IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA4/13

In the matter between:

SHATTERPRUFE (PTY) LTD **Appellant**

and

NTOMBEKHAYA SESANI N.O. **First Respondent**

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY **Second Respondent**

JOSEPH SONAMZI **Third Respondent**

Heard: **26 August 2014**

Delivered: **10 September 2014**

Summary: Review of arbitration award- Employer adopting escalation procedure to curb financial losses resulting from breakdown in production during night shift. Procedure enjoining employee to notify Supervisor within 30 minutes of the occurrence of breakdown. Employee experiencing series of breakdown during night shift- employee notifying supervisor via sms minutes later. Arbitrator finding that sms inappropriate in the circumstances- Labour Court reviewing arbitration award on factual basis. Appeal- reasonable test restated. Evidence showing that employee failed to follow escalation procedure- Failure to resolve factual dispute not vitiating the arbitration award- award falling within the band of reasonableness- appeal upheld- review application dismissed.

Coram: Waglay JP, Murphy et Dlodlo AJJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the decision of the Labour Court reviewing and setting aside the award of the first respondent ("the arbitrator") to the effect that the dismissal of the third respondent ("Sonamzi") was fair. None of the respondents actively opposed the appeal.

[2] The Labour Court found that the arbitrator's failure to resolve two factual disputes amounted to a gross irregularity within the meaning of section 145 of the Labour Relations Act[1] ("the LRA"). It set aside the award and ordered the dispute to be remitted to the bargaining council (the second respondent) for hearing by an arbitrator other than the first respondent.

[3] Sonamzi was employed as a shift leader and had worked for the appellant for more than 22 years. He was charged with misconduct as follows:

> 'Failure to follow the standard escalation procedure in that you did not call your manager after having extensive downtime and losses on nightshift on 05.11.09.
>
> Totally unacceptable work performance in that there was no work done on the Bando and only 3 pallets of off line during all the downtime on nightshift of 05.11.09.'

[4] A disciplinary enquiry found Sonamzi guilty of the misconduct and recommended his dismissal. Sonamzi did not challenge the procedural fairness of his dismissal. His case was that he was not guilty of misconduct. He also maintained that even if he was guilty, the sanction of dismissal was in the circumstances too severe. His contention in this latter respect must be assessed in light of his rejection after the disciplinary enquiry of an offer by the appellant to substitute the recommended sanction of dismissal with one of demotion.

[1] Act 66 of 1995.

[5] As stated, Sonamzi worked for the appellant for a long time. He rose to the position of team leader and was then promoted to the position of shift leader, a post which carried with it significant responsibility, particularly since it made him the highest ranking employee at the plant during the evening shift.

[6] In the years leading up to the incident, the appellant had suffered significant financial losses, which were to a large extent attributable to mechanical breakdowns and associated down time and lost production. In an effort to curtail these losses, the appellant took steps to ensure that the so-called "escalation procedure" was rigidly applied and adhered to.

[7] The escalation procedure required the shift leader to notify his superior of any breakdown in the production process during his shift so that remedial steps could be immediately implemented with a view to limiting production losses. Responsible employees are obliged to report and escalate breakdowns to the next highest level of authority, with a view to ensuring a timely and effective intervention. The shift leader was thus expected to notify both the production manager and the plant engineer within 30 minutes of the occurrence of a breakdown. The rationale underlying the escalation procedure was two-fold. Firstly, it served to apprise senior management of production related difficulties. This would enable them to determine precisely what resources ought to be invested in addressing the problem. Secondly, the act of notifying more senior management allowed those managers to determine how best to utilise the existing manpower resources. The procedure allowed senior management to take the important decision of determining production priorities and, if necessary, switching products etc.

[8] The applicable rule is recorded at the bottom of the Short Interval Control Chart, an internal production document. It specifies as follows:

> 'After thirty minutes of continuous down time, notify the Production Manager Plant Engineer and the Shift Leader.'

[9] The duty to contact both the production manager and plant engineer is not discretionary. It arises immediately on the expiry of the 30 minute period of continuous down time. In the event of more than four hours continuous down time, the production manager is required to notify the general manager. The production manager, Mr Africa, testified that he had discussed the policy with Sonamzi a few weeks before the incident and had informed him that the rule required that he be contacted, that a short message service (sms) would be insufficient compliance with the requirements of the rule and that he should actually phone and speak to him. Sonamzi denied this.

[10] The existing disciplinary code recommends dismissal for a first offence of failing to comply with standard operating procedures. The same recommended sanction applies in cases of gross negligence and unacceptable work performance.

[11] On 5 November 2009, Sonamzi was the shift leader of the so-called "6/6 shift", meaning that he was the most senior employee on site. His direct superior – and the person to whom he would escalate any production related difficulties – was the production manager, Africa. At approximately 21h20 that evening Sonamzi experienced the first of a series of mechanical breakdowns, which resulted in an interruption of production. Sonamzi first engaged artisans on site in an attempt to solve the problem but was unsuccessful in solving the problem. Contrary to the escalation procedure, Sonamzi did not attempt to contact Africa by 21h50, being within the 30 minute cut-off. He waited a further approximately 20 minutes before forwarding an sms to Africa, the production manager, and to Smit, the plant engineer. Africa did not respond to the sms. It is common cause that Africa was asleep at the time. A further hour's production was lost before Sonamzi sent another sms to Africa. This occurred shortly after 23h00. Once again, this method of communication proved ineffective.

[12] At about midnight, there was a further major mechanical breakdown. Sonamzi again waited almost a full hour before sending an sms at 00h48 to the production manager and plant engineer. It elicited no reaction from Africa, who was still asleep.

At about this time – an hour after the second major breakdown – Sonamzi instructed his team leader to contact Gerrie Oosthuizen, a process technician, who then attended on the site and attempted (unsuccessfully) to fix the breakdown

[13] Africa first became aware of the significant down time when he received the production figures (per sms) from Sonamzi shortly after 06h00 on the morning of 6 November 2009. This resulted in him immediately contacting Sonamzi and enquiring about the inadequate production figures.

[14] It was not disputed that had Sonamzi communicated effectively, Africa would have enlisted the services of Oosthuizen at a far earlier stage. Africa testified that had he been made aware of the magnitude of the problem he would have switched production to the SAG process. The appellant could then have run the SAG process for at least six hours and have usefully deployed the employees working the shift in this process. As things turned out, however, the SAG process only commenced four hours into the next morning's shift.

[15] Sonamzi initially maintained that he complied with the standard escalation procedure by notifying Africa by way of sms of the production problems which were beyond his control and claimed that he did his best by utilising the staff at his disposal as effectively as possible. He thus suggested that in the context of the escalation procedure an sms was adequate. During the course of cross-examination he was however forced to concede that the term "notify" meant "bring to the attention of" for the purpose of allowing the more senior manager to take a decision about what remedial steps had to be taken to fix the problem, and about how to utilise manpower if the problem could not be fixed rapidly. He conceded also that the purpose of the escalation policy, to allow senior management to take decision regarding production priorities, could never be achieved in the absence of an actual communication between himself and Africa. He thus in effect recognised that an unanswered sms could never satisfy the objectives of the policy.

[16] In relation to the second charge, Sonamzi maintained that there was no person on duty competent to run the Bando machine. Africa disputed this and added that had

Sonamzi actually spoken to him he would have told him who to use to get that machine operational.

[17] The arbitrator in her award correctly noted that the purpose of the escalation procedure is to enable senior management to determine what resources ought to be utilised in addressing the problem, as well as to determine how best to utilise existing manpower in order to cut down financial losses caused by breakdown and down time. She considered the applicable rule and procedure to be reasonable. She held that the requirement to notify senior management necessarily implied bringing the particular issue to management's attention. On the facts that did not occur. She reasoned:

> 'I therefore fail to understand the applicant's logic that he notified Mr Africa via the sms's. The fact that Mr Africa did not respond to the applicant's first sms should have raised some concerns on him. Arguing that he sent Mr Africa the sms's and he chose not to respond is an element of having disregard of the consequences of his actions. Any reasonable person would have made a follow up, probably by means of a telephone call, so as to ensure that the problem at the workplace is communicated to the production manager.'

[18] Regarding the crux of Sonamzi's defence, namely communication by sms, the arbitrator reasoned as follows:

> 'The applicant argued that they previously communicated via sms's and that was the reason why he sent Mr Africa sms's on the night in question. In support of this argument he submitted transcribed sms's between himself and Mr Africa. I accept that there was previous communication via sms's but one needs to state that those sms's came to Mr Africa's attention, he received them and as such notified of the problem, hence the response. They constituted effective communication. The sms's of the night in question never reached his attention even though they were sent. He was not notified of the problem.'

[19] In relation to the second charge, the arbitrator held that had there been proper communication, the Bando machine could have been brought into operation and that Sonamzi was accordingly guilty of misconduct on that score too.

[20] With regard to an appropriate sanction, the arbitrator held the following:

> 'Having considered the above evidence and submissions, it is my finding that the applicant failed to observe the escalation procedure in place, thereby causing the respondent substantive financial loss that could have been minimised. As a shift leader, he was in a position of trust, responsible for the staff in his shift and to ensure that there is a reasonable production. His disregard of the rules and procedures in place makes him an untrustworthy employee. It is further my finding that the applicant's dismissal was reasonable and fair.'

[21] The Labour Court set aside the award on two grounds. It was of the view that the arbitrator erred in not resolving the factual dispute about whether Africa had told Sonamzi that communication by sms was insufficient, and erred secondly in not similarly resolving the factual dispute regarding the presence of an employee with skills to operate the Bando machine during the shift. The failure of the arbitrator to apply her mind properly to these issues, which the court *a quo* regarded as material, in its view, denied Sonamzi the right to have his case fully and fairly determined. These material irregularities, the court held, meant that the decision was not a decision that a reasonable decision-maker could reach.

[22] Thus, the court held that resolving the dispute of fact about communication by sms was material to determination of the dispute about Sonamzi's guilt on the first charge. The appellant submitted that the court *a quo* erred in this respect and did not properly construe the purpose of the escalation policy, namely to enable managers at higher levels of authority to bring their minds to bear on operational problems that occur at times when they are not at the workplace. Compliance or otherwise with the escalation policy had to be evaluated with reference to that purpose. Notwithstanding any instruction by Africa to Sonamzi requiring the latter to phone the former, a series of unanswered text messages could in any event never

amount to compliance with the escalation policy – rendering resolution of the first factual dispute unnecessary. As the arbitrator found, a reasonable person would have taken further action once his first text message went unanswered and further unanswered text messages could not cure the inadequacy of the first unanswered text message. Self-evidently, ineffective communication could not be cured by way of additional ineffective communication. It follows that even if the factual dispute in question had been resolved in favour of Sonamzi, the outcome would have been no different, since he would in any event have been guilty of failure to comply with the escalation policy. The arbitrator appears to have appreciated this when she said in her award:

> 'Whether this instruction was issued or not is not clear. However, any reasonable person would have known that the most reasonable thing to do when Mr Africa was not answering his phone was to call him.'

[23] In the premises, the arbitrator did in fact apply her mind to the issue and concluded that there was no need to resolve the factual dispute. She committed no irregularity in that regard which impacted on the award so as to render its outcome unreasonable.

[24] In relation to the second charge, the Labour Court implicitly proceeded from the premise that Sonamzi could not be guilty of this charge unless the appellant showed that the Bando machine was capable of being operated on the night in question. It accordingly considered the resolution of the dispute of fact about the availability of an employee with the necessary skills to operate the Bando machine to be material to determination of Sonamzi's guilt on this charge. The appellant argued that this premise misconceived the essence of its argument, and ignored the evidence about the alternatives available to Sonamzi on the night in question. The appellant's argument is that, regardless of the availability of someone with the skills to operate the Bando machine, Sonamzi's failure to properly escalate the problem to his superiors deprived those superiors of the opportunity to minimise production losses by way of appropriate decisions about redeployment of available human and other resources. In this regard the arbitrator stated in her award:

> 'Mr. Africa came up with a number of alternatives that would have been adopted had the applicant observed the escalation procedure. Such alternative (sic) shows the importance of the escalation procedure and its purpose.'

[25] Moreover, the ambit of the second charge went beyond the non-operation of the Bando machine. It also included the fact of an inadequate quantity of alternative work being performed on the night in question, despite the availability of work that could usefully have been performed during the interruption of production resulting from the breakdown.

[26] But also whether someone was available on the shift could have been determined had there been proper communication. The arbitrator recognised that there were factual disputes, but again, after applying her mind, decided they did not require definitive resolution. She quite reasonably reached the following conclusion:

> '…one can only state that had the applicant observed the escalation procedure in place, he would have known who was capable to operate the Bando. The evidence before me suggests that the applicant had no authority to change production. Instead of getting intervention from other managers he decided out of his own accord to change the production, an action that again shows disregard of rules in place.'

[27] The arbitrator recognised that there were factual disputes. Nonetheless, she reached the following conclusion:

> '…one can only state that had the applicant observed the escalation procedure in place, he would have known who was capable to operate the Bando. The evidence before me suggests that the applicant had no authority to change production. Instead of getting intervention from other managers he decided out of his own accord to change the production, an action that again shows disregard of rules in place.'

[28] Regardless of the outcome of any factual dispute regarding the use of the Bando machine, the arbitrator reasonably and correctly concluded that the losses suffered by the appellant on the evening in question were the result of Sonamzi's failure to

properly escalate the problem to his superiors – and were therefore attributable to him.

[29] In the circumstances, it cannot be said that the arbitrator committed any irregularity which rendered her ultimate finding unreasonable. The arbitration award, when considered with reference to the evidentiary material before the arbitrator, represented a result that fell within the range of reasonable outcomes. A review of a CCMA award is permissible only if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable. Thus, even had the arbitrator committed an irregularity by not resolving the factual disputes, it was incumbent on the court to enquire further to determine if the outcome was unreasonable, which, for the reasons given, in this case it was not.

[30] There are *dicta* in the judgment of the Labour Court appearing to accept that Sonamzi might in fact have complied with the escalation procedure by sending an sms within 15 minutes of the breakdown. The common cause evidence was to the effect that the first text message was only sent 50 minutes after the incident, while the escalation policy required the matter to be escalated within 30 minutes. Consequently, the evidence demonstrated that Sonamzi acted in breach of the escalation policy and was therefore guilty of misconduct even on his own version.

[31] The sanction of dismissal does in this instance appear to be harsh given Sonamzi's length of service. A sanction of demotion would have been more appropriate. The arbitrator in her award applied her mind to this issue and came to that conclusion.

However, having regard to the fact that Sonamzi was subject to a valid, current, final written warning for being under the influence of alcohol while on duty, and more importantly had refused to accept a demotion, the arbitrator concluded that dismissal was fair in the circumstances. No consideration appears to have been given to any argument that it might have been fairer for the employer simply to have imposed demotion and not to have persisted with a dismissal. But this Court's conception of what might have been fairer is not decisive. The award of the arbitrator is not one which a reasonable arbitrator could not reach. However, the fact that there was a fair alternative to dismissal, and the lack of opposition, justify not awarding the appellant the costs of the appeal.

[32] In the result,

(a) The appeal is upheld with no order as to costs.

(b) The order of the Labour Court is set aside and replaced with the following order:

"The application is dismissed with no order as to costs."

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JR Murphy AJA

I agree

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Waglay JP

I agree

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Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT:	Adv F le Roux
	Instructed by Rob McWilliams Attorneys Port Elizabeth
FOR THE RESPONDENT:	No appearance