IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No. : JR 406/03

In the matter between:-

ANGLO OPERATIONS LIMITED BANK COLLIERY	Applicant

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
RICHARD BYRNE N.O.	Second Respondent
JOHANNES PIENAAR	Third Respondent
MINEWORKERS UNION SOLIDARITY	Fourth Respondent

JUDGMENT BY: H.M. MUSI, J

HEARD ON: 1 DECEMBER 2005

DELIVERED ON: 16 FEBRUARY 2006

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[1] This is an application brought under the provisions of section 145 of the Labour Relations Act 66 of 1995 (the LRA) for the review and setting aside of an arbitration award. The factual background to the dispute is set out hereunder.

[2] It is common cause that the applicant company falls under the purview of the Mine Health and Safety Act 29 of 1996 (the Act) and the regulations promulgated thereunder, which set rules and standards to promote health and safety in the mining industry. Mr. Johannes Pienaar, the third respondent, was employed by the applicant in 2001 as a Face Boss/Miner and was in charge of the workforce in the applicant's south shaft underground section 7 (section 7). As such he was charged with responsibility for the safety of the designated area and workforce thereat. It is common cause that for a person to be appointed to such post, he/she must have the requisite qualifications in the form of certificates in *inter alia* blasting and gas testing and must have been properly trained in the safety requirements of the Act. It is common cause that the third respondent had the requisite qualifications and training.

[3] It is also common cause that section 7 was a methane prone area. Methane is a highly combustible gas which if ignited, would explode and could thereby cause massive underground damage and loss of life. Now this is a coal mine and methane occurs naturally with coal. The situation

is made more volatile due to the presence of coal dust which is also highly combustible. For that reason, stringent measures and procedures have been put in place to minimise the risk of explosions. It is the alleged failure on the part of the third respondent to comply with these procedures that is at the root of the dispute herein.

[4] The third respondent was arraigned before the applicant's disciplinary tribunal on a charge dubbed unsatisfactory work performance, being a contravention of the provisions of section 22 of the Mine Health and Safety Act read with Regulations 8.5.1, 10.6.4 and 10.6.5 in that he had allowed workers under him to work in an environment where there was poor ventilation. He was found guilty and dismissed on 1 November 2002.

[5] Following his dismissal, the third respondent declared a dispute with the CCMA, the first respondent, alleging unfair dismissal. Conciliation having failed the dispute was arbitrated upon by Mr. Richard Byrne, the second respondent, under the auspices of the CCMA. He issued his award on 28 January 2003 in terms of which he found that

the dismissal was procedurally and substantively unfair and ordered re-instatement with full backpay and further that the third respondent be issued with a final warning. It is this award that the applicant challenges. The application is opposed by the Solidarity Union, the fourth respondent, on behalf of the third respondent. I shall henceforth refer to the third respondent simply as the employee, to the fourth respondent as Solidarity and to the second respondent as the arbitrator.

[6] The dismissal arises out of the events of 21 October 2002 at section 7. The evidence of the applicant's ventilation officer in the name of Mr. Eric Nkosi (Nkosi) is critical and it is briefly that Nkosi arrived there at 11h45 and went to the area referred to as "belt road" where rock face drilling had been in progress. He found the machine operator there (the operator) at his station with the machine switched on but not running. He found that the operator's methanometer with which he was supposed to test for methane at regular intervals was not functioning. Nkosi tested for methane and recorded a staggering 4.2%. He then summoned the employee and alerted him to the risk posed by the high

concentration of methane in that area. A second test was then conducted and it recorded 3.7%.

[7] Nkosi also testified that he found that the fan that was supposed to provide ventilation at “belt road”, was not working. Another jet fan nearby at what is called “Left 1” was not functioning either. Nkosi also said that when he and the employee left belt road for another spot, it was found that the roof under which they were walking was not supported, which is dangerous.

[8] Much of Nkosi’s evidence was uncontested. In particular, the following is common cause:

8.1 It is a contravention of the rules and hazardous that the operator should have been drilling whilst his methanometer was not functioning as he was then unable to monitor the concentration of methane at regular intervals as is standard procedure.

8.2 It was a serious violation of safety measures to have allowed the operator to operate whilst the methane levels were above the limit of 1.4%.

8.3 It is a violation of the safety rules to have allowed the operator to continue working whilst the fan at belt road was not functioning. Ventilation is necessary to dilute the effects of methane concentration and it was hazardous to do drilling where there was no ventilation.

8.4 The rules stipulate that the face boss should test for methane at intervals of one hour. In the instant case, the employee had last tested for methane at belt road at 09h50, which means that almost two hours had elapsed when the next test was done at 11h50.

8.5 The regulations stipulate that in circumstances such as the above where the level of methane is above the limit and/or where there is insufficient or no ventilation, the face boss must clear the area of workers and barricade it so that nobody remains there until the problem has been sorted out. Only those workers who would be

working on the problem could remain at such a site. It is not in dispute that the area had not been cleared and barricaded as at the time of Nkosi's arrival.

[9] In my view, the above evidence shows a clear dereliction of duty on the part of the employee and the only question to be determined is whether the explanation that he gave was reasonable and acceptable, as the arbitrator found. In other words, is this finding by the arbitrator justifiable?

[10] The arbitrator's rendition of the employee's version is interesting and I refer here to the paragraph in the middle of page 63 of the record starting with the sentence:

"Lets consider the sequence of events."

The passage raises a number of questions. The employee says that the fan in Left 1 was functioning when he started work in the morning but then he never realised that it had stopped functioning until he was told so at the meeting he had called at 11h00. This begs the question: how long had work progressed without this fan also functioning? Nkosi

found it along with the fan at belt road not working and the only other source of ventilation would have been this other fan. You would then have the situation that for some time prior to Nkosi's arrival there was simply no ventilation at this point. Also it is a fact that when Nkosi arrived, the methane concentration at belt road had not been tested for about two hours. The explanation for this failure is to be found in a combination of factors. Firstly, the fact that the operator's methanometer was not functioning and secondly, the employee had not tested for methane at intervals of one hour as is required. It is no excuse to say that the operator should have reported the fact that his testing device was not functioning. That did not absolve the employee from himself monitoring the situation. The fact that methane levels had shown a marked fluctuation from 4.2% to 3.7% within a short space of time, does not exclude the probability that drilling had proceeded whilst the methane concentration was dangerously high.

[11] Now the employee says that after the meeting he had first gone to attend to the jet fan at Left 1 and that, had he succeeded to fix it, then there would have been enough

airflow and the problems would have been sorted out before Nkosi's arrival. The arbitrator accepted this version and found that the employee was busy attending to the problems and that if Nkosi had arrived a little later, the employee would have taken all the requisite measures.

[12] Now the arbitrator's line of reasoning was severely criticized by Mr. Snider, for the applicant, who also contended that the arbitrator had generally misconstrued the evidence and misdirected himself in material respects in the process. Counsel submitted that the arbitrator's findings are simply not justifiable on the evidence.

[13] In my view, this criticism and submissions made by Mr. Snider are not without merit. What the employee did after Nkosi's arrival is immaterial. The fact is that he had neglected to do all these things prior to Nkosi's arrival. The latter was justifiably upset by what he found. The fact is as at Nkosi's arrival the fan at belt road was not functioning and the fan nearby at Left 1 was also not functioning. You then have a combination of a complete lack of ventilation and no testing for methane at that point. And quite clearly, drilling

had proceeded under those circumstances. It was a truly dangerous and unacceptable state of affairs that put the lives of the workers and the mine property at risk.

[14] In support of the arbitrator's findings, Mr. Raubenheimer, the Solidarity official who represented the employee, raised the following issues:

14.1 The employee's evidence that he had, at the start of the shift in the morning, phoned his superior, one Mr. Hleko, and sought the latter's guidance in view of the fact that the fan at belt road was not functioning. He said that Hleko had given him the green light to carry on up to a certain point on certain conditions.

14.2 The employee's evidence that after he had learned at 11h00 that the operator's methanometer was not working, he had instructed the latter not to do any work but to sit at his machine. It was contended in this regard that the operator had not been drilling when Nkosi arrived.

14.3 The evidence that when the shift started the employee had found no methane at belt road and that the last test at 10h00 also revealed no presence of methane. It was contended that the employee had been justified in using his discretion to work as he was concerned about production.

14.4 Evidence that the jet fan at Left 1 was in fact working although not properly as it was tripping. It was contended that this fan provided some ventilation at belt road and that this coupled with the fact that no methane had been detected justified the decision to work.

14.5 The employee's claim that the previous shift had left the fan at belt road not working and the suggestion that they too would have operated without it.

[15] Now it was pointed out during argument that the story that Hleko had advised the employee to carry on working whilst there was no sufficient ventilation at belt road, was not canvassed with the applicant's witnesses and hence could

not be verified with Hleko. It was submitted that it should be disregarded as improbable. The point, however, is that any such instruction would be illegal as being contrary to the safety rules and it would not absolve the employee from liability for his own breach of the rules. Regarding the second point, Nkosi's evidence is that the operator had been working before his arrival and hence his machine had not been switched off. It is obvious also that the operator had been drilling at least up to before being called to the meeting at 11h00 whilst he had no means of testing for methane. Regarding the third point, the fact is that the employee had no discretion in the matter. According to the rules, he should not have started work at all and he failed to test for methane at the required intervals.

[16] It is also a fact that in Nkosi's presence the jet fan at Left 1 was not functioning and the employee tried to switch it on. His evidence in this regard is in fact contradictory. Finally, there is simply no evidence that the previous shift team had operated at belt road whilst the fan was not functioning and the employee cannot explain his own breach of the safety measures by pointing a finger at the previous shift. In any

event, if the previous shift had breached the rules, that would not entitle him to repeat the breach.

I have come to the conclusion that the arbitrator's finding that dismissal was substantively unfair, is not justifiable on the evidence.

[17] As for the finding that the dismissal was procedurally unfair, the arbitrator has sent out mixed signals in his reasoning. The employee's complaint was that he had not been given sufficient notice of the disciplinary enquiry as he had been informed thereof only in the morning of the day of the hearing. The arbitrator states at page 62 of the record that the employee had been aware that a disciplinary enquiry would follow, but that it had been unfair not to have afforded him sufficient time to prepare. Significantly the arbitrator concludes as follows:

> "However I am not convinced that he suffered any real prejudice as a result thereof."

If the employee suffered no prejudice as a result of the short notice, what is it then that has resulted in the procedure being unfair? In arriving at the conclusion that no serious prejudice has resulted, the arbitrator took into account that the employee was able to call his witnesses and to put his case before the disciplinary tribunal. Incidentally the employee preferred not to call his witnesses to the arbitration. I conclude therefore that the finding that the procedure was unfair is also not justifiable.

[18] The last issue to consider is the appropriateness of dismissal as a sanction. The arbitrator considered this aspect as if the employee had been found guilty of the charges, which he correctly stigmatised as misconduct as opposed to poor performance. Here again, the award suffers from startling contradictions. Firstly, the arbitrator acknowledged the seriousness of the offence. He states the following at page 64 of the record, the middle paragraph:

> "I do not intend, in any way, to dilute the safety measures which should be in place at the mine. The fan should have been working in the belt road. Miners and others should appreciate

> the seriousness of it. In the circumstances as outlined by the respondent this is a serious matter."

Yet he continues to find that the offence was not serious. Then again, he correctly acknowledges that he is not entitled to substitute his own viewpoints for the legitimate viewpoints of the employer. Yet he proceeds to do exactly that. He acknowledges that the question of whether a final warning instead of dismissal should be given, depends on the seriousness of the offence. Yet he proceeds to fault the employer for not issuing a final warning. Quite clearly the finding that dismissal was a severe sanction is premised on the view that the offence was not serious. In this regard, I agree with Mr. Snider that the arbitrator has second-guessed the employer. The offence on which the employee was convicted, is a serious and dismissable offence in terms of the code of the employer, and the arbitrator was not entitled to usurp the employer's discretion in this regard.

[19] The application succeeds and the following order is made:

19.1 The arbitration award issued by the second respondent on 28 January 2003 under number MP4786/2002 is reviewed and set aside.

19.2 No costs order is made.

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H.M. MUSI, J

On behalf of applicant:	Adv. A. Snider Instructed by: Leppan Beech Attorneys
On behalf of fourth respondent:	Mr. Raubenheimer Union Official Instructed by: Solidarity Trade Union

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