stationed at the depot, Mdluli and Mr Robert Mashia (Mashia), who worked under the supervision of Mr Mohamed Kazim (Kazim), the branch manager.Kazim was not staying on the site. These two employees had to be on site sothat they could help one another to load heavy gas containers onto customers' vehicles.

[3] On 7 June 2016, Kazim visited the depot site after 11am. On his arrival, he found Mashia, butMdluli was not present. He enquired from Mashia as to the whereabouts of Mdluli. Mashia reported that he did not see Mdluli at work that morning. Kazim sent an sms to Mdluli enquiring about his whereabouts. Mdluli responded and stated that he was at boiler 4. Kazim was scheduled to see a few customers. Mashia accompanied him but they went via boiler 4 to look for Mdluli. They could not find him there.

[4] Kazim proceeded to see his customer at NA Engineering where Mashia dropped him. He spent some time with the customer and when he had finished, he calledMashia to come and fetch him. They went back to the depot. On their way to the depot, he called Mdluli and requested him to come and see him (Kazim) at the depot. Mdluli responded and said he could not hear him properly and Kazim asked him to call him back. He instructed Mdluli to come and see him. It was about after 12midday.

[5] Kazim testified that the yard is fairly small and that if Mdluli was at work there was no way he could not be seen by them. He did not see Mdluli on the day in question until he left at half-past two.Kazim testified that there was nothing to be loaded at boiler 4 and asked Mdluli what he was doing there. The evidence of Kazim was corroborated in material respects by that of Mashia.

[6] Mdluli confirmed that he received a message from Kazim and responded to it. However, he was adamant that on the day in question he reported for duty. He testified that at 12:06 he entered the kitchen. At 12:08, he received a message from

Kazim and replied at 12:16. Kazim wanted to know what he was doing at boiler 4 and he informed him that he was packing cylinders. At 12:25, Kazim called him saying he was supposed to be with Mashia. He confirmed that he heard Kazim saying he wanted to see him after lunch since he was not seeing him at work and wanted to know what he had been doing at boiler 4. According to Mdluli, when he went to the office he could not find Kazim as he had already left.

[7] On 12 June 2016, Mdluli was served with a notice to attend a disciplinary hearing. He was charged with two counts of misconduct, namely, (a) gross dishonesty in that he lied about his presence at work when in fact he was not present; (b) gross insubordination in that he failed to obey a reasonable instruction to meet with his manager when instructed to do so on 7 June 2016. He was found guilty of gross dishonesty and of insubordination. He was dismissed on 28 June 2016.

[8] The dispute of unfair dismissal was referred to CCMA. The arbitrator held that the dismissal was substantively unfair and overturned the dismissal. He replaced it with reinstatement with retrospective effect from the date of dismissal and ordered payment of arrear salary.

[9] The appellant brought an application in the Labour Court seeking an order reviewing and setting aside the award of the arbitrator. The application for review was dismissed, but leave to appeal was subsequently granted, hence this appeal.

Evaluation of evidence

[10] The arbitrator found that the witnesses for the appellant were not credible witnesses. But, he found that Mdluli's evidence was credible and reliable. Mdluli was adamant throughout that he was present at work on the 7th of June 2016. He produced a printout from the canteen as evidence that he had clocked at the canteen at lunch time. Further, he stated that he signed the attendance register on the following day as it was kept in the car of Mashia on 7 June 2016.

[11] According to Mdluli, on 13 June 2016, Kazim called him saying he wanted to see him in his office at his branch in Witbank. He could not make it on that day because there were no taxis. On 14 June 2016, he was given a document, presumably notice of disciplinary hearing, informing him to appear at a disciplinary enquiry scheduled for the 17th of June 2016. As far as he was concerned, the insubordination charge related to disobedience of the instructions of 13 June 2016.

[12] The arbitrator found, as correct, Mdluli's version that it was the unit's practice to sign the attendance register the following day. He found that Mdluli was present at work on the day in question. He relied, *inter alia*, on a printout, purportedly from the canteen, which he described as "authentic" even though he is not a "specialist". He found that in the absence of evidence that Mdluli was not at the canteen he accepted that Mdluli was at work on that day. He found that the witnesses of the employer were not 'convincing and corroborative of each other's testimony'.

[13] The Labour Court dismissed the review application. From the judgment, it appears that the Learned Judge accepted the printout, allegedly from the canteen, as proof that Mdluli was present at work. The Labour Court held that as the parties did not lead evidence on the veracity of the canteen printout the arbitrator was correct to hold that Mdluli was at work on the day in question.'

[14] Although the arbitrator and the Labour Court held that the evidence of the printout was proof of Mdluli's presence at work, Mdluli conceded under cross-examination that the depot was so small that if he was at work on that day, there was no way he could not have been seen. The printout relied on by the arbitrator and the Court *a quo* was for the canteen and not for the worksite. No evidence was led as to the proximity of this canteen to the depot. Accordingly, in my opinion, no reasonable arbitrator could have reached such a decision that the printout was proof of presence at work. Accordingly, the Labour erred in finding that Mdluli was at work on 7 June 2016.

[15] Although the arbitrator found that Mdluli was a "credible witness", he laid no basis for the finding of credibility. Over decades and since the case of *Rv Dhlumayo*

*and Another*¹ courts have held that a court of appeal will be slow to interfere with a trial Court's evaluation of oral evidence. The findings of fact which are made on the strength of such evaluation are presumed to be correct, and, in the absence of a material misdirection, the Court will not disturb those findings unless a reading of the record clearly shows that they are insupportable.²

[16] In view of the fact that the arbitrator laid no basis for his finding of credibility of Mdluli, this Court is at large to evaluate the evidence of the witnesses as it stands on the record. Insofar as I am placed in a position to evaluate the employer's evidence, I find it to be cogent and reliable. In my view, the findings of the arbitrator and the Court *a quo* were not rationally connected with the evidence led as a whole. The finding by the arbitrator that the evidence of Kazim and Mashia was unreliable ignores the fact that Mdluli's evidence corroborated their evidence in all material respects. Mdluli did not deny that he was never seen at work on 7 June 2016. He did not deny the evidence that the unit was so small that it was virtually not possible not to notice anyone present at work.

[17] If regard is had to the record, the more reliable and credible evidence was that of Kazim and Mashia, and it was corroborated in all material respects by Mdluli. Mdluli confirmed that he was not seen at work on the day in question. He confirmed that Kazim enquired about his whereabouts. He confirmed that the depot was so small that there was no way he could not be seen if he was present. He confirmed that he did say he was at boiler 4. He did not dispute the evidence that Kazim and Mashia went to look for him at boiler 4 but could not find him. He confirmed that although he was requested to come and see Kazim he never went to see him. He confirmed that he did not sign the attendance register but only signed it on the following day. All this evidence points to one conclusion, namely, that Mdluli lied about the fact that he was at work on 7 June 2016.

[18] Furthermore, both the Labour Court and the arbitrator did not deal with the evidence relating to insubordination. The overall evidence of Mdluli was consistent

¹ 1948(2) SA 677 (A) at 705.

² *Kunz v Swart and Others* 1924 AD 618 at 655; *Taljaard v Sentrale RaadvirKoöperatieweAssuransieBpk* 1974 (2) SA 450 (A) at 452A – B.

with that of Mashia and Kazim. Where his version conflicted with that of those witnesses it should have been rejected as false.

[19] In light of the above, the Labour Court erred in dismissing the review application. The Labour Court ought to have found that the decision of the arbitrator was not rationally connected to the evidence that was placed before him and was therefore unreasonable.

[20] None of the respondents filed heads of argument and none of them appeared in Court on the date of hearing of this appeal. Mr *Snyman* who appeared for the appellant submitted that the appeal should succeed and the order of the Labour Court should be set aside and substituted with the order that the review application is upheld. I find no reason why this should not follow.

Costs

[21] In labour matters, the question of costs is to be determined in accordance with law and fairness. The third respondent did not oppose the appeal and there is no reason in law and fairness to burden him with a cost order.

[22] In the result, the following order will be made:

1. The appeal against the order of the Labour Court is upheld.
2. There is no order in respect of the costs of the appeal.
3. The order of the Labour Court is set aside and the following order is substituted for it:
 - 3.1. "The review application succeeds and the award is reviewed and set aside;
 - 3.2 It is declared that the dismissal of the third respondent was procedurally and substantively fair.

3.3 There is no order as to costs.”

B R Tokota
Acting Judge of Labour Appeal Court

Coppin JA and Phatudi AJA concurred in the judgment

APPEARANCES

FOR THE APPELLANT

Mr S Snyman

Instructed by Snyman Attorneys

FOR THE FIRST RESPONDENT

No appearance